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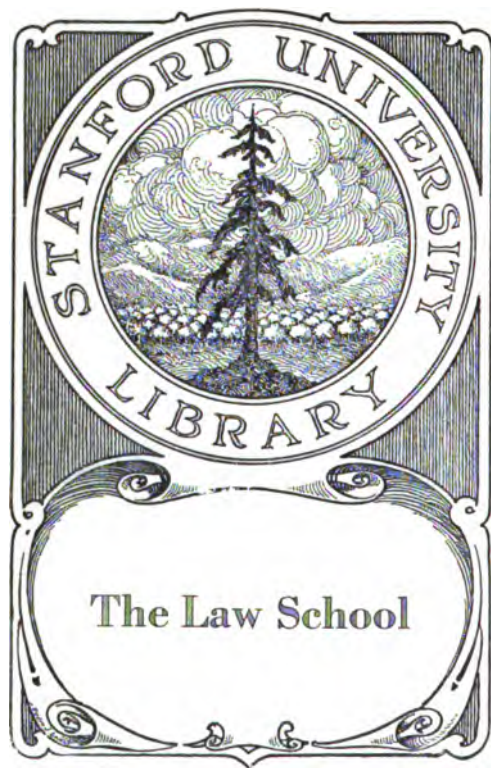
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THE
LAW OF CONTRACTS

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IN FOUR VOLUMES

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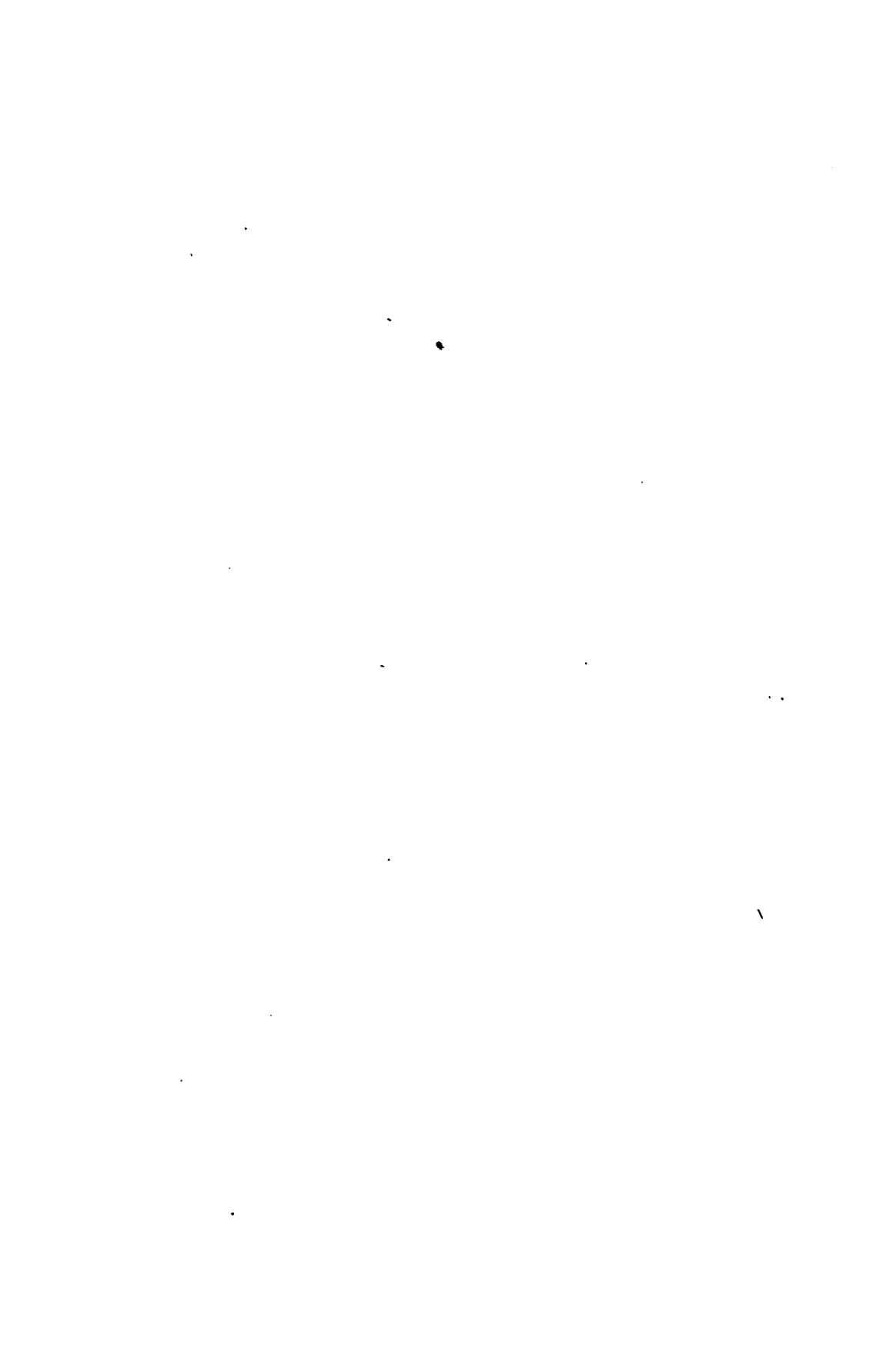
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WILLISTON ON CONTRACTS

INTRODUCTORY

CHAPTER I

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§ 1. Contract.

A contract is a promise, or set of promises, to which the law attaches legal obligation. This definition may seem somewhat unsatisfactory since it is necessary subsequently to define the circumstances under which the law does in fact attach legal obligation to promises, but in order to make a definition which should state these circumstances it would be necessary to compress the whole law of the formation of contracts into a sentence, which is impossible.¹ The definition given at least makes clear that the obligation of a contractor is based on a promise made by him.²

¹ Many definitions of contract contain a reference to mutual assent and consideration, but these requirements are applicable only to simple contracts.

² It has been suggested that the conception of a contract as necessarily involving a promise, is not accurate so far as formal contracts are con-

It is neither the circumstances which make a promise or set of promises binding nor the legal relations between the parties which arise from the existence of a binding promise or promises which constitute the contract, but the promise or promises themselves. Though language is often loosely used, blurring these distinctions, the meaning here adopted is that of customary legal usage and probably of scientific convenience also.³

§ 2. Agreement.

An agreement is an expression by two or more persons of assent in regard to some present or future performance by one or more of them.⁴ Agreement is in some respects a wider term than contract. It covers executed sales, gifts, and other transfers of property. It also covers promises to which the law attaches no legal obligation. An agreement is essential for the formation of a simple contract, but is not the only requisite. On the other hand, the common law recognized the possibility of contractual liability under a formal contract by the mere act of the obligor—that is, without agreement.⁵

cerned. Harriman on Contracts (2d ed.), § 623. It is doubtless true that the early conception of a sealed contract was analogous rather to a grant or to a conclusive statement of fact made in such fashion that the obligor could not dispute its correctness than to a promise, but in quite early times the validity of a covenant under seal in terms promising to do an act in the future was recognized, and it must have been very long ago when the conception of the meaning of such a covenant became substantially that which would be entertained to-day. At the present time even though a contract under seal be in the form of an acknowledgment of an existing indebtedness, it is clear enough that the language means in fact to the parties,—as it means in law—a promise. In defining what is a contract it must be remembered one is not explaining history, but

analyzing the meaning of the word to-day.

³ "The act alone is the contract, the resulting contractual relation is quite a different thing." Holland, Jurisprudence (10th ed.), p. 251.

Professor Corbin defines contract, it is true, as "the legal relations between persons arising from a voluntary expression of intention, and including at least one primary right *in personam*, actual or potential, with its corresponding duty," (26 Yale L. J. 170), but the terms of a contract do not necessarily include all the rights and duties which the law imposes when the contract is formed. See *infra*, § 615; and in any event the words contractual obligations and rights sufficiently express the relations between the parties.

⁴ See *Carter v. Prairie Oil & Gas Co.* 58 Okl. 365, 160 Pac. 319.

⁵ See *infra*, § 205.

§ 3. Express and implied contracts; quasi-contracts.

Contracts are express when their terms are stated by the parties. Contracts are implied when their terms are not so stated. The expression "implied contract" has given rise to great confusion in the law. Until recently the divisions of the law customarily made coincided with the forms of action known to the common law. Consequently, all rights enforced by the contractual actions of assumpsit, covenant and debt, were regarded as based on contracts. Some of these rights, however, were created not by any promise or mutual assent of the parties but were imposed by law on the defendant irrespective of, and sometimes in violation of, his intention. Such obligations were called implied contracts. A better name is that now generally in use of "quasi-contracts."⁶ This name is better since it makes clear that the obligations in question are not true contracts, and also because it avoids confusion with another class of obligations which have also been called implied contracts. This latter class consists of obligations arising from mutual agreement and intent to promise but where the agreement and promise have not been expressed in words. Such transactions are true contracts and have sometimes been called contracts implied in fact.⁷ In the present work the words implied contract will not be used to include quasi-contractual obligations.

⁶ A "quasi-contract" is a constructive contract which is raised by law to enforce legal duties by contract actions, where an express or implied contract does not actually exist. *Brown's Estate v. Stair*, 25 Colo. App. 140, 136 Pac. 1003.

⁷ A "contract implied in fact" requires a meeting of the minds, an agreement, just as much as an "express contract"; the difference between the two being largely in the character of the evidence by which they are established. *Lombard v. Rahilly*, 127 Minn. 449, 149 N. W. 950.

In *Highway Com'rs v. Bloomington*, 253 Ill. 164, 97 N. E. 280, 284, in speaking of quasi-contracts, the Court said: "The liability exists from an implication of law that arises from the facts

and circumstances, independent of agreement or presumed intention. *Pracht v. Daniels*, 20 Colo. 100, 36 Pac. 845. In this class of cases, the notion of a contract is purely fictitious. There are none of the elements of a contract that are necessarily present. The intention of the parties in such case is entirely disregarded, while in cases of express and implied contracts in fact the intention is of the essence of the transaction. In the case of contracts, the parties fix their terms and set the bounds upon their liability. As has been said, in the case of contracts, the agreement defines the duty, while in the latter class of cases 'the duty defines the contract.' *Hertzog v. Hertzog*, 29 Pa. 465, 468; *Columbus, Hocking Valley & Toledo Railway*

It is important to distinguish between quasi-contracts and contracts implied in fact, not only because it is desirable for clear theoretical analysis, but also because of the differing results which may follow when an obligation is a true contract from those which follow from a quasi-contract. In the first place as quasi-contractual obligations are imposed by the law for the purpose of bringing about justice without reference to the intention of the parties, the only limit upon the power of the law to create such obligations is that they must be of such a sort as to be capable of enforcement in a contractual action; while a true contract cannot exist, however desirable it might be to have one, unless there is an expression of assent to the making of a promise. Furthermore, the measure of damages appropriate to contractual and quasi-contractual obligations differs.⁸

Quasi-contractual obligations are often assumed to be confined to obligations for the payment of money enforceable under common-law procedure by the common counts. There are, however, unquestionably obligations imposed by law without reference to mutual assent and enforceable only in special assumpsit as if they were actual contracts. Accuracy of reasoning requires a recognition of such obligations also as quasi-contracts.⁹

It is also true that quasi-contractual obligations are not so universally based on unjust enrichment or benefit as is sometimes supposed. There are many cases where the law enforces in a contractual action a duty to restore the plaintiff to a former status—not merely to surrender the benefit which the defendant has received. This is true wherever the plaintiff has a right to rescind a transaction because of the defendant's wrong, whether fraud, duress or breach of contract; and

Co. v. Gaffney, 65 Ohio St. 104, 61 N. E. 152."

See also *People v. Dummer*, 274 Ill. 637, 113 N. E. 934; *W. A. Snow Iron Works v. Chadwick*, 227 Mass. 382, 116 N. E. 801; *Anderson v. Caldwell*, 242 Mo. 201, 146 S. W. 444; *Miller v. Schloss*, 218 N. Y. 400, 113 N. E. 337; *Morse v. Kenney*, 87 Vt. 445, 89

Atl. 865; *Wojahn v. Nat. Union Bank*, 144 Wis. 646, 129 N. W. 1068; *Underhill v. Rutland R.*, 90 Vt. 462, 98 Atl. 1017.

⁸ See *infra*, §§ 1470-1473.

⁹ An illustration of such an obligation may be found in the law of implied warranty.

though the amount of the defendant's enrichment will frequently be identical with the amount necessary to restore the plaintiff to his former condition this is by no means always the case.¹⁰

§ 4. Formal contracts.

There are in our system of law, and in other systems of law, two ways in which promises may be made binding and thereby become contracts. One way is by giving the transaction a certain form, the other is by compliance with requisites based on the essential nature of the transaction rather than on the form which it takes.¹¹ In the Roman law as well as in the early German and in the English law, the validity of formal contracts was established before contracts of the latter sort were recognized. Formal contracts in our system of law are—

- (1) Promises under seal.
- (2) Recognizances.
- (3) Negotiable instruments.

Judgments have often been classified as contracts of record, but this is due to the fact that a judgment could be sued upon in an action appropriate to the enforcement of contractual liability. There is no element of promise in a judgment. Contracts in writing have been given by statute in some States some of the attributes of contracts under seal, and to this extent have become formal contracts.¹²

The Roman law required as a general rule that an agreement in order to be binding should take the form of a stipulation; but to this rule there were considerable exceptions. The modern Civil law has entirely abandoned the requisite of form as a general basis for the validity of contracts, and the mere expressed will of the parties however declared is sufficient to create a contractual obligation,¹³ subject to some statutory exceptions.¹⁴ A cause or motive for the contract

¹⁰ See *infra*, § 1478 *et seq.*

¹¹ That is, for a simple contract, there must be mutual assent and consideration.

¹² See *infra*, § 218.

¹³ Windscheid, *Lehrbuch*, § 312; *Bürgerliches Gesetzbuch*, §§ 116 *et seq.*, 145.

¹⁴ Notarial authentication is requisite for the validity of some contracts.

is indeed required in the French code ¹⁶ and in many of the codes based upon it,¹⁶ but as a spirit of liberality or the "satisfaction of a sentiment of generosity" is sufficient cause ¹⁷ the requirement amounts simply to an inhibition of agreements based on illegality, mistake or fraud; and in the German code ¹⁸ and some other modern codes, the requirement is altogether omitted.¹⁹

§ 5. Contracts under seal.

The formality recognized by the English law as giving legal force to a promise is a seal. Centuries before the recognition of simple contracts, promises under seal were held binding.²⁰ They were variously called deeds, specialties, or covenants. A seal was a legal formality essential for the transfer of property in many cases, and the words "deed" and "specialty," both include transfers under seal, as well as promises under seal. The word "covenant," on the contrary, is appropriate only to promises under seal. Contracts under seal were enforced at common law by the action of covenant unless the contract was for the payment of a fixed sum of money. In that case debt was the exclusive remedy until the seventeenth century.²¹ Afterwards covenant became a concurrent remedy.²²

§ 6. Recognizance.

A recognizance is an acknowledgment in court by the recognizer of an obligation that he is bound to a certain payment subject to the condition that on the performance of a specified act the obligation shall be discharged. As a recognizance is in terms an undertaking and is created by the act of the recognizer, it is properly classified as a contract.²³

§ 7. Negotiable instruments.

Bills of exchange (including checks) and promissory notes payable to the order of a specified person, or to bearer, are

¹⁶ Code Civil, Art. 1131, 1133.

¹⁷ See Lorenzen, 28 Yale L. J. 621.

¹⁸ Larombière, Obligations, Art. 1131, § 2.

¹⁹ Bürgerliches Gesetzbuch, § 305.

²⁰ Lorenzen, 28 Yale L. J. 621, 642.

²¹ This was established before the end of Edward I's reign. Pollock & Maitland's History of Eng. Law (2d ed.), 219.

²² Ames, 2 Harv. L. Rev. 56.

²³ 3 Bl. Comm. 154.

²⁴ See National Surety Co. v. Nas-

negotiable instruments. Certain formal requisites are necessary in order to constitute a writing a bill exchange or promissory note.²³ If these requisites are complied with, the contract represented by the writing is a formal contract. Such instruments are in vogue throughout the commercial world and the rules of law applicable to them under our system of law and under the civil law prevailing on the Continent of Europe are in most respects the same. The English and American law of negotiable instruments have, however, been much affected by the law of simple contracts, and some principles not originally applicable to negotiable instruments have been attached to them in this way. It is still true, however, that no adequate understanding of the law of bills and notes is possible without recognizing that they are formal contracts—mercantile specialties.²⁴ Assumpsit and debt were the proper remedies for the enforcement of liabilities on negotiable instruments.²⁵

§ 8. Real contracts.

The term "real contract" is in common use in the civil law, and though not commonly used by judges or writers in the common law, nevertheless describes certain obligations known to the common law from very early times. A real contract is an obligation arising from the possession or transfer of a *res*. The real contracts known to the common law were enforced by the actions of account, detinue and debt. All of these forms of action fell into disuse to a great extent after the rise of the action of assumpsit. This action gave the plaintiff a more favorable and simpler remedy for the enforcement of the obligations in question than any other form of action. To the general allowance of this remedy as a substitute for the earlier forms of action is due the forgetfulness of modern lawyers of some distinctions which were vital in our early law and which are still of importance in appraising early authorities and occasionally also in determining the rights of parties

Mass. 1919), 123 N. E. 346, and cases cited.

²³ See *infra*, §§ 136 *et seq.*

²⁴ See 2 Ames' Cas. Bills and Notes, 872 *et seq.*

²⁵ See 2 Ames' Cas. Bills and Notes, 873, 874.

in present controversies. As procedure was inextricably interwoven with the early substantive law, the nature and incidents of the real contracts known to the common law may best be learned by an examination of the forms of action by which they were enforced.

§ 9. Account.

The obligation to account arose when property was received by a guardian, bailiff, or receiver. In effect the defendant in these cases was a trustee, since under the early law the seisin of property personal as well as real, carried with it the idea of ownership.²⁶ Therefore the action of account was in its essence an action to enforce a trust. The judgment, if in favor of the plaintiff, was an interlocutory one—that the defendant account; and, subsequently, upon an account being taken before auditors, final judgment was given for the balance found due.²⁷ The theory of trust underlying the action is clearly disclosed by the circumstance that a third person to whose use money or property was delivered to another might maintain the action against the latter, though there was no privity between them.²⁸

§ 10. Detinue.

Detinue was the only action allowed by the common law to recover specific goods except in the few instances where replevin would lie.

The obligation upon which detinue was based arose from the possession of property by the defendant which he was under a duty to deliver to the plaintiff. This obligation most commonly arose upon a bailment; but also arose where the defendant had sold goods to the plaintiff and the ownership had become vested in the plaintiff.²⁹ The action was also allowed in cases where the defendant had wrongfully come into

²⁶ See *The Seisin of Chattels*, 1 *Law Q. Rev.* 326, by Maitland; *The Disseisin of Chattels*, 3 *Harv. L. Rev.* 23, 313, 337, by Ames.

²⁷ The action of account and the obligations upon which it might be

based are analyzed by Langdell in 2 *Harv. L. Rev.* 243-257.

²⁸ See a full examination of the early authorities by Hening in 3 *Select Essays in Anglo-American Legal History*, 343.

²⁹ 8 *Harv. L. Rev.* 258, 259, by Ames.

possession of the property. And as the remedy of *assumpsit* never came into use in such a case,³⁰ *detinue* came to be regarded as sounding in tort rather than in contract; or at least partaking in some degree of the character of each of these branches of the law.³¹

§ 11. Debt.

To the modern analyst of the law debt does not seem a real contract; since the obligation of the debtor is not to repay specific money but merely a certain amount of money. In the early law, however, the conception of a debt was analogous to that still popular in regard to money deposited in a bank. The depositor conceives himself the owner of a specified sum of the bank's money rather than a mere creditor of the bank for money lent.³² A debt might exist not only for the payment of money but also for chattels;³³ and the judgment which the plaintiff recovered in either case was for the amount of money or of chattels due him, and damages for its detention. Debt would not lie for the recovery of an unliquidated demand.³⁴ This rule shows the conception at the foundation of the action, that the plaintiff was seeking to recover specific property. A debt might arise (1) upon a judgment or (2) upon a formal contract for the payment of a fixed sum of money,³⁵ or (3) upon a *quid pro quo* which the debtor had received.

³⁰ In this respect the action of *assumpsit* was not carried so far in regard to goods as in regard to money. A plaintiff was allowed to recover in *indebitatus assumpsit* money which equitably belonged to him against a defendant who had tortiously received it, but no fictitious implied promise seems to have been invented from the wrongful possessor of goods in favor of the person justly entitled to them. At least actions based on this theory were not brought, though *indebitatus assumpsit* would lie for chattels. *Falmouth v. Penrose*, 6 B. & C. 385; *Mayor of Reading v. Clarke*, 4 B. & Ald. 268.

³¹ 1 Chitty on Pleading (6th Eng. ed.), 121.

³² This theory of the early lawyers has often been remarked upon. Langdell, Summary of Contracts, § 100; Ames, 8 Harv. L. Rev. 260.

³³ 8 Harv. L. Rev. 260, n. 1. "Detinue was the proper remedy for the recovery of a specific chattel; debt, on the other hand, for the recovery of a specific amount of unascertained chattels."

³⁴ Y. B. 12 Edw. IV, 9 pl. 22; *Young v. Ashburnham*, 3 Leon. 161; *Mason v. Welland*, Skin. 238, 242.

³⁵ Debt was the exclusive remedy in such a case until the seventeenth cen-

The *quid pro quo* might be anything which could be regarded as beneficial to the debtor. In early times it was usually a sale, a loan, a lease, or work. Later, less tangible benefits were held sufficient, as a release or forbearance, but mutual promises were insufficient to create mutual debts. Originally it was also necessary that the *quid pro quo* should be given to the debtor himself. To give it to a third person even at the debtor's request was insufficient; but this rule, subsequently, gave way, and anything which might be a *quid pro quo* if furnished to the defendant himself would also create a debt if furnished to a third person at the request of the defendant; provided, however, that the person to whom the benefit was given, himself was under no obligation to pay for it; for it remained permanently a requirement that one *quid pro quo* could not create two debts. If the person receiving the *quid pro quo*, therefore, was indebted on account of it, no other person could be. Accordingly a guarantor is not a debtor even though goods were sold to the principal debtor, or work done for him at the guarantor's request.³⁶

§ 12. Simple or parol contracts.

Contracts which derive their efficacy from the substance of the transaction rather than its form are called simple contracts. The essential requisites for simple contracts are the mutual assent of the parties and consideration. Such contracts may be either oral or in writing. Except so far as Statutes of Frauds³⁷ or other enactments³⁸ have changed the common law there is no difference except in matters of procedure and proof between oral and written contracts. Both are classed as parol contracts.³⁹ Assumpsit was the appropriate remedy for

tury—Ames, 2 Harv. L. Rev. 56, and the common remedy until the eighteenth century when the action of covenant became more common. 3 Bl. Comm. 154.

³⁶ See 8 Harv. L. Rev. 261, *et seq.*, by Ames. Ames, Legal Essays, 93, 94.

³⁷ See *infra*, §§ 448, *et seq.*

³⁸ See, *e. g.*, *infra*, § 218, an enumeration of statutes making written agreements carry with them a presumption

that they were based on sufficient consideration.

³⁹ "All contracts are by the laws of England distinguished into agreements by specialty, and agreements by parol; nor is there any such third class, as some of the counsel have endeavored to maintain, as contracts in writing. If they be merely written and not specialties, they are parol and a consideration must be proved." Skyn-

the enforcement of simple contracts, and was the exclusive remedy where the transaction could not be classified as a real contract. The development of the action of *assumpsit* can best be considered in connection with the law of consideration.⁴⁰

§ 13. Bilateral and unilateral contracts; bifactoral and unifactoral obligations.

A vital distinction in contracts exists between (1) those where each party promises some performance and, (2) those where only one party promises performance, the consideration from the promisee being actually given. The former are called bilateral, the latter unilateral. The recognition of unilateral contracts by the law antedated the recognition of bilateral contracts by about a century.⁴¹ Both bilateral and unilateral contracts may be made as contracts under seal, or as simple contracts. The distinction between these two kinds of contracts was fully recognized three hundred years ago, but lack of appropriate names caused the distinction and its consequences to be frequently overlooked in the later history of the law.⁴² Even to-day it is frequently said in the opinions of

ner, C. B., delivering the opinion of the judges to the House of Lords, *Rann v. Hughes*, 7 T. R. 350, note (a). See also *Hillas v. Fuller*, 143 N. Y. S. 15; *Kime v. Tobyhanna Creek Ice Co.*, 240 Pa. 61, 87 Atl. 278. It is an illustration of the unfortunate ambiguity too common in the terminology of our law that "parol" is also used to distinguish written from oral contracts, *e. g.*, under the so-called "parol evidence" rule.

⁴⁰ See *infra*, § 99.

⁴¹ *Ibid.*

⁴² The earliest use of the words bilateral or unilateral in our law, in the sense in which they are here used, seems to have been by Judge Dillon, in *Barrett v. Dean*, 21 Ill. 423. Though Judge Story in *D'Neen v. Rabaud*, 1 Pet. 476, 500, 7 L. Ed. 207, speaks of contracts where one consideration is furnished by A in exchange for two several promises by B and C, "if one

might use the phrase, a trilateral contract." Trilateral is used in the same sense in *Aultman v. Fletcher*, 110 Ala. 452, 458, 18 So. 215. The terms bilateral and unilateral were popularized by Professor Langdell, and are now in common use in the reports. See, *e. g.*, *Stevenson v. McLean*, 5 Q. B. D. 346, 351; *Davis v. Wells*, 104 U. S. 159, 166, 26 L. Ed. 686; *Harmon v. Adams*, 120 U. S. 363, 365, 30 L. Ed. 683; *Howe v. Howe & Owen Co.*, 154 Fed. 820, 83 C. C. A. 536; *Howard v. East Tenn. &c. R. Co.*, 91 Ala. 268, 269, 8 So. 868; *Los Angeles Traction Co. v. Wilshire*, 135 Cal. 654, 658, 67 Pac. 1086; *Plumb v. Campbell*, 129 Ill. 101, 18 N. E. 790; *Nowlin v. Pyne*, 40 Ia. 166; *Coleman v. Applegarth*, 68 Md. 21, 25, 27, 11 Atl. 284, 6 Am. St. Rep. 417; *First Nat. Bank v. Watkins*, 154 Mass. 385, 387, 28 N. E. 275; *Thomas v. Barnes*, 156 Mass. 581, 31 N. E. 683; *Averill*

courts that both parties must be bound, or that there must be mutuality of obligation in a contract.⁴² Such statements are true only of bilateral contracts. An offer of reward, an offer of a price for goods, or for services, becomes a contract when what is requested is given or done, though no obligation to give or to do anything ever exists.⁴³

The term unilateral contract is not infrequently used with a slightly different meaning from that here given; namely, to designate a promise for which no consideration was requested, or for which no sufficient consideration was given.⁴⁴ It will be noticed that in this use of the word unilateral as well as in the use suggested earlier in this section, the word indicates a promise made by one party to a bargain. If no sufficient consideration was requested for that promise or, if, though requested, the consideration was not given, the transaction is undoubtedly unilateral, but it is not a unilateral *contract*. A contract may give rise merely to an imperfectly enforceable obligation but one which creates no obligation is a contradiction in terms.⁴⁵ Therefore the term unilateral contract should be reserved for cases where a binding obligation has been

v. Boston, 193 Mass. 488, 494, 80 N. E. 583; *McMillan v. Ames*, 33 Minn. 257, 22 N. W. 612; *Stensgaard v. Smith*, 43 Minn. 11, 15, 44 N. W. 669; *Underwood Typewriter Co. v. Century Realty Co.*, 220 Mo. 522, 119 S. W. 400, 25 L. R. A. (N. S.) 1173; *Feudtner v. Ross*, 74 N. J. Eq. 214, 69 Atl. 190; *Stengel v. Sergeant*, 74 N. J. Eq. 20, 68 Atl. 1106; *Post v. Frank*, 132 N. Y. Supp. 807, 75 N. Y. Misc. 130; *Wiley v. Broadus & Co. Lumber Co.*, 156 N. C. 210, 72 S. E. 305; *Winders v. Kenan*, 161 N. C. 628, 77 S. E. 687; *Barrow S. S. Co. v. Mexican Cent. Ry. Co.*, 134 N. Y. 15, 24, 31 N. E. 261, 17 L. R. A. 359; *Lemler v. Bord*, 80 Oreg. 224, 156 Pac. 427.

⁴² See *infra*, § 140.

⁴³ See, e. g., *Peeples v. Citizens' Ins. Co.*, 11 Ga. App. 177, 74 S. E. 1034; *Train v. Gold*, 5 Pick. 380, 384; *Taylor v. Barbour*, 90 Miss. 888, 44 So. 988, 122 Am. St. Rep. 328; *Miller v. McKensie*, 95 N. Y. 575, 47 Am. Rep. 85;

Grossman v. Schenker, 206 N. Y. 466, 100 N. E. 39.

⁴⁴ *Great Northern Railway Co. v. Witham*, L. R. 9 C. P. 16; *Johnson v. Staenglen*, 85 Fed. 603, 606, 29 C. C. A. 369; *Fulenwider v. Rowan*, 136 Ala. 287, 306; *Hardwick v. McClurg*, 16 Col. App. 354, 65 Pac. 405, 408; *Harrison v. Wilson Lumber Co.*, 119 Ga. 6, 45 S. E. 730, 731; *Terry v. International Cotton Co.*, 136 Ga. 187, 70 S. E. 1100; *Buick Motor Co. v. Thompson*, 138 Ga. 282, 75 S. E. 354; *Luke v. Livingston*, 9 Ga. App. 116, 70 S. E. 21; *Joliet Bottling Co. v. Joliet Brewing Co.*, 254 Ill. 215, 98 N. E. 263, 265; *Levin v. Diets*, 194 N. Y. 376, 87 N. E. 454, 20 L. R. A. (N. S.) 251; *Mutual Film Corp. v. Morris* (Tex. Civ. App.), 184 S. W. 1060; *Abba v. Smyth*, 21 Utah, 109, 117, 59 Pac. 756.

⁴⁵ In *High Wheel Auto Parts Co. v. Journal Co.*, 50 Ind. App. 396, 98 N. E. 442, 443, the Court said of the phrase

created, but only one party to the obligation has made a promise. Where there is no binding obligation, the transaction may be a unilateral promise or a unilateral offer, but it certainly cannot properly be called a unilateral contract.⁴⁶ Contracts may be partly bilateral and partly unilateral; that is, the consideration on one or on both sides may consist partly of acts and partly of promises

Obligations have also been divided into unifactoral and bifactoral obligations: the former created by one party alone, the latter by the act of two.⁴⁶ Simple contracts are necessarily bifactoral, but in the early common law at least, and in some jurisdictions still, assent on the part of the promisee is not essential to the validity of a contract under seal. A debt or a quasi-contractual obligation also may arise without any assent on the part of the debtor, and, occasionally, without any volition on the part of the creditor.⁴⁷

§ 14. Executed and executory contracts.

If a transaction is fully executed on both sides, it is not properly described as a contract. The term "executed contract" has, however, been sometimes used to describe executed consensual agreements, like sales completely carried out on both sides. The same term has also been used to describe unilateral contracts which are executed on one side only, as sales where the price has not yet been paid. Since the phrase if understood in the former meaning contains an improper use of the word contract, and in any event is ambiguous, its use is better avoided. The same criticism, so far as ambiguity is concerned, applies to the phrase "executory contracts." All

unilateral contract as thus used, that it is a "legal solecism."

^a A somewhat similar use of the word unilateral is occasionally found in cases where specific performance of a contract is sought and objection made that the contract lacks the so-called mutuality necessary for the allowance of the remedy of specific performance. A bargain open to such an objection is sometimes said to be unilateral. See Pomeroy's

Equity Jurisprudence (3d ed.) § 1405, n. 3; *Stengel v. Sergeant*, 74 N. J. Eq. 20, 68 Atl. 1106.

⁴⁶ *Harriman, Contracts* (2d ed.), § 617.

^a For instance, if A devises land to B subject to a charge that B shall pay C one thousand dollars, if B accepts the devise, C may bring debt against him for the money and no previous acceptance or assent by C seems necessary.

contracts to a greater or less extent are executory. When they cease to be so, they cease to be contracts.

§ 15. Void and voidable contracts.

An agreement which produces no legal obligation is often called a void contract. Though the phrase is often convenient, it is a contradiction in terms. If the agreement is void it is not a contract. A voidable contract, however, is common in the law. Infancy, fraud, mistake, duress, some kinds of illegality, all afford ground for rescinding or refusing to perform a contract. Unless rescinded, however, a voidable contract imposes on the parties the same obligations as if it were not voidable. Some distinctions in different kinds of contracts which are called voidable are hereafter noticed.⁴⁸

§ 16. Unenforceable contracts.

Agreements which are neither void nor voidable may, nevertheless, be unenforceable by one or both parties. If such contracts produced no legal consequences whatever, they would not be contracts at all. If either or both parties had the right to avoid them at will, they would properly be described as voidable. But there is another class of agreements which though not enforceable by ordinary legal remedies may, nevertheless, produce certain legal consequences for the parties to them. Such agreements are sometimes called agreements of imperfect obligation;⁴⁹ but they may also be called unenforceable contracts. A contract may be unenforceable because (1) no ordinary remedy is provided by the law for obligations of such a character; (2) because some prerequisite for the full validity of the obligation has not been performed; (3) because the remedy has been lost. Illustrations of the first type are contracts with a government. These are enforceable against the government only so far as it chooses; and yet such contracts are recognized by the law, and produce certain legal consequences.⁵⁰ Other illustrations are found in England in

⁴⁸ See *infra*, § 683.

⁴⁹ Pollock on Contracts (8th ed.), 682.

⁵⁰ For instance, a trustee in bank-

ruptcy of one who had contracted with the government would be entitled to receive such performance of the contract as the government was willing to

the right of barristers to compensation for their services.⁵¹ Illustrations of the second type of case may be found in contracts within the Statute of Frauds. The Statute does not render the original contract void, but a right of action is denied against either or both parties while the requirements of the statute are not complied with. / The third type of case is illustrated by Statutes of Limitations, which though they bar a right of recovery do not prevent the law from recognizing in various ways the existence of a contract.⁵² Certain illegal contracts may also be classed as unenforceable by one or both parties rather than as void or voidable, since legal effects are often produced by such contracts and their avoidance does not always depend upon the wishes of the parties.⁵³

render. The performance by the government would not be regarded as a voluntary gift to the contractor (in which case the trustee would not be entitled to it), although the government's performance took place subsequent to the bankruptcy. See *Williams v. Heard*, 140 U. S. 529, 35 L. Ed. 552; *Butler v. Goreley*, 146 U. S. 303, 36 L. Ed. 981; *Price v. Forest*, 173 U. S. 410, 43 L. Ed. 749; *Calder v. Henderson*, 54 Fed. 802, 4 C. C. A. 584; *Cf. Blagge v. Balch*, 162 U. S. 439, 40 L. Ed. 1032; *Briggs v. Walker*,

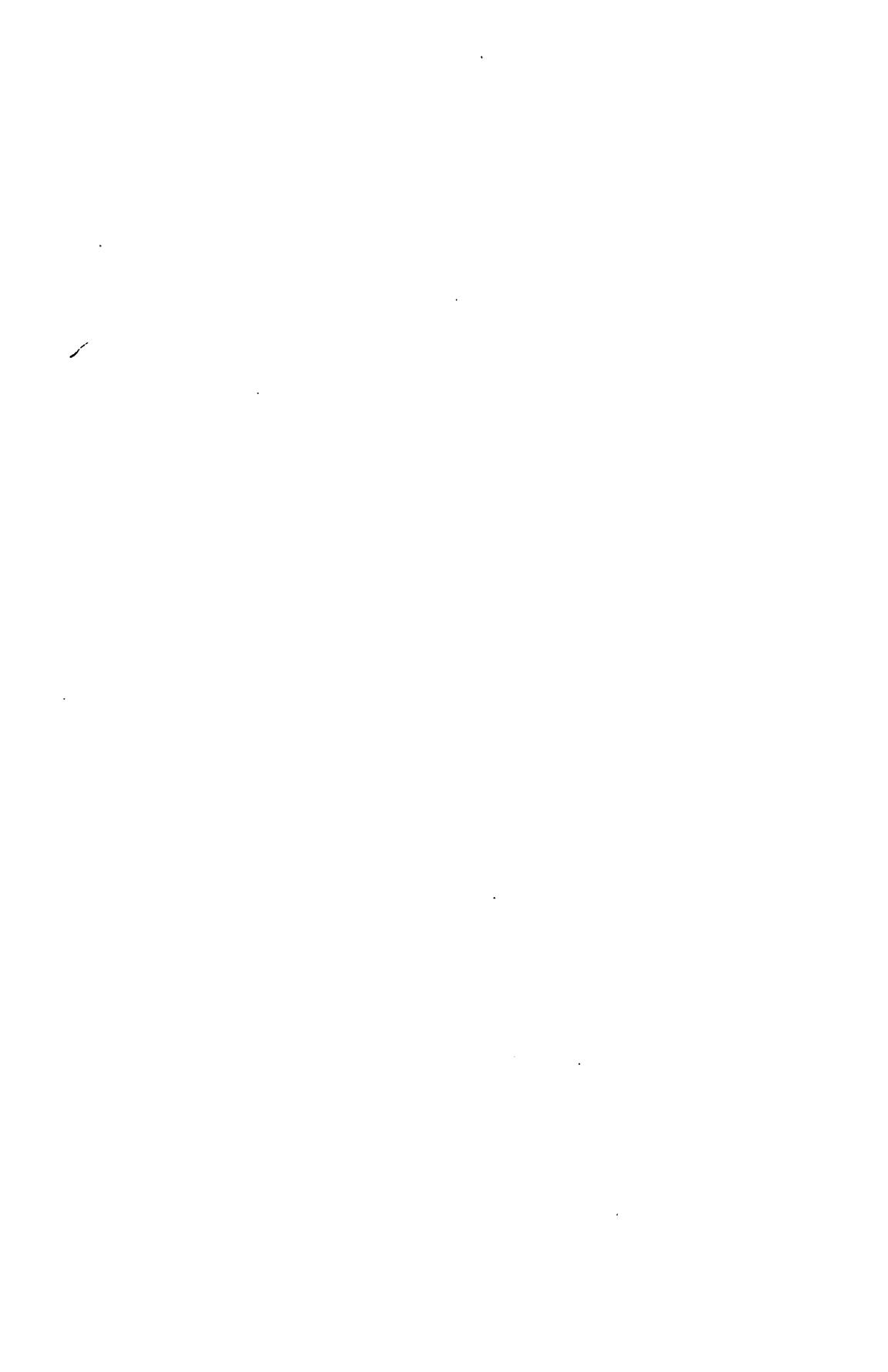
171 U. S. 466, 43 L. Ed. 243, 19 Sup. Ct. 1.

⁵¹ See Pollock on Contracts (8th ed.), 712.

⁵² Consider, *e. g.*, the effect of a new promise to pay a barred debt, *infra*, §160 *et seq.* Also that the payment of a barred debt by an insolvent debtor is not a fraudulent conveyance, since the creditor is recognized as entitled to the money. 14 Am. & Eng. Cyc. of Law (2d ed.), 226.

Also other incidental effects exist.

⁵³ See *infra*, §§ 1628-1632.



BOOK I
FORMATION OF CONTRACTS

CHAPTER II

REQUISITES OF SIMPLE CONTRACTS

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§ 17. Simple contracts the typical kind.

Although formal contracts are historically the earlier, simple contracts at the present time are of much greater importance. Furthermore the rules applicable to simple contracts have been borrowed to a greater or less extent by the law governing formal contracts. It, therefore, seems wise in considering the formation of contracts to disregard historical order and first to consider simple contracts.

§ 18. Requirements for the formation of a simple contract.

The requirements for the formation of a simple contract are: (1) Parties of legal capacity; (2) an expression of mutual assent of the parties to a promise, or set of promises, (3) an agreed valid consideration. The agreement must also not be declared void by statute or common law. The requirement last enumerated has often been too broadly stated; namely, that the agreement must not be illegal. But all illegal contracts are not void.¹ Possibility of performance, which is also stated by some writers as requisite ² does not seem essential. Parties may contract to do something which is impossible, if they wish

¹ See *infra*, § 1630.

² See, e. g., Holland, *Jurisprudence* (9th ed.), 252.

to do so,³ though, doubtless if they know of the impossibility, it will generally be assumed that they do not. Two other supposed requirements have also been suggested: Genuineness of consent, and intent to contract. These do not seem to be properly classed as essential, for the reasons stated in the following sections.

§ 19. Legality of contract.

A writer whose work on contracts has had great currency,⁴ enumerates as requisite for the formation of contract the legality of the object which the contract proposes to effect, and this statement has often been copied or the statement made that illegal contracts are void. It would seem that the legality of the object for which a contract was formed is of no greater importance than the legality of the consideration for which the promise was given. Illegality in either respect will generally preclude enforcement of the contract, but the subsequent discussion of the subject of illegality⁵ will indicate that by no means all illegal agreements are void or, so far as one party to them is concerned, even unenforceable. The effect of illegality undoubtedly often is to make the contract unenforceable by both parties, and almost always to make it unenforceable by one party. But as illegal contracts are not infrequently enforceable by one party to them, and sometimes by both parties, it is obvious that legality is not one of the absolute requisites for the formation of contracts, though doubtless by statute a forbidden agreement may be declared absolutely void.

§ 20. Genuineness of consent.

The writer referred to in the preceding section has also stated as a requirement for the formation of contracts genuineness or reality of consent of the parties, and under this heading has included the subject of mistake, misapprehension, fraud, duress, and undue influence. But this supposed requirement for the formation of contracts is no real

³ See the following section.

also Holland, *Jurisprudence* (9th ed.), 252.

⁴ Sir William Anson, *Principles of the English Law of Contracts*. See

⁵ See *infra*, § 1630.

additional requirement to that of expressed mutual assent already stated. If there has been an expression of mutual assent, the fact that the expression was made under a mistake or induced by fraud, duress, or under undue influence, will not prevent the formation of a contract if there was assent, however induced, to make the expression in question.⁶ In some instances it is true there may seem at first sight to be an expression of mutual assent, and yet, in fact, be no such expression because the acts of apparent assent, when their real meaning is discovered,⁷ do not in truth indicate assent. In other cases because the assent has been induced improperly, the contract may be avoided by one of the parties to it, but it is of vital importance to distinguish between a voidable contract and an agreement which lacks altogether the essential requisites of a contract. Fraud, mistake and duress generally are personal or equitable defenses to a contract, and where they actually prevent the formation of a contract they do so because no proper expression of mutual assent existed—not because the assent was not “genuine.” A contrary view is indeed common, and finds some warrant in the language of the cases, especially of decisions in equity, and text writers have drawn broad conclusions from such language. Thus in Ashburner’s *Principles of Equity*,⁸ the learned author says: “If A. offers to sell Whiteacre to B for £1,000, and in his offer writes sell when he meant let, or Whiteacre when he meant Blackacre, or £1,000 when he meant £2,000, his mistake lies in a discrepancy between his mental offer and his outward expression; and although B accepts in the *bona fide* belief that A meant what he had written, there is not in reality a concluded contract between the parties. If A is bound to carry out his written offer, he is bound not on the ground of contract, but on the ground of estoppel; and there seems no reason why he should be bound unless A has altered his position on the faith of the apparent offer.”⁹

⁶ See *infra*, §§ 94, 95, 1535–1537.

⁷ See *infra*, § 601 *et seq.* as to what is the “real meaning” of the parties’ expressions.

⁸ P. 369.

⁹ The even more extraordinary state-

ment is made in 20 *Amer. & Eng. Encyc. of Law* (2d ed.), page 809: “Courts of equity, in exercising the powers of rescission and reformation, do not operate upon contracts at all, but merely upon what erroneously

In most instances it would make little practical difference whether it was said that the mental assent of the parties was the vital element in the formation of the contract, and that their words or acts proved their mental attitude, or whether it was said that their words and acts were the only essential matter in the formation of a contract. In some cases, however, the distinction is important. If it were true that the mental element was the vital matter the consequences would properly follow, as the writer just quoted suggests, that unless the other party has altered his position in reliance on the mistaken expression, there would be no obligation, and even if there were such alteration of position the obligation would be based on estoppel rather than on contract. There seems no trace of such a doctrine in courts of law, and such equity decisions as may afford some warrant for it may be explained as well or better on the theory that a contract exists but is voidable, as on the ground that no contract exists.¹⁰ Indeed if the view here criticised were sound there would have been little occasion for the exercise by courts of equity of a jurisdiction to rescind contracts for mistake. Wherever the difficulty is lack of such assent by one or both parties as is requisite for the formation of a contract, a court of law would be competent to treat the transaction as void. Yet equity took jurisdiction of the subject of mistake. Moreover, every term of an offer and acceptance is vital, and the two must be in complete accord. But a contract is not even voidable in equity because in some minor particular there was even a mutual mistake as to the meaning of the expressions used.

The parol evidence rule which is of such far reaching importance in determining the existence and meaning of contracts is based on the assumption that where a written memorial of the transaction is made its terms are conclusive. Such a rule is inconsistent with the view that the mental attitude or assent of the parties is the ultimate juridical fact to be established. If it be said that the parol evidence rule merely

purport to be contracts." To say that a deed "erroneously purports" to be a contract or conveyance because the grantor was under an error in regard to

the property covered by it is likely to lead to confusion and mistaken conclusions.

¹⁰ See *infra*, § 1535 *et seq.*

provides conclusive proof of the mental attitude of the parties, the reply is obvious that to express the law in terms of conclusive presumptions is to express it in terms of fiction. If from A, B is always conclusively presumed, not B, but A is the essential factor.

Finally, the history of the common law is opposed to the view here criticised. The original basis of the action of assumpsit was consideration, and the essential feature of consideration was the justifiable reliance upon words or acts. The acceptor's justifiable reliance on the offeror's proposal is historically, and it is believed on proper analysis still law to-day, the basis of contract. The view here criticised was developed as part of the system of philosophy, law and economics, which, during the first half of the nineteenth century laid emphasis on the will. This philosophy has had great influence on the law of the continent of Europe and through the writings of Savigny especially, whose theories of the formation of contracts were made familiar to English and American readers by Sir Frederick Pollock, and others, has served to obscure the true foundation of the English law of contracts.

§ 21. Intent to contract.

The further statement of Savigny which has been popularized for English and American lawyers by Sir Frederick Pollock and others, that not only mental assent to a promise in fact, but an intent to form a legal relation is a requisite for the formation of contracts, is part of the same system criticised in the preceding section, and cannot be accepted.¹¹ Such a repetition of a rule of the civil law shows the danger of assuming that a sound principle in that law may be successfully transplanted. Nowhere is there greater danger in attempting such a transfer than in the law governing the formation of contracts. In a system of law which makes no requirement of consideration, it may well be desirable to limit enforceable promises to those where a legal bond was contem-

¹¹ Pollock on Contracts (8th ed.), page 3, states that "it must be the intention of the parties that the matter in hand shall, if necessary, be so dealt with [i. e., by a Court of Justice], or at

least they must not have a contrary intention." The last clause of this statement may be admitted. See also *Koenigsberg v. Blau*, 127 N. Y. Supp. 602.

plated, but in a system of law which does not enforce promises unless some benefit to the promisor or detriment to the promisee has been asked and given, there is no propriety in such a limitation. The only proof of its existence will be the production of cases holding that though consideration was asked and given for a promise, it is, nevertheless, not enforceable because a legal relation was not contemplated. On the contrary, the assertion is ventured that the common law does not require any positive intention to create a legal obligation as an element of contract.¹² The views of parties to an agreement as to what are the requirements of a contract, as to what mutual assent means, or consideration, or what contracts are enforceable without a writing, and what are not, are wholly immaterial. They are as immaterial as the views of an individual as to what constitutes a tort. In regard to both torts and contracts, the law, not the parties, fixes the requirements of a legal obligation.¹³ It would indeed be possible for a system of contractual law to adopt as a principle that wherever the parties intended legal obligation, then and then only the law would create one, and such an idea seems to have developed and to have had considerable acceptance on the Continent of Europe;¹⁴ but it is foreign to the common law and, it may be added, is intrinsically objectionable. Parties to an informal transaction frequently are not thinking of legal obligations. They intend an exchange, a gift, or to induce action by the other parties when they make promises, and to make the obligation of such promises depend upon the accident of the promisor's reflection on his legal situation is unfortunate. It may be guessed that where it is stated that an intent to

¹² In considering the liability of a member of a voluntary association on contracts made on behalf of the association, the Connecticut court said: "It is of no legal significance that the defendants did not intend to be individually responsible, or that they did not know or believe that as a matter of law they would be." *Davidson v. Holden*, 55 Conn. 103, 112, 10 Atl. 515. Consider also contracts imposed upon promoters. See *infra*, § 306.

¹³ In *Hotchkiss v. Nat. City Bank*, 200 Fed. 287, 293 (aff'd 231 U. S. 50, 58 L. Ed. 115, 34 Sup. Ct. 20), L. Hand, J., said: "A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties. A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent."

¹⁴ See *Lorensen*, 28 Yale L. J. 621.

create a legal relation is the test of a contract, the intent is frequently fictitiously assumed; and that a deliberate promise seriously made is enforced irrespective of the promisor's views regarding his legal liability. It is indeed true that if the parties to an agreement undertake that no legal obligation shall be created, their undertaking in this regard will be respected by the law as would any other term of their agreement.¹⁵ Consequently if both parties indicate that their words are merely in joke, no contract will be formed.¹⁶ So where words appropriate to an offer are used evidently merely as a boast or explosion of wrath so that no reasonable person would be justified in taking them literally, no contract will result from an acceptance.¹⁷ But if a reasonable person would understand the words used as importing that the speaker promised to do something if given a requested exchange therefor, it is immaterial what intention the offeror may have had.¹⁸ There seems no reason why merely social engagements

¹⁵ *Central Bitulithic Paving Co. v. Highland Park*, 164 Mich. 223, 129 N. W. 46. "A promise made with an understood intention that it is not to be legally binding, but only expressive of a present intention, is not a contract. *Thurston v. Thornton*, 1 Cush. 89;" *Wellington v. Aphthorp*, 145 Mass. 69, 74, 13 N. E. 10.

¹⁶ *Keller v. Holderman*, 11 Mich. 248, 83 Am. Dec. 737; *McClurg v. Terry*, 21 N. J. Eq. 225; *Theiss v. Weiss*, 166 Pa. 9, 31 Atl. 63, 45 Am. St. Rep. 638; *Bruce v. Bishop*, 43 Vt. 161; *Nyulasy v. Rowan*, 17 Vict. L. R. 663. The intent of one party to make a jest will not deprive his words of their natural meaning, however, and if the other understands, and has reason to do so, that the words are seriously intended, a contract will result. *Plate v. Durst*, 42 W. Va. 63, 24 S. E. 580, 32 L. R. A. 404. The earliest statements in English law to the effect that promises made in jest are not obligatory relate to promises of marriage, which were governed by the civil law conception of obligations as developed

in the canon law. See *The Lady's Law* (2d ed., 1737), p. 29; *Swinburne on Spousals* (2d ed., 1711), p. 210. It is more in the spirit of the early common law to hold parties to the consequences of their acts even though each knew the other intended a jest.

¹⁷ *Higgins v. Lessig*, 49 Ill. App. 459. The defendant after the theft of harness, worth \$15, said with rough language and epithets concerning the thief: "I will give \$100 to any man who will find out who the thief is, and I will give a lawyer \$100 for prosecuting him." The court held that these words should be regarded as "the extravagant exclamations of an excited man" and that the plaintiff had no right to consider them an offer.

¹⁸ In *Hoggard v. Dickerson*, 180 Mo. App. 70, 165 S. W. 1135, 1137, the court said—"The defendant had the benefit of an instruction to the effect that if the offer of reward for the capture or arrest of the slayer of Stanley Ketchel was made by defendant [the offeror] while laboring under strong excitement and without any intention

should not create contracts if the requisites for the formation of a contract already enumerated exists.¹⁹ Even where one party makes it clear to the other that he is unwilling to enter into a contract, the law may nevertheless impose one upon him where his conduct would be tortious except upon the assumption that he assented to an offer.²⁰

of making a contract, but merely as a boast, then the verdict should be for defendant. This went to the limit in defendant's favor and perhaps stated the law too broadly, as we doubt about the unexpressed intention of a person offering a reward not to be bound by it being a defence against one who honestly acted upon it."

¹⁹ Pollock suggests the case of an invitation to dinner which has been accepted [8th ed. p. 4, n. (c),] and suggests that there is no contract. This would ordinarily be true but the reason is because the promise of the guest to attend the dinner is not given or asked for as the price of the host's promise. Though in the popular meaning of the word the acceptance is at the request of the host, in the legal meaning of the word request, it is not. See *infra*, § 112. In *Bolton v. Madden*, L. R. 9 Q. B. 55, the plaintiff and defendant were both subscribers to a charity, the objects of which were elected by the subscribers, who had votes proportioned in num-

ber to the amount of their subscriptions. The plaintiff and defendant agreed that if the plaintiff would give 28 votes for an object of the charity the defendant favored, the defendant would, at the next election, give 28 votes for such charity as the plaintiff should then favor. This was held a binding contract. The agreement cannot, it is true, be called strictly a social engagement, but the decision seems to indicate the possibility of undertakings being enforced which are not business contracts.

²⁰ See *infra*, §§ 1795, 1856. Such cases as this where there is no real expression of mutual assent perhaps may be classed as quasi-contracts, but obligations of the sort referred to are unlike most quasi-contracts since they are not necessarily merely to pay money. Moreover, the extent of the liability is measured by the terms of an offer, not by the benefit received by the defendant.

CHAPTER III

MAKING OF OFFERS

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§ 22. Mutual assent must be expressed.

It is customarily said that mutual assent is essential to the formation of simple contracts, but it should further be stated that the mutual assent must be expressed by one party to the other, and except as so expressed is unimportant. In some

branches of the law, especially in the criminal law, a person's secret intent is important, but in the formation of contracts it was long ago settled that secret intent was immaterial; only overt acts being considered in the determination of such mutual assent as that branch of the law requires.¹ During the first half of the nineteenth century there are many expressions which seem to indicate the contrary, but that the fundamental basis of contract in the common law is reliance on an outward act (that is a promise) is shown by the early development of the law of consideration as compared with that of mutual assent. Courts of equity indeed have not shown the same indifference to the undisclosed intent of the parties, as have courts of law; but equity makes its views effective not by denying or altering the rules of law governing the formation of contracts but by subsequently reforming or rescinding legally valid contracts in cases coming within its own rules. Not only must assent to a contract be expressed by overt acts, but promises in contracts must be made by an expression of agreement moving from the promisor to the promisee. The assent of the promisee to a unilateral contract may be indicated by an act requested by the promisor, but of which he has no knowledge, and is not likely to acquire knowledge unless he takes steps to inform himself; ² but a promise necessarily implies either communication from the promisor to the promisee, or at least some action which will normally indicate to the promisee the intent of the promisor.

¹ "It is trite learning that the thought of man is not triable, for the devil himself knows not the thought of man." Brian in *Y. B.*, 17 Edw. IV, 1. In *O'Donnell v. Clinton*, 145 Mass. 461, 463, 14 N. E. 747, the court said: "Intention is immaterial till it manifests itself in act. If a man intends to buy, and says so to the intended seller, and he intends to sell, and says so to the intended buyer, there is a contract of sale; and so there would be if neither had the intention. If there is a contract of sale, and the seller intends to appropriate a particular chattel in fulfillment of it, and the buyer intends to

accept, and accepts, the property vests in him; and so it would had there been no such intention. If the buyer refuses, and the chattel corresponds with the contract, the vendor has a right of action, not because of his intention, but of his offer. An intention not communicated to the buyer is immaterial. Telling it to an indifferent person is no more than though he had noted it in his memorandum book, which is no more than though it existed in his own mind." See also *Browne v. Hare*, 3 H. & N. 484, 495. *Williams v. Burdick*, 63 Or. 41, 126 Pac. 603.

² See *infra*, §§ 68, 69, 71.

§ 22a. Assent may be expressed by acts.

Though assent must be expressed in order to be legally effective, it need not be expressed in words. In the early law of assumpsit stress was laid on the necessity of a promise in terms, but the modern law rightly construes both acts and words as having the meaning which a reasonable person present would put upon them in view of the surrounding circumstances.³ Even where words are used "a contract includes not only what the parties said, but also what is necessarily to be implied from what they said."⁴ And it may be said broadly that any conduct of one party, from which the other may reasonably draw the inference of a promise, is effective in law as such. Thus if A steps into his grocer's, and takes a package of goods from the counter, hands it to a clerk, and walks out, his conduct may mean, "if you will send that package to my house I will pay for it;" and the subsequent act of the clerk in sending the package, though no words have been spoken, amounts to an acceptance.

§ 23. Mutual assent is expressed ordinarily by an offer and an acceptance.

As simple contracts can be formed only by an expression of assent of the parties to the terms of the promise and to the consideration for it, it is ordinarily necessary for one of the parties to propose to the other the promise which he will make for a certain consideration, or to state the consideration which he will give for a certain promise; that is, a proposal or offer is necessary. An acceptance of the proposal or offer completes the expression of assent. It is conceivable that the requisite assent may be expressed without an offer or acceptance. Thus the case has been supposed⁵ that a third person suggests the terms of a contract between A and B in the presence of both of them and they both say simultaneously "we agree." There seems no reason to doubt that a contract would be formed.

³ *Lea Bridge District Gas Co. v. Malvern* [1917], 1 K. B. 803; *O'Donnell v. Clinton*, 145 Mass. 461, 463, 14 N. E. 747; *Phillip v. Gallant*, 62 N. Y. 256; *Stroock Plush Co. v. Talcott*, 150

N. Y. App. D. 343, 134 N. Y. S. 1052, and see *infra*, §§ 90-90e.

⁴ *Grossman v. Schenker*, 206 N. Y. 466, 100 N. E. 39.

⁵ *Wald's Pollock on Contracts* (3d ed.), 6.

to take in return for his promise if his terms are accepted.⁸ An apparent exception to the rule that a promise looks to the future, arises in the case of warranties or guaranties of existing facts, and also in the case of insurance against events which though unknown have already occurred; but the exception is only apparent. The promises in such contracts are in effect agreements to be liable for damages arising from the non-existence or existence of the fact to which the agreement relates.

A promise also *ex vi termini* imports some communication actual or constructive from the promisor to the promisee. A secret intent cannot be a promise, nor does the manifestation of an intent by an overt act help the matter unless that act comes or should come within the knowledge of the other party and, therefore, can be looked upon as a means of communication.

§ 25. An offer is a promise.

61 An offer is a statement by the offeror of what he will give in return for some promise or act of the offeree. As the offeror's statement necessarily looks to the future, it must always be promissory in terms. It is sometimes assumed that an offer is something different in its nature from a promise and from a contract, but this is a mistake. An offer is always a conditional promise and it may be a contract.⁹ An option for which consideration is given, or which is under seal (in jurisdictions where seals still retain their efficacy) is a contract but it is also an offer which, when accepted, will create another contract or a sale.¹⁰

If no consideration is given for an option, it is merely a revocable offer.¹¹

An offer is to be known from other conditional promises only because the performance of the condition in an offer is requested as the exchange or return for the promise in the offer,¹²

⁸ The requisite certainty of offers and of promises contained in them are considered in *infra*, §§ 37-49.

⁹ *Graves v. Smedes' Adm.*, 7 Dana, 344.

¹⁰ See *infra*, § 61.

¹¹ *Smith v. Bangham*, 156 Cal. 359,

104 Pac. 689, 28 L. R. A. (N. S.) 522; *Walter G. Reese Co. v. House*, 162 Cal. 740, 124 Pac. 442.

¹² As to when stating a condition in the promise involves such a request, see *infra*, § 112.

thereby giving the offeree a power, by complying with the request, to turn the promise in the offer into a contract or sale.¹³ The offer may be for the formation either of a bilateral contract or of a unilateral contract. If the former, the offeror's statement is not only promissory in terms when made, but will remain a promise after the formation of a contract by acceptance. If the offer contemplates the formation of a unilateral contract, it may be that the offeror proposes to exchange his own promise for an act of the offeree or, conceivably, that the offeror proposes to exchange an act on his part in exchange for a promise which he requests from the offeree. In fact, an offer contemplating a unilateral contract is almost invariably of the former sort; that is, the offeror is the party who becomes bound as promisor when the contract is formed by acceptance. Even when the offeror in terms offers an act of his own in exchange for a promise to be made by the offeree, the words of the offer are necessarily promissory, for the offeror must, in the nature of the case, announce that he will do a certain act in the future, in return for a promise to be made to him. Indeed an offer which requests from the offeree a promise will, when accepted, always ripen into a bilateral rather than a unilateral contract, except in one narrow class of cases; namely, where the very giving of the promise by the offeree also has the effect of completing the act promised by the offeror. The only instance of this sort that can be supposed arises where the offeror offers (that is, promises) to transfer title to personal property on receiving a specified promise from the offeree. As title to most kinds of personal property will pass by the mere assent of parties, it follows that when the offeree makes the promise requested the requisite assent is had and he at once becomes the owner of the property offered. The offer though in terms a promise when made, thus becomes fully executed by the transfer of title at the instant the contract is completed by the promise of the offeree. A unilateral contract is thus formed in which the offeror has performed the act (transferring the ownership of goods) which is the consideration for the acceptor's promise.¹⁴

¹³ Hohfeld, 23 Yale L. J. 49; Corbin, 26 id. 181.

¹⁴ See *Emerson v. Stevens Grocer Co.*, 95 Ark. 421, 130 S. W. 541, 544, 105

to take in return for his promise if his terms are accepted.⁸ An apparent exception to the rule that a promise looks to the future, arises in the case of warranties or guaranties of existing facts, and also in the case of insurance against events which though unknown have already occurred; but the exception is only apparent. The promises in such contracts are in effect agreements to be liable for damages arising from the non-existence or existence of the fact to which the agreement relates.

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¹³ Hohfeld, 23 Yale L. J. 49; Corbin, 26 id. 181.

¹⁴ See *Emerson v. Stevens Grocer Co.*, 95 Ark. 421, 130 S. W. 541, 544, 105

§ 26. Expression of intention is not an offer.

Since an offer must be a promise a mere expression of intention or general willingness to do something on the happening of a particular event or in return for something to be received does not amount to an offer.¹⁵ Therefore an ordinance or resolution of a municipal corporation¹⁶ or a vote of a private corporation,¹⁷ does not of itself amount to an offer, though it may be so communicated by the corporation to another as then to become an offer.¹⁸

§ 27. An offer distinguished from preliminary negotiations.

Frequently negotiations for a contract are begun between parties by general expressions of willingness to enter into a bargain upon stated terms and yet the natural construction of the words and conduct of the parties is rather that they are inviting offers, or suggesting the terms of a possible future

Ark. 575, 151 S. W. 1003; *Wheat v. Cross*, 31 Md. 99, 1 Am. Rep. 28; *Mac-tier's Adm. v. Frith*, 6 Wend. 103, 21 Am. Dec. 262. The facts in these cases suggest at least the situation supposed in the text.

¹⁵ *Kleinhans v. Jones*, 68 Fed. Rep. 742, 749, 15 C. C. A. 644; *Joyce v. Hamilton*, 111 Ind. 163, 12 N. E. 294; *Wellington v. Apthorp*, 145 Mass. 69, 13 N. E. 10; *McTague v. Finnegan*, 54 N. J. Eq. 454, 35 Atl. 542; *Murphy v. Corrigan*, 161 Pa. 59, 28 Atl. 947; *McClane v. People's Light & Heat Co.*, 178 Pa. 424, 35 Atl. 812; *Callum v. Rice*, 35 S. C. 551, 15 S. E. 268.

¹⁶ *Pollok v. San Diego*, 118 Cal. 593, 50 Pac. 769; *Madden v. Boston*, 177 Mass. 350, 58 N. E. 1024; *Bickford v. Hyde Park*, 173 Mass. 536, 54 N. E. 250; *Marsh v. Scituate*, 153 Mass. 34, 26 N. E. 412, 10 L. R. A. 202; *Ball v. Nashua*, 61 N. H. 403; *Mayor &c. of Jersey City v. Harrison*, 71 N. J. L. 69, 58 Atl. 100; *Potter v. Hollister*, 45 N. J. Eq. 508, 18 Atl. 204. See also *Wheeling & B. Bridge Co. v. Wheeling Bridge Co.*, 138 U. S. 287, 34 L. Ed. 967; *Pike County v. Spencer*, 192 Fed.

11, 112 C. C. A. 433. So an uncommunicated vote of highway commissioners to accept an offer which they had received, is not an acceptance. *Northwestern Construction Co. v. North Hempstead*, 121 N. Y. App. Div. 187, 105 N. Y. S. 581.

¹⁷ *In re East of England Banking Co.*, 4 Ch. App. 14; *Cumberland &c. R. Co. v. Shelbyville &c. R. Co.*, 117 Ky. 95, 77 S. W. 690; *Benton v. Springfield Young Men's Christian Association*, 170 Mass. 534, 49 N. E. 928, 64 Am. St. Rep. 320; *Hazard v. Hope Land Co.*, 69 Atl. 602 (R. I.), 18 L. R. A. (N. S.) 293. See also dissenting opinion in *Washer v. Independent Mining Co.*, 142 Cal. 702, 709, 76 Pac. 654.

¹⁸ *Rosborough v. Shasta R. R. Co.*, 22 Cal. 556, 561; *Argus Co. v. Albany*, 55 N. Y. 495, 503, 14 Am. Rep. 296; *Western Timber Co. v. Kalama River Lumber Co.*, 42 Wash. 620, 85 Pac. 338, 114 Am. St. Rep. 137, *Cf. Acme Grain Co. v. Wenaus*, 36 Dom. L. R. 347. An authorized communication of the vote will not turn it into an offer. *Benton v. Springfield Young Men's Chris-*

bargain than making positive offers. Especially is this likely to be true where the words in question are in the form of an advertisement. Thus, if goods are advertised for sale at a certain price, it is not an offer, and no contract is formed by the statement of an intending purchaser that he will take a specified quantity of the goods at that price.¹⁹ The construction is rather favored that such an advertisement is a mere invitation to enter into a bargain rather than an offer. Even where the parties are dealing exclusively with one another by private letters, or telegrams, or oral conversation, the same question may arise; and language that at first sight may seem an offer may be found merely preliminary in its character.²⁰

tian Association, 170 Mass. 534, 49 N. E. 928, 64 Am. St. Rep. 320.

"It is not like cases in which you offer to negotiate, or you issue advertisements that you have got a stock of books to sell, or houses to let, in which case there is no offer to be bound by any contract. Such advertisements are offers to negotiate—offers to receive offers—offers to chaffer, as, I think some learned Judge in one of the cases has said." Bowen, L. J., in *Carlill v. Carbolic Smoke Ball Co.* [1893], 1 Q. B. 256, 268; *Crawley v. Rex* [1909], *Transvaal*, 1105.

"In *Moulton v. Kershaw*, 59 Wis. 316, 18 N. W. 172, 48 Am. Rep. 516, the defendants, salt dealers, wrote to the plaintiff, a dealer in salt, accustomed to buy salt in large quantities as the defendants knew, as follows: "Dear Sir,—In consequence of a rupture in the salt trade we are authorized to offer Michigan fine salt, in full carload lots of 80 to 95 barrels, delivered at your city, at 85 cents per barrel to be shipped per C. & N. W. R. R. Co. only. At this price it is a bargain, as the price in general remains unchanged. Shall be pleased to receive your order."

The plaintiff, on the day this letter reached him, telegraphed:—

"Your letter of yesterday received

and noted. You may ship me two thousand (2,000) barrels Michigan fine salt as offered in your letter. Answer."

The defendants replied on the following day, refusing to fill the order.

The court held that no contract had been created, chiefly because the defendants' letter did not specify any limit of quantity.

In *Beaupré v. Pacific & Atlantic Telegraph Co.*, 21 Minn. 155, the plaintiffs wrote: "Have you any more north-western mess pork? also extra mess? Telegraph price on receipt of this." The reply was telegraphed: "Letter received. No light mess here. Extra mess \$28.75." The plaintiffs replied by telegraph "Despatch received. Will take two hundred extra mess, price named." The court held there was no contract."

In *Johnston v. Rogers*, 30 Ont. 150, the defendant wrote in regard to sales of flour: "We quote you Hungarian \$5.40 and strong Bakers \$5.00, car lots only." . . . We would suggest your using the wire to order, as prices are so rapidly advancing that they may be beyond reach before a letter would reach us." To this the plaintiff promptly replied by telegram: "We will take 2 cars Hungarian at your offer of yesterday." The court held no contract was created. In *Cox v. Den-*

This principle has been carried to an extreme in some cases. Where the property to be sold is accurately defined and an amount stated as the price in a communication made, not by general advertisement, but to one person individually, no reasonable construction seems possible except that the writer offers to sell the property described for the price mentioned.²¹

ton (Kans.), 180 Pac. 261, a letter inquiring "Do you want to buy 240 good cattle at 8.25, must be sold by Friday," describing the cattle and adding, "Phone me at Wichita, care Acacia Hotel" was held not an offer. See also *Harvey v. Facey* (1893), A. C. 552; *Schon-Klingstein Co. v. Snow*, 43 Colo. 538, 96 Pac. 182; *Talbot v. Pettigrew*, 3 Dak. 141, 13 N. W. 576; *Chunn v. Evans*, 15 Ga. App. 57, 82 S. E. 631; *Knight v. Cooley*, 34 Ia. 218; *Patton v. Arney*, 95 Ia. 664, 64 N. W. 635; *Smith v. Gowdy*, 8 Allen, 566; *Ashcroft v. Butterworth*, 136 Mass. 511; *James v. Marion Fruit Jar Co.*, 69 Mo. App. 207; *Schenectady Stove Co. v. Holbrook*, 101 N. Y. 45, 4 N. E. 4; *Stein-Gray Drug Co. v. Michelsen Drug Co.*, 116 N. Y. Supp. 789; *Cherokee Tanning Extract Co. v. Western Union Tel. Co.*, 143 N. C. 376, 55 S. E. 277, 118 Am. St. Rep. 806; *Eckert v. Schoch*, 155 Pa. 530, 26 Atl. 654; *Fulton v. Upper Canada Furniture Co.*, 9 Ont. App. 211; *Kinghorne v. Montreal Tel. Co. Up. Can.*, 18 Q. B. 60; *Boston v. Toronto Fruit Co.*, 4 Ont. L. R. 20. In *Sellers v. Warren*, 116 Me. 350, 102 Atl. 40, 41, the court said of the case before it: "'Would not consider less than half,' is not to be taken as an outright offer to sell for one-half. In *Lake v. Ocean City*, 62 N. J. Law, 160, 162, 41 Atl. 427, it is said that consider 'means to think with care upon a matter.' To the same effect is *Hallock v. Lebanon*, 215 Pa. 1, 5, 64 Atl. 362. See *Crooker v. Trevett*, 28 Me. 271, 274; *Wason v. Rowe*, 16 Vt. 525, 528. It cannot be held that a refusal to consider less than half is an offer to

accept one-half. It is tantamount to saying that a party will consider, think or reflect upon such an offer if made. The words are appropriate to the invitation rather than to the proposal of an offer. We conclude this is the construction to be placed upon the telegram of Mrs. Warren. The following cases: *Ashcroft v. Butterworth*, 136 Mass. 511, 513, 514; *Martin v. Northwestern Fuel Co.*, 22 Fed. 596, 599; *Stagg v. Compton*, 81 Ind. 171, 175; *Knight v. Cooley*, 34 Iowa, 218, 221; *Patton v. Arney*, 95 Iowa, 664, 64 N. W. 635; *Moulton v. Kershaw*, 59 Wis. 316, 18 N. W. 172, 48 Amer. Rep. 516, 519, are illustrative." The Swiss Code of Obligations (Art. 7) provides: "Sending tariffs, prices current, etc., does not constitute an offer to contract. The act of exposing goods with the price indicated is deemed, as a rule, an offer."

²¹ This criticism is applicable to *Harvey v. Facey* [1893], A. C. 552. The plaintiff there telegraphed the defendant, "Will you sell us Bumper Hall Pen. Telegraph lowest cash price." In reply the defendant telegraphed,—"Lowest price for Bumper Hall Pen, £900." And the plaintiff again telegraphed,—"We agree to buy Bumper Hall Pen for £900 asked by you. Please send us your title-deed in order that we may get early possession."

The court held no contract had been made, saying that the defendant's telegram contained no agreement to sell to the persons making the inquiry. Such construction of language is certainly not based on the natural inference which would be drawn by a

In any event there can be no doubt that a positive offer may be made even by an advertisement or general notice.²² Even a catalogue of an institution of learning,²³ has been held in connection with other circumstances to amount to an offer. Offers of reward have been frequently made by means of advertisement.²⁴ The only general test which can be submitted as a guide is the inquiry whether the facts show that some performance was promised in positive terms in return for something requested.

The mere expectation that a contract will be entered into and

reasonable person under the circumstances.

In *Smith v. Gowdy*, 8 Allen, 566, the plaintiff wrote inquiring the quantity of rags defendant had and their price. The defendant replied "We have about a ton, and our price is 3¼cts." The plaintiff thereupon agreed to take the rags but the court held no offer had been made.

Again, in *Lincoln v. Erie Preserving Co.*, 132 Mass. 129, the plaintiff telegraphed to the defendant "Telegraph how much corn you will sell, at lowest cash price." The defendant replied "Three thousand cases, one dollar five cents, open one week." On receipt of this message, the plaintiff sent a telegram "Sold corn, will see you tomorrow." The plaintiff had acted previously as a broker for the defendant, but had also dealt with the defendant as a principal. The court said: "The telegrams do not contain any offer by the defendant to sell to the plaintiff . . . the defendant says to the plaintiff that it will sell a certain quantity of corn, on certain terms, and within a certain time; but it does not say that it will sell to the plaintiff." In *Nebraska Seed Co. v. Harsh*, 98 Neb. 89, 152 N. W. 310, L. R. A. 1915 F. 824, a letter of the defendant stated that he had about 1800 bushels of millet seed of which he was mailing a sample and added "I want \$2.25 per cwt. for this seed f. o. b. Lowell." The

plaintiff immediately replied: Sample and letter received, accept your offer." The court held no contract was created. On the other hand, where in reply to an inquiry for the price of a specified quantity of goods an answer was made stating the price, this answer was given the natural construction of an offer to sell the goods to the inquirer at that price, in *Fairmont Glass Works v. Crunden-Martin Co.*, 106 Ky. 659, 51 S. W. 196, and in *Crossett v. Carleton*, 23 N. Y. App. Div. 366, 48 N. Y. Supp. 309.

²² *Carlill v. Carbolic Smoke Ball Co.* [1893], 1 Q. B. 256 (an advertisement that the manufacturers of certain carbolic smoke balls would pay £50 to any person who used the smoke balls as prescribed without success); *Seymour v. Armstrong*, 62 Kans. 720, 64 Pac. 612. (An advertisement positively offering certain price for all eggs shipped to the advertiser.) *Vigo & Co. Society v. Brumfiel*, 102 Ind. 146, 1 N. E. 382, 52 Am. Rep. 657; *Tarbell v. Stevens*, 7 Iowa, 163; *Anderson v. Public Schools*, 122 Mo. 61, 27 S. W. 610, 26 L. R. A. 707. See also *Shepherd v. Kain*, 5 B. & Ald. 240.

²³ *Niedermeyer v. Curators of University of Missouri*, 61 Mo. App. 654; *Horner School v. Wescott*, 124 N. C. 518, 32 S. E. 885.

²⁴ See, e. g., *Williams v. Carwardine*, 4 B. & Ad. 621; *Gibbons v. Proctor*, 64 L. T. (N. S.) 594; *Shuey v. United*

that negotiations have been made to carry that expectation into effect, do not constitute a contract.²⁵

§ 28. Agreements preliminary to written contracts.

The distinction between preliminary negotiations and completed contracts is often involved in cases where the parties contemplate the execution of a written agreement. It is everywhere agreed to be possible for parties to enter into a binding informal or oral agreement to execute a written contract. It is also everywhere agreed that if the parties contemplate a reduction to writing of their agreement before it can be considered complete, there is no contract until the writing is signed. But between these two clear situations, ambiguous ones arise as to which there is a difference. On the one hand it has been said, by the New York Court of Appeals: "Where all the substantial terms of a contract have been agreed on, and there is nothing left for future settlement, the fact, alone, that it was the understanding that the contract should be formally drawn up and put in writing, did not leave the transaction incomplete and without binding force, in the absence of a positive agreement that it should not be binding until so reduced to writing and formally executed."²⁶ And, on the other hand, it has been said by the New Jersey Supreme Court,²⁷ "If it appears that the parties, although they have agreed on all the terms of their contract, mean to have them reduced to writing and signed before the bargain shall be considered as complete, neither party will be bound until that is done, so long as the contract remains without any acts done under it on either side."²⁸ This leaves open the question, how it is to be known that

States, 92 U. S. 73, 23 L. Ed. 697; *Loring v. Boston*, 7 Metc. 409; *Biggers v. Owen*, 79 Ga. 658, 5 S. E. 193; *Williams v. West Chicago St. Ry. Co.*, 191 Ill. 610, 61 N. E. 456, 85 Am. St. Rep. 278.

²⁵ *Brighton Packing Co. v. Butchers Association*, 211 Mass. 398, 97 N. E. 780.

²⁶ *Disken v. Herter*, 73 N. Y. App. Div. 453, 77 N. Y. Supp. 300, *aff'd* without opinion, 175 N. Y. 480, 67

N. E. 1081. To the same effect see *Concannon v. Point Mining Co.*, 156 Mo. App. 79, 135 S. W. 983.

²⁷ *Donnelly v. Currie Hardware Co.*, 66 N. J. L. 388, 49 Atl. 428.

²⁸ *Water Commissioners v. Brown*, 32 N. J. L. 504, 510, quoted with approval in *Donnelly v. Currie Hardware Co.*, 66 N. J. L. 388, 49 Atl. 488. *Cf. McCulloch v. Lake & Risley Co.*, 91 N. J. L. 381, 103 Atl. 1000.

parties who mean to reduce it to writing mean that till then the contract shall not be "considered as complete." Under both these statements the ultimate question is one of fact as to the intention of the parties,²⁹ but if the statement of the New Jersey court means that the mere fact that a writing is to be prepared amounts to an expression of intention that until that is done the parties shall not be bound, it seems extreme. As has been pointed out previously,³⁰ the intention to make a legal obligation is not necessary for the existence of a contract though an expressed intent that there shall be no legal obligation is effective to prevent one. In the absence of such an expressed intent, mutual assent, informally given, to make an exchange of acts or promises is sufficient. Consequently, if such assent exists, to avoid the conclusion that a contract has been formed it must be found as a fact that the parties impliedly agreed that until the writing was executed they should not be bound. The burden of establishing this implication of fact is on the one who denies the existence of a contract. The decisions although not all perfectly consistent, generally conform to this test.³¹ If the oral pre-

²⁹ Thus, in *Mississippi &c. S. S. Co. v. Swift*, 86 Me. 248, 258, 29 Atl. 1063, the court said: "From these expressions of courts and jurists, it is quite clear that, after all, the question is mainly one of intention. If the party sought to be charged intended to close a contract prior to the formal signing of a written draft, or if he signified such an intention to the other party, he will be bound by the contract actually made, though the signing of the written draft be omitted. If, on the other hand, such party neither had nor signified such an intention to close the contract until it was fully expressed in a written instrument and attested by signatures, then he will not be bound until the signatures are affixed. The expression of the idea may be attempted in other words: if the written draft is viewed by the parties merely as a convenient memorial, or record of their previous contract, its

absence does not affect the binding force of the contract; if, however, it is viewed as the consummation of the negotiation, there is no contract until the written draft is finally signed."

³⁰ See § 21.

³¹ In the following cases it was held that there was a contract, though it was agreed that a written contract should be subsequently prepared: *Jones v. Victoria Dock Co.*, 2 Q. B. D. 314; *Bonnewell v. Jenkins*, 8 Ch. D. 70, 73; *Bolton v. Lambert*, 41 Ch. D. 295; *Fouchy v. Ellis*, 140 Fed. 149; *Jenkins & Reynolds Co. v. Alpena Portland Cement Co.*, 147 Fed. 641, 77 C. C. A. 625; *Wehner v. Bauer*, 160 Fed. 240; *Northwestern Lumber Co. v. Grays Harbor, etc., R. Co.*, 208 Fed. 624; *Whitted v. Fairfield Cotton Mills*, 210 Fed. 725, 128 C. C. A. 219; *West India S. S. Co. v. Chicago &c. Co.*, 249 Fed. 338, 161 C. C. A. 346; *Emerson v. Stevens Groc. Co.*, 95 Ark. 421, 426,

liminary agreement constituted a contract, a subsequent erroneous supposition of the parties that a formal contract

130 S. W. 541; *Friedman v. Schleuter*, 105 Ark. 580, 151 S. W. 696; *Alexander-Amberg v. Hollis*, 115 Ark. 589, 171 S. W. 915; *Webber v. Smith*, 24 Cal. App. 51, 140 Pac. 37; *Meroer Elec. Mfg. Co. v. Connecticut Elec. Mfg. Co.*, 87 Conn. 691, 89 Atl. 909; *Bell v. Offutt*, 10 Bush, 632; *Hollerbach & May Co. v. Wilkins*, 130 Ky. 51, 112 S. W. 1126; *Tucker v. Sheeran*, 155 Ky. 670, 160 S. W. 176; *Montague v. Weil*, 30 La. Ann. 50; *Berman v. Rosenberg*, 115 Me. 19, 97 Atl. 6; *McConnell v. Harrell & Nicholson Co.*, 181 Mich. 369, 149 N. W. 1042; *Lamoureux v. Weisman*, 136 Minn. 207, 161 N. W. 504; *Allen v. Chouteau*, 102 Mo. 309, 14 S. W. 869; *Green v. Cole (Mo.)*, 24 S. W. 1085; *Hudson v. Rodgers*, 121 Mo. App. 168, 98 S. W. 778; *T. C. Bottom Produce Co. v. Olsen*, 188 Mo. App. 181, 175 S. W. 126; *Gale v. J. Kennard & Co.*, 182 Mo. App. 498, 165 S. W. 842; *Long v. Needham*, 37 Mont. 408, 96 Pac. 731; *Wharton v. Stoutenburgh*, 35 N. J. Eq. 266; *Sanders v. Pottlitzer Bros. Fruit Co.*, 144 N. Y. 209, 39 N. E. 75, 29 L. R. A. 431, 43 Am. St. Rep. 757; *Ferguson Contract Co. v. Helderberg Cement Co.*, 120 N. Y. Supp. 317, 135 App. Div. 494; *Peires v. Cornell*, 117 N. Y. App. Div. 66, 102 N. Y. Supp. 102; *Morton v. Witte*, 131 N. Y. Supp. 777; *Teal v. Templeton*, 149 N. C. 32, 62 S. E. 737; *Gooding v. Moore*, 150 N. C. 195, 63 S. E. 895; *Billings v. Wilby*, 175 N. C. 571, 96 S. E. 50; *Blaney v. Hoke*, 14 Ohio St. 292; *Williams v. Burdick*, 63 Or. 41, 125 Pac. 844; *Mackey v. Mackey's Adm.*, 29 Gratt. 158; *Paige v. Fullerton Woolen Co.*, 27 Vt. 485; *Loewi v. Long*, 76 Wash. 480, 136 Pac. 673; *Lawrence v. Milwaukee & Co. Ry. Co.*, 84 Wis. 427, 54 N. W. 797; *Cohn v. Plumer*, 88 Wis. 622, 60 N. W. 1000; *Jungdorf v. Little Rice*, 156 Wis. 466, 145 N. W. 1092. See also *Garber v.*

Goldstein, 92 Conn. 226, 102 Atl. 605.

In the following cases it was held that no contract existed until the execution of a written contract, the signing of which was one of the terms of a previous agreement. *Ridgway v. Wharton*, 6 H. L. C. 238, 264, 268, 305; *Chinnock v. Marchioness of Ely*, 4 DeG. J. & S. 638, 646; *Winn v. Bull*, 7 Ch. D. 29; *Von Hatzfeldt-Wildenburg v. Alexander*, [1912] 1 Ch. 284; *Spinney v. Downing*, 108 Cal. 666, 41 Pac. 797; *McCrimmon v. Brundage*, 53 Fla. 478, 43 So. 431; *Strong, etc., Co. v. Baars*, 60 Fla. 253, 54 So. 92; *Scott v. Fowler*, 227 Ill. 104, 81 N. E. 34; *Lynn v. Richardson*, 151 Ia. 284, 130 N. W. 1097; *Alexandria Billiard Co. v. Miloslawsky*, 167 Ia. 395, 149 N. W. 504; *California Ins. Co. v. Settle*, 162 Ky. 82, 172 S. W. 119; *Fredericks v. Fasnacht*, 30 La. Ann. 117; *Ferre Canal Co. v. Burgin*, 106 La. 309, 30 So. 863; *Barrelli v. Wehrli*, 121 La. 540, 46 So. 620; *Mississippi & Co. S. Co. v. Swift*, 86 Me. 248, 29 Atl. 1063; *Wills v. Carpenter*, 75 Md. 80, 25 Atl. 415; *Lyman v. Robinson*, 14 Allen, 242; *Sibley v. Felton*, 156 Mass. 273, 31 N. E. 10; *Houston & Co. R. Co. v. Jos. Joseph & Bros. Co.*, 169 Mo. App. 174, 152 S. W. 394; *Morrill v. Tehama Co.*, 10 Nev. 125; *Water Commissioners v. Brown*, 32 N. J. L. 504; *Donnelly v. Currie Hardware Co.*, 66 N. J. L. 388, 49 Atl. 428; *Brown v. New York Central R. R. Co.*, 44 N. Y. 79; *Commercial Tel. Co. v. Smith*, 47 Hun, 494; *Nicholls v. Granger*, 7 N. Y. App. Div. 113, 40 N. Y. Supp. 99; *Arnold v. Rothschild's Sons Co.*, 37 N. Y. App. Div. 564, 56 N. Y. Supp. 161, aff'd without opinion 164 N. Y. 562, 58 N. E. 1085; *Franke v. Hewitt*, 56 N. Y. App. Div. 497, 68 N. Y. Supp. 968; *Sherry v. Proal*, 131 N. Y. App. Div.

was necessary to make the bargain binding will be ignored.³² It should be observed, however, that frequently where the parties contemplate a future written contract, it is obvious from their language or from the surrounding circumstances, that other matters, as to which no definite agreement has yet been reached, are expected to be provided for in the writing. In such a case the oral agreement may be objectionable for indefiniteness,³³ and in any event a positive intention is apparent that the bargain shall be ineffectual until some further acts. Sometimes the parties expressly provide that no obligation shall arise until the formal writing is executed.³⁴

§ 29. Formation of contracts at auction.

As an original question it seems fairly open to argument whether an auctioneer by putting up goods for sale makes an offer which ripens into a contract or sale when the highest bidder accepts the offer; or whether putting up the goods for sale is merely an invitation to those present to make offers which they do by making bids, one of which is ultimately accepted by the fall of the hammer. Under the former view each bid would amount to an acceptance of the offer and would complete a contract or sale subject to the condition subsequent that no higher bid should be made.³⁵ The latter view, however, seems more in accordance with the facts. The auctioneer may more accurately be said to invite offers than himself to be an offeror, and the law has adopted this doctrine. As the bargain is incomplete until the hammer falls, a bidder may therefore retract his bid until that time.³⁶

774, 116 N. Y. Supp. 234; *Guarantee Const. Co. v. Rickert-Finlay Realty Co.*, 88 N. Y. Misc. 73, 150 N. Y. S. 551; *Congdon v. Darcy*, 46 Vt. 478; *Boisseau v. Fuller*, 96 Va. 45, 30 S. E. 457; *McDonnell v. Coeur d'Alene Lumber Co.*, 56 Wash. 495, 106 Pac. 135, *Francis H. Leggett Co. v. West Salem Canning Co.*, 155 Wis. 462, 144 N. W. 909; *Goldstine v. Tolman*, 157 Wis. 141, 147 N. W. 7.

³² *T. C. Bottom Produce Co. v. Olsen* (Mo. App.), 175 S. W. 128. See also *infra*, § 623, *ad fin.*

³³ See *infra*, § 37 *et seq.*

³⁴ Such a provision is common in applications for insurance.

³⁵ This view is advocated in *Langdell's Summary of Contracts*, § 19.

³⁶ *Payne v. Cave*, 3 T. R. 148; *Sale of Goods Act*, § 58 (2); *Hibernia Savings Society v. Behnke*, 121 Cal. 339, 53 Pac. 812; *Mallard v. Curran*, 123 Ga. 872, 875, 51 S. E. 712; *McDonald v. Green*, 5 Hawaii, 325; *Grotenkemper v. Achtermeyer*, 11 Bush, 222; *Head v. Clark*, 88 Ky. 362, 364, 11 S. W. 203; *Nebraska Loan Co. v. Hamer*, 40 Neb.

The same point is involved in decisions turning on the right of the auctioneer to withdraw an article offered for sale. As the contract is not complete until the hammer falls, the auctioneer may withdraw until that time,³⁷ unless it has been advertised that the sale shall be without reserve. If such an advertisement has been made, how far it limits the right of the auctioneer to withdraw, depends on the principles considered in the following section.

When a contract has been completed the auctioneer is personally liable upon it, unless prior to its formation he disclosed the principal for whom he was acting.³⁸ This is in accordance with the general principles of law governing undisclosed principals.³⁹

"In the United States a distinction has sometimes been made between ordinary private [sales] and judicial and official sales, but the only difference seems to be that the latter may require the approval of the court."⁴⁰ "It has been held that the highest bidder at a judicial sale is entitled as a matter of law to the property,⁴¹ but the decided weight of authority is

281, 293, 58 N. W. 695; *Fisher v. Seltzer*, 23 Pa. St. 308, 62 Am. Dec. 335. It is so provided also in the German *Bürgerliches Gesetzbuch*, § 156.

Even after the fall of the hammer, if the sale is within the local Statute of Frauds, the bidder may withdraw until a memorandum of the sale is made. See *infra*, § 588.

³⁷ *Tillman v. Dunman*, 114 Ga. 406, 40 S. E. 244, 57 L. R. A. 784, 88 Am. State Reports, 28; *Corryolles v. Mossy*, 2 La. 504; *Baham v. Bach*, 13 La. 287, 33 Am. Dec. 56; *Warehime v. Graf*, 83 Md. 98, 34 Atl. 364; *Anderson v. Wisconsin Cent. R. Co.*, 107 Minn. 296, 120 N. W. 39, 20 L. R. A. (N. S.) 1133; 131 Am. St. Rep. 462; *McPherson Bros. Company v. Okanogan Co.*, 45 Wash. 285, 88 Pac. 199; *Holder v. Jackson*, 11 U. C. C. P. 543. See also cases cited in preceding note. After the hammer has fallen, however, the auctioneer cannot reopen the sale to accept a higher bid. *Blossom v. Rail-*

road, 3 Wall. 196, 206, 18 L. Ed. 43; *Coker v. Dawkins*, 20 Fla. 141, 153.

³⁸ *Jones v. Litledale*, 6 A. & E. 486; *Warlow v. Harrison*, 1 E. & E. 295; *Elison v. Wulff*, 26 Ill. App. 616; *Thomas v. Kerr*, 3 Bush, 619, 96 Am. Dec. 262; *Seemuller v. Fuchs*, 64 Md. 217, 1 Atl. 120, 54 Am. Rep. 766; *Schell v. Stephens*, 50 Mo. 375; *Meyer v. Redmond*, 205 N. Y. 478, 98 N. E. 906, aff'g s. c. 141 N. Y. App. Div. 123, 125 N. Y. Supp. 1052; *Davie v. Lynch*, 1 Tex. App. Civ. Cas., § 695.

³⁹ See *infra*, § 285.

⁴⁰ *Anderson v. Wisconsin Central R. Co.*, 107 Minn. 296, 120 N. W. 39, 20 L. R. A. (N. S.) 1133, 131 Am. St. Rep. 462, citing *Blossom v. Railroad Co.*, 3 Wall. 196, 18 L. Ed. 43.

⁴¹ *Anderson v. Wisconsin Central R. Co.*, 107 Minn. 296, 120 N. W. 39, 20 L. R. A. (N. S.) 1133, 131 Am. St. Rep. 462, citing—*State v. Johnston*, 2 N. C. (1 Hayw.) *293; *McLeod v. McCall*, 48 N. C. (3 Jones L.) 87;

otherwise."⁴² Though the court has power to give or refuse confirmation to a judicial sale, there is, nevertheless, a contract formed by an accepted bid, and the bidder cannot withdraw after acceptance.⁴³

§ 30. Contracts preliminary to auction sales.

Since it has been held that no contract for the sale of goods is complete until the hammer falls, it necessarily follows that even though an auction sale has been advertised to be without reserve, or has been advertised to be held under other specific conditions, the auctioneer may without liability change those conditions at any time before the fall of the hammer, unless some preliminary contract can be found, binding the auctioneer from the outset of the sale to observe the advertised conditions of the sale. In England it has been decided that a collateral contract is formed by the attendance of bidders at the auction; that is, the auctioneer is held to offer to observe the advertised conditions (as to sell without reserve) in consideration of the bidder's attendance and taking part in the auction.⁴⁴ However desirable the result reached by this

Gilbert v. Watts-DeGolyer Co., 169 Ill. 129, 48 N. E. 430, 61 Am. St. Rep. 154; *Morton v. Moore*, 4 Ky. L. Rep. 717.

⁴² *Anderson v. Wisconsin Central R. Co.*, 107 Minn. 296, 120 N. W. 39, 20 L. R. A. (N. S.) 1133, 131 Am. St. Rep. 462, citing *Knox v. Spratt*, 19 Fla. 833; *Rogers & B. Hardware Co. v. Cleveland Bldg. Co.*, 132 Mo. 442, 31 L. R. A. 335, 53 Am. St. Rep. 494, 34 S. W. 57; *Davis v. McCann*, 143 Mo. 172, 44 S. W. 795. See also *Keightley v. Birch*, 3 Campb. *521. To the same effect are *State v. Quintard*, 80 Fed. 829, 835 26 C. C. A. 165; *Terry v. Cole's Exec.*, 80 Va. 695; *Virginia Fire Ins. Co. v. Cottrell*, 85 Va. 857, 861, 9 S. E. 132, 17 Am. St. Rep. 108.

⁴³ *Camden v. Mayhew*, 129 U. S. 73, 85, 32 L. Ed. 608, and cases cited; and if after the sale has become binding on the purchaser he fails to complete it, the property may be resold at his risk. *Continental Trust Co. v. Baltimore Re-*

frigerating &c. Co., 120 Md. 450, 87 Atl. 947.

⁴⁴ *Warlow v. Harrison*, 1 E. & E. 295. The plaintiff in this case bid £63 for a horse at an auction sale which was advertised to be held without reserve; nevertheless, the owner bid more and the auctioneer knocked the horse down to him, which in effect amounted to withdrawing it from sale. It was held that the plaintiff might recover against the auctioneer on a theory that a contract had been made with him that the sale should be without reserve. The principal was not disclosed and, therefore, this collateral contract was with the auctioneer personally. It was held further that the Statute of Frauds did not apply to this collateral contract that the sale should be without reserve. In *Mainprice v. Westley*, 6 B. & S. 420, similar facts were involved, but the auctioneer's principal was disclosed and the court held no action would lie

doctrine may be, it seems artificial to say that the auctioneer actually makes an offer of the sort supposed.⁴⁵ It seems better to reach the result desired by statute than to strain reasoning so far as has been done in the English decisions. In a number of American States it is enacted that where an auction sale is advertised to be without reserve the auctioneer cannot withdraw the goods from sale.⁴⁶ In the absence of such statutes the announcement of an auction sale, and of the manner in which it will be held, as that the property will be sold without reserve to the highest bidder, seems merely preliminary to any bargain, and an invitation for offers rather than itself an offer. Indeed the contrary view is inconsistent with the numerous decisions holding that the sale of the property is not complete until the fall of the hammer;⁴⁷ for

against the auctioneer. *Warlow v. Harrison* was followed by a decision of a single justice in *Johnston v. Boyes*, [1899] 2 Ch. 73. This was an action against the auctioneer for not allowing the completion of a sale of real estate which had been knocked down at auction to the plaintiff. Completion of the sale was refused by the auctioneer because of supposed insolvency of the buyer, and because a check for the price was tendered instead of cash. There were printed conditions of sale which included a statement that the property would be knocked down to the highest bidder. The court held the action could be maintained and that though the Statute of Frauds might prevent the direct enforcement of the sale, it did not prevent enforcement of the collateral contract to sell to the highest bidder. See also *Harris v. Nickerson*, L. R. 8 Q. B. 286; *Spencer v. Harding*, L. R. 5 C. P. 561; *McManus v. Fortescue*, [1907] 2 K. B. 1; *McAlpine v. Young*, 2 Ch. Chamb. (U. C.) 85; *O'Connor v. Woodard*, 6 Ont. Pr. 223; (cp. *Holder v. Jackson*, 11 U. C. C. P. 543).

⁴⁵ Cp. the discussion and cases stated *supra*, § 27.

⁴⁶ Cal. Civil Code, § 1796. "If at a sale by auction the auctioneer, having authority to do so, publicly announces that the sale will be without reserve, or makes any announcement equivalent thereto, the highest bidder, in good faith, has an absolute right to the completion of the sale to him; and upon such a sale bids by the seller or any agent for him, are void." This statute was copied in Dak. Civil Code, § 1026, and on the division of Dakota re-enacted in N. Dak. Civil Code, § 3993; S. Dak. Civil Code, § 1345.

In the Uniform Sales Act it is provided—§ 21 (2); until the fall of the hammer "any bidder may retract his bid; and the auctioneer may withdraw the goods from sale unless the auction has been announced to be without reserve." The states in which this statute has been enacted are enumerated *infra*, § 506.

In regard to the time of transfer of title in an auction sale, see Williston on Sales, § 296. In regard to the application of the Statute of Frauds to such sales, see *infra*, § 588. In regard to the effect of secret bidding on behalf of the seller, see *infra*, § 1664.

⁴⁷ See *supra*, § 29.

if the announcement by the auctioneer that he is to sell goods without reserve amounts to an offer, and the advertised terms and conditions of the sale are also offers to contract, it seems impossible to deny that the actual putting up of the goods, a much stronger act than merely advertising that they are to be put up, is also an offer.⁴⁸

§ 31. Tenders.

Often tenders or bids are advertised for either by public corporations, municipalities, counties or States, or by private corporations. The rules governing such bidding are analogous to the rules governing auction sales. That is, an advertisement for bids or tenders is not itself an offer but the bid or tender is an offer which creates no right until accepted.⁴⁹ Even though the charter of a municipality expressly requires that a contract shall be awarded to the lowest bidder, a contract is not formed until the lowest bid is in fact accepted. Though the municipality can make a contract with no other person than the lowest bidder, it need make no contract with him.⁵⁰

Often in the formation of public contracts, the formalities required by law, or by the request for bids, such as a written contract,⁵¹ or the furnishing of a bond,⁵² indicate that even after acceptance of the bid, no contract is formed, until the requisite formality has been complied with. Except in the case of municipal or public corporations under such disa-

⁴⁸ This line of reasoning was adopted by the Minnesota court which held that no preliminary contract was created in *Anderson v. Wisconsin Central R. R. Co.*, 107 Minn. 296, 120 N. W. 39, 20 L. R. A. (N. S.) 1133, after a very thorough examination of all authorities bearing upon the question. See also *McPherson Bros. Co. v. Okanogan County*, 45 Wash. 285, 88 Pac. 199, 9 L. R. A. (N. S.) 748.

⁴⁹ *Spencer v. Harding*, L. R. 5 C. P. 561; *Kingston-upon-Hull v. Petch*, 10 Exch. 610; *Cedar Rapids Lumber Co. v. Fisher*, 129 Iowa, 332, 105 N. W. 595, 4 L. R. A. (N. S.) 177; *Weitz v. Independ-*

ent District, 79 Ia. 423, 44 N. W. 696; *Edge Moor Bridge Works v. County of Bristol*, 170 Mass. 528, 49 N. E. 918.

⁵⁰ *State v. New Orleans*, 48 La. Ann. 643, 19 So. 690; *Howard v. Industrial School*, 78 Me. 230, 3 Atl. 657; *Walsh v. Mayor &c. of New York*, 113 N. Y. 142, 20 N. E. 825.

⁵¹ *Edge Moor Bridge Works v. County of Bristol*, 170 Mass. 528, 49 N. E. 918.

⁵² *Howard v. Industrial School*, 78 Me. 230, 3 Atl. 657. See also *Standard Mfg. Co. v. Lembke*, 108 Ill. App. 530.

bilities as just suggested, there seems no reason to suppose that it is not possible for one seeking tenders to make a statement in such positive terms that he will accept the highest tender, that the statement will amount to an offer and ripen into a contract with the person thereafter making the highest tender.⁵³

§ 32. General offers.

Though offers are ordinarily made to specific persons, it is possible to make offers to any one, or to every one, who may perform a specified act or make a specified promise. The commonest illustration of such offers is furnished by offers of reward for the apprehension or conviction of criminals.⁵⁴ General offers are usually to be construed as addressed to the first person who may perform the act requested,⁵⁵ but it is possible to make an offer of reward to every one who may do the act requested. Thus in a well-known English case⁵⁶ the offer in question was to pay £100 reward to any one who should contract influenza after using one of the defendant's smoke balls three times daily for two weeks.⁵⁷ Though the point was not involved in the case, it would seem that the offer was susceptible of acceptance by more than one person.

A letter of credit also may be a general offer addressed to any one who will advance money upon the faith of it.⁵⁸ Sometimes

⁵³ In *So. Hetton Coal Co. v. Haswell, etc., Coal Co.* [1898], 1 Ch. 465, a liquidator who was offering coal property for sale wrote—"The highest net money tender I receive (all other things being equal and satisfactory), that tender I will at once accept." The language of the court seems to indicate the opinion that the liquidator would have been bound to accept a tender coming within this description. The tender in question, however, which was "of such a sum as will exceed by £200 the amount offered by another bidder," the amount of whose bid was unknown, was not a tender within the meaning of the liquidator's proposal.

⁵⁴ See illustration of such offers *infra*, § 33.

⁵⁵ See *infra*, § 74.

⁵⁶ *Carlill v. Carbolic Smoke Ball Co.* [1892], 2 Q. B. 484; [1893] 1 Q. B. 256.

⁵⁷ Similarly in *Stollery v. Maskelyne*, 15 T. L. Rep. 79, there was an offer by a conjurer of £500 to any one could imitate his trick. It may be supposed that this offer could have been accepted by more than one person.

⁵⁸ *Ex parte Asiatic Banking Corporation*, L. R. 2 Ch. App. 391; *Posey v. Denver Nat. Bank*, 7 Col. App. 108, 42 Pac. 684.

In the latter case a letter stating "if you are still there and need the money you can make a draft on me for \$500 and I will pay it," was held to amount to an offer which might be accepted by a bank cashing such a draft. A sim-

newspapers offer a prize to one who shall receive the most votes, written on coupons cut from copies of the newspaper. When the votes have been cast a contract is formed with those who cast votes for the winning candidate for the benefit of that candidate.⁵⁹ A similar principle has been applied to entries in races or other competitions.⁶⁰ In the case of the *Satanita*⁶¹ it was held that the owner of the yacht *Satanita* had entered into a contract with the owner of the yacht *Valkyrie* to pay all damage which might be caused by infringement of the rules. The entry of the *Satanita* by her owner for the regatta contained this clause: "I undertake that, while sailing under this entry, I will obey and be bound by the sailing rules of the Yacht Racing Association and the by-laws of the club." Among the rules was the following: "Rule 24: . . . If a yacht, in consequence of her neglect of any of these rules, shall foul another yacht . . . she shall forfeit all claim to the prize, and shall pay all damages." It was the conclusion of the court that the entry constituted a general offer to all other contestants, which had been accepted by them. The case at least shows the possibility of such a general offer. Had the entry been addressed to the other contestants, there could have been no doubt of the correctness of the decision. Upon the actual facts it would seem rather that there was a promise to the regatta committee to whom the entry was addressed. This promise was doubtless for the benefit of the other contestants, but does not seem, when fairly construed, to contemplate an agreement with them.⁶² The relation of the parties to the transaction seems similar to the relation between a club and its members with reference to its by-laws; which are "in

ilar decision is *Oil Well Supply Co. v. MacMurphy*, 119 Minn. 500, 138 N. W. 784.

⁵⁹ *Millsaps v. Urban*, 116 Ark. 90, 171 S. W. 1198; *Smead v. Stearns*, 173 Ia. 174, 155 N. W. 307. See also *Weisz v. Price*, (Iowa,) 172 N. W. 939.

⁶⁰ *Peters v. Agricultural Soc.*, 3 N. Brunswick Eq. 127.

⁶¹ [1895] P. D. 248, *aff'd sub nom. Clarke v. Dunraven*, [1897] App. Cas. 59.

⁶² It is suggested by Sir Frederick Pollock, *Contracts* (8th ed.), page 27, that "the secretary of the club who receives the entries may be regarded as an agent to receive . . . the offer," but, as is stated on the same page, the secretary is not "in any ordinary sense" an agent. He is, in short, just as much and just as little an agent as any promisee who receives a promise for the sole benefit of a third person. See *infra*, § 352.

effect a contract between the different members and the corporation."⁶³

§ 32a. Obligations imposed by law without assent distinguished.

The advertised time-table of a railroad has been held part of a general offer which becomes binding when accepted by the purchase of a ticket.⁶⁴ It seems difficult, however, to regard such an advertisement as an offer. There is certainly less reason to regard it as such than an ordinary advertisement of goods for sale.⁶⁵ The obligation of the railroad to conform to its time-table seems rather due to its obligations as a public service corporation, irrespective of contract, than to an obligation voluntarily assumed. There is no doubt that the carrier must run its trains in conformity with published time-tables so far as circumstances will permit.⁶⁶ (But a railroad company is excused from liability if any cause beyond its control makes it impossible or unreasonably difficult to keep to the published time.⁶⁷) If, in fact, the time-table were an offer which created a contract with a passenger, the carrier would not thus be excused.⁶⁸ A clearer case of the confusion

⁶³ *Boston Club v. Potter*, 212 Mass. 23, 26, 98 N. E. 614. Therefore the resignation of a member in order to free him from liability for future dues, must comply with the terms of the by-law providing for withdrawal. *Ibid.* See also *Finch v. Oake* [1896], 1 Ch. 409; *People v. New York Motor Boat Club*, 129 N. Y. Supp. 365, 70 N. Y. Misc. 603.

⁶⁴ *Denton v. Great Northern Ry.*, 5 E. & B. 860; *Sears v. Eastern R. R. Co.*, 14 Allen, 433, 92 Am. Dec. 780; *Coleman v. Railroad*, 138 N. C. 351, 50 S. E. 690.

⁶⁵ See *supra*, § 27.

⁶⁶ See cases cited in the preceding and following notes. Also *Savannah, etc., R. R. Co. v. Bonaud*, 58 Ga. 180; *Weed v. Panama R. R.*, 17 N. Y. 362, 72 Am. Dec. 474; *Van Camp v. Railroad Co.*, 137 Mich. 467, 100 N. W.

771; *Geer v. Michigan Central R. R. Co.*, 142 Mich. 511, 106 N. W. 72.

⁶⁷ *Ohio & M. Ry. Co. v. Allender*, 59 Ill. App. 620; *Wilsey v. R. R. Co.*, 83 Ky. 511; *McClary v. Sioux City R. R. Co.*, 3 Neb. 44, 19 Am. Rep. 631; *Gordon v. Manchester & L. R. R. Co.*, 52 N. H. 596; *Houston R. R. v. Rogers*, 16 Tex. Civ. App. 19, 40 S. W. 201; *International & G. N. R. R. Co. v. Harder*, 36 Tex. Civ. App. 151, 81 S. W. 356.

⁶⁸ Even the decisions which assert that the time-table is an offer, agree that the railroad is not liable if without its fault it cannot conform to the schedule. "The printed schedule is an offer which was accepted by the plaintiff when he asked for a ticket, and he had a legal right to be transported by the first train stopping at Harrisburg. If the train arrives after schedule time

of a contractual obligation with one imposed by law irrespective of contract, may be found in a recent English decision,⁶⁹ where the defendants, who were newspaper proprietors, advertised that they would answer inquiries from readers who desired financial advice. The plaintiff, a reader of the paper, thereupon wrote requesting the name of a good stock broker. The defendants negligently, but honestly, gave the name of one who was not a member of the stock exchange, and who was an undischarged bankrupt. In consequence of this advice the plaintiff lost money. It was held that the defendants had contracted to use reasonable care in answering inquiries. That the defendants should be liable in such a case in an action of tort for negligence seems probable, but it is impossible to find the elements of a contract. The plaintiff was not asked to furnish consideration, and in fact gave none. The statement of the defendants that they would answer inquiries on financial subjects was obviously not made as an offer to contract.⁷⁰

Re
 § 33. An offer must be communicated; rewards. ✓

In the nature of the case it is impossible for an offeree actually to assent to an offer unless he knows of its existence. A simple contract when not based on actual consent at least requires what the parties are justified in regarding as such. There can be obviously no real assent until the offer has been communicated; and unless an act done or language spoken by the offeree in ignorance of the offer, was of a character which a reasonable person in his position ought to have known

or misses connection, or delivers a passenger at his destination after the schedule time, unless the delay is caused by no fault of the carrier, the passenger has a right to recover compensation for his loss of time and actual expense." *Coleman v. Railroad Co.*, 138 N. C. 351, 354, 50 S. E. 690. If it were true that the printed schedule was an offer, there would be no condition implied in the offer that delay caused by no fault of the carrier should be an excuse. Such conditions are not implied in real offers. The in-

stances when impossibility is a defense are narrowly limited. See *infra*, § 1935.

⁶⁹ *De La Bere v. Pearson* (1907), 1 K. B. 483, aff'd in (1908) 1 K. B. 280.

⁷⁰ The case is criticised on this ground in 23 L. Quarterly Rev. 133. The English courts by unduly narrowing the boundaries of liability in tort seem to have been driven to extend unwarrantably the province of contract. See an article on Liability for Honest Misrepresentation, 24 Harv. L. Rev. 415.

was calculated to deceive, there is nothing which the other party is justified in regarding as assent, and it may be shown that the act done, or language used, did not really mean assent.⁷¹ This seems clear upon principle, but in one class of cases, especially, there are a number of decisions which disregard the rule. Where an offer of reward has been published, one who performs the offer requested in ignorance of the existence of the offer, has been held entitled in some jurisdictions to recover the promised reward.⁷²

Doubtless the reason for these decisions is the feeling of the court that the defendant has received the benefit for which he asked, and for which he expected to pay, and therefore that he should be required to pay. It is impossible, however, to find a contract in any proper sense of that word in such a case. If it is clear the offeror intended to pay for the service, it is equally certain that the person rendering the service performed it voluntarily and not in return for a promise to pay. If one person expects to buy, and the other to give, there can hardly be found mutual assent. These views are supported by the great weight of authority, and generally a plaintiff in the sort of case under discussion is not allowed to recover.⁷³ The view that unless there is some estoppel

⁷¹ *Richardson v. Rowntree* [1894], A. C. 217; *The Majestic*, 166 U. S. 375, 41 L. Ed. 1039; *Saunders v. Southern Ry. Co.*, 128 Fed. 15, 62 C. C. A. 523; *Malone v. Boston & Worcester R. R.*, 12 Gray, 388, 74 Am. Dec. 598; *Martin v. Central R. R.*, 121 N. Y. App. Div. 552, 106 N. Y. Supp. 226; *Black v. Atlantic Coast Line R. Co.*, 82 S. C. 478, 64 S. E. 418. See also *Robertson v. Rowell*, 158 Mass. 94, 97, 32 N. E. 898, 35 Am. St. Rep. 466.

⁷² *Williams v. Carwardine*, 4 B. & Ad. 621; *Gibbons v. Proctor*, 64 L. T. (N. S.) 594; *Eagle v. Smith*, 4 Houst. 293; *Dawkins v. Sappington*, 26 Ind. 199; *Sullivan v. Phillips*, 178 Ind. 164, 98 N. E. 868; *Everman v. Hyman*, 26 Ind. App. 165, 28 N. E. 1022; *Auditor v. Ballard*, 9 Bush, 572, 15 Am. Rep. 728; *Coffey v. Commonwealth*, 18 Ky.

L. Rep. 646, 37 S. W. 575; *Russell v. Stewart*, 44 Vt. 170. See also *Drummond v. United States*, 35 Ct. Claims, 356. A distinction may be taken where the right to a reward is based upon a statute. It is of course possible for a statute to provide for a reward to one who does a certain act whether he did it in expectation of the reward or not. See *Taft v. Hyatt*, (Kans., 1919), 180 Pac. 213; *Broadnax v. Ledbetter*, 100 Tex. 375, 99 S. W. 1111, 9 L. R. A. (N. S.) 1057; *Choice v. Dallas* (Tex. Civ. App.), 210 S. W. 753.

⁷³ *Morrell v. Quarles*, 35 Ala. 544, 550; *Hewitt v. Anderson*, 56 Cal. 476, 38 Am. Rep. 65; *Wilson v. Stump*, 103 Cal. 255, 37 Pac. 151; *Williams v. West Chicago St. Ry. Co.*, 191 Ill. 610, 61 N. E. 456, 85 Am. St. Rep. 278; *Taft v. Hyatt*, (Kans., 1919), 180 Pac.

to deny communication, nothing can properly be called an offer which has not been communicated, is supported, moreover, not simply by the bulk of American cases on rewards which have been referred to above, but also by decisions which hold that an offer cannot be supplemented by a subsequent letter of the offeror which had been sent but not received by the acceptor at the time when he gave his acceptance.⁷⁴

§ 33a. The whole consideration must be given after knowledge of the offer.

It is essential on principle also that the offeree shall know of the existence of the offer, not only before he has completely performed the consideration requested, but before he has performed any part of it; otherwise the consideration requested is not given as a whole in exchange for the offer.⁷⁵ The contrary has been held in several cases⁷⁶ where the plaintiff was allowed to recover a reward offered for the apprehension of a criminal though he had not acquired knowledge of the reward until after part of the requested services had been rendered,

213; *Ball v. Newton*, 7 Cush. 599; *Forsythe v. Murnane*, 113 Minn. 181, 129 N. W. 134; *Smith v. Vernon County*, 188 Mo. 501, 87 N. W. 949, 70 L. R. A. 59; (*Cf. Hoggard v. Dickerson*, 180 Mo. App. 70, 165 S. W. 1135); *Furman v. Parke*, 21 N. J. L. 310; *Mayor of Hoboken v. Bailey*, 36 N. J. L. 490; *Fitch v. Snedaker*, 38 N. Y. 248, 97 Am. Dec. 791; *Howland v. Lounds*, 51 N. Y. 604, 10 Am. Rep. 654; *Vitty v. Eley*, 51 N. Y. App. D. 44, 64 N. Y. Supp. 397; *Sheldon v. George*, 132 N. Y. App. D. 470, 116 N. Y. S. 969; *Rubenstein v. Frost*, 116 N. Y. Supp. 681; *Couch v. State*, 14 N. Dak. 361, 103 N. W. 942; *Stamper v. Temple*, 6 Humph. 113, 44 Am. Dec. 296; *Broadnax v. Ledbetter*, 100 Tex. 375, 99 S. W. 1111, 9 L. R. A. (N. S.) 1057; *Tobin v. McComb* (Tex. Civ. App.), 156 S. W. 237; *Choice v. Dallas* (Tex. Civ. App.), 210 S. W. 753.

⁷⁴ *Tinn v. Hoffman*, 29 L. T. (N. S.) 271, stated *supra*, § 23, n. 7; *James*

v. Marion Fruit Jar Co., 69 Mo. App. 207. See also *Harris v. Scott*, 67 N. H. 437, 32 Atl. 770, and *supra*, § 23. *Cp. Mactier's Adm. v. Frith*, 6 Wend. 103, 21 Am. Dec. 262. See also *Cox v. Troy*, 5 B. & Ald. 474, where it was held that a drawee who had written his acceptance upon the draft was entitled to cancel the acceptance prior to the redelivery of the draft to the holder and prior to any communication to him of the acceptance.

⁷⁵ This was so held in *Williams v. West Chicago Street Ry. Co.*, 191 Ill. 610, 61 N. E. 456, 85 Am. St. Rep. 278, where it was held that the plaintiff was not entitled to a reward because, among other reasons, the services were largely though not entirely rendered before the plaintiff knew of the reward.

⁷⁶ *Coffey v. Commonwealth*, 18 Ky. L. Rep. 646, 37 S. W. 575; *Smith v. Vernon County*, 108 Mo. 501, 87 S. W. 949, 70 L. R. A. 59; *Hoggard v. Dickerson*, 180 Mo. App. 70, 165 S. W. 1135.

but knew of the offered reward and intended to claim it before the completion of the requested services. But a consideration of supposititious cases involving the same principle shows that such a result cannot be supported. If E makes R a Christmas present of \$20 in ignorance of the fact that R has offered to give a set of books to any one who will give him \$25, he surely cannot by giving the remaining \$5 after Christmas, when he has learned of the offer, and intends to accept it, entitle himself to the reward.

It must be borne in mind, however, that the fact that the offeree has made preparation for the performance which is requested, will not debar him from accepting the offer later by doing the requested act. Thus if a reward is offered for the apprehension of a criminal and the plaintiff, before knowledge of the reward, has gone to great labor in detecting the criminal, and learning his whereabouts, and is about to apprehend him, he may entitle himself to the reward by making the actual apprehension after the offer comes to his knowledge.

§ 34. An offer by mail must be received.

It was laid down in the leading case of *Adams v. Lindsell*,⁷⁷ that the offerors must be regarded "As making during every instant of the time their letter was travelling the same identical offer to the plaintiffs." And this statement has been often repeated. If it is to be taken literally, it would follow that a complete offer is made at the instant that a letter containing it is mailed. If this merely means that the offerer has then completed the only act or manifestation of assent he is called upon to make, no fault can be found with the statement; but if it is meant that the letter becomes an offer capable of ripening into a contract without reference to the offeree's knowledge of the existence of the offer, the statement is at variance with fundamental theories of contract. Yet the English court not only in cases of reward⁷⁸ but in other connections has gone to this extreme.⁷⁹ The truth of the matter has been

⁷⁷ 1 B. & Ald. 681.

⁷⁸ See *supra*, § 33, n. 72.

⁷⁹ *Taylor v. Jones*, 1 C. P. D. 87 (C. A.) In this case a letter containing

an offer to buy goods was mailed in London to the plaintiff in Surrey. No letter was sent accepting the offer, but the goods requested were taken by a

expressed by Lindley, J.: "a letter is a continuing offer or order, or statement by the sender which takes effect in the place where the person to whom it is sent receives it."⁸⁰

§ 35. Negligent appearance of assent may bind the parties though the actual offer not communicated.

Throughout the formation of contracts it is to be observed that not assent, but what the other party is justified as regarding as assent, is essential. Accordingly if an offeree in ignorance of the terms of an offer so acts or expresses himself as to justify the other party in inferring assent, and this action or expression was of such a character that a reasonable man in the position of the offeree should have known it was calculated to deceive the offeror into the belief that his offer had been accepted, a contract will be formed in spite of the offeree's ignorance of the terms of the offer. The commonest illustration of this principle is where one who is ignorant of the language in which a document is written,⁸¹ or who is illiterate executes, under a mistake as to its contents, a writing proposed as a contract. He is bound, if he did not require the document to be read to him⁸² and much more if the signer

servant of the plaintiff and delivered to the defendant in London. Action was brought in the Mayor's Court in London, the jurisdiction of which is confined to causes of action arising wholly within the City. It was conceded that this limitation of jurisdiction required both the offer and the acceptance to have been made in the City. The court upheld the jurisdiction, holding that the order was given when the letter containing it was posted. See also *Reg. v. Holmes*, 12 Q. B. D. 23; *Holland v. Bennett* [1902], 1 K. B. 867 (C. A.). Cp. *Edmundson v. Render*, [1905] 2 Ch. 320; *Burton v. United States*, 202 U. S. 344, 386, 50 L. Ed. 1057; *Commonwealth Ins. Co. v. Knabe*, 171 Mass. 265, 50 N. E. 516; *Perry v. Mt. Hope Iron Co.*, 15 R. I. 380, 5 Atl. 632, 2 Am. St. Rep. 902. In the three cases last cited it was held that a contract was made in the place

from which an acceptance was dispatched, though the offer had been sent from another State. In the first of these cases it was held that where the making of such a contract was a crime on the part of the offeror, the place of the acceptance was the place where the crime was committed by the offeree.

⁸⁰ *Bennett v. Cosgriff*, 38 L. T. Rep. (N. S.) 177. See also *Harris v. Scott*, 67 N. H. 437, 32 Atl. 770.

⁸¹ *Constantine v. McDonald*, 25 Ida. 342, 137 Pac. 531.

⁸² *Stern v. Moneyweight Scale Co.*, 42 App. Dist. Col. 162; *Shulman v. Moser*, 284 Ill. 134, 119 N. E. 936; *Robinson v. Glass*, 94 Ind. 211; *Roach v. Karr*, 18 Kans. 529, 26 Am. Rep. 788; *Leddy v. Barney*, 139 Mass. 394, 2 N. E. 107; *Morstad v. Atchison, &c. Ry. Co.*, 23 N. Mex. 663, 170 Pac. 886; *Hallenbeck v. Dewitt*, 2 Johns. 404;

of a writing is not illiterate, "it will not do for him to enter into a contract and when called upon to abide by its conditions, say that he did not read it when he signed it, or did not know what it contained."³³ This principle is not carried so far,

Bauer v. Roth, 4 Rawle, 83, 94; *Weller's Appeal*, 103 Pa. St. 594. In *Shores-Mueller Co. v. Lonning*, 159 Ia. 95, 140 N. W. 197, it was held to be a question of fact under all the circumstances of the case whether the signer was negligent. See also *Miller v. Spokane Internat. R. Co.*, 82 Wash. 170, 143 Pac. 981.

³³ *Upton v. Tribilcock*, 91 U. S. 45, 50, 23 L. Ed. 203; *Hazard v. Griswold*, 21 Fed. 178; *Stutz v. Handley*, 41 Fed. 531, 534; *Travellers' Ins. Co. v. Henderson*, 69 Fed. 762, 768, 16 C. C. A. 390; *Lumley v. Railway Co.*, 76 Fed. 66, 22 C. C. A. 60, rev'g 71 Fed. 21; *Royston v. Miller*, 76 Fed. 50; *Chicago &c. Ry. Co. v. Belliwith*, 83 Fed. 437, 28 C. C. A. 358; *New York Life Ins. Co. v. McMaster*, 87 Fed. 63, 67, 30 C. C. A. 532; *Wagner v. Natl. Life Ins. Co.*, 90 Fed. 395, 407, 33 C. C. A. 121; *Chicago & A. Ry. Co. v. Green*, 114 Fed. 676; *Hickman v. Sawyer*, 216 Fed. 281, 132 C. C. A. 425; *Bailey v. Lisle Mfg. Co.*, 238 Fed. 257, 152 C. C. A. 3; *Hoshaw v. Cosgriff*, 247 Fed. 22, 159 C. C. A. 240; *Goetter v. Pickett*, 61 Ala. 387; *Dawson v. Burrus & Williams*, 73 Ala. 111; *Martin v. Smith*, 116 Ala. 639, 22 So. 917; *Prestwood v. Carlton*, 162 Ala. 327, 50 So. 254; *Greil v. Tillis*, 170 Ala. 391, 54 So. 524; *Birmingham Ry. L. & P. Co. v. Jordan*, 170 Ala. 530, 54 So. 280; *Alosi v. Birmingham Water Works Co.*, 1 Ala. App. 630, 55 So. 1029; *Ingram v. Coleman*, 110 Ark. 632, 160 S. W. 886; *Stone v. Prescott, etc.*, District, 119 Ark. 553, 178 S. W. 399; *Placer Bank v. Freeman*, 126 Cal. 90, 58 Pac. 388; *Baltimore & O. R. Co. v. Morgan*, 35 App. D. C. 195; *Brooks v. Matthews*, 78 Ga. 739, 3 S. E. 627; *Jossey v. Georgia, etc., Ry. Co.*, 109 Ga. 439, 34 S. E. 664; *Georgia*

Medicine Co. v. Hyman, 117 Ga. 851, 45 S. E. 238; *Newsome v. Harrell*, 146 Ga. 139, 90 S. E. 855; *Black v. Wabash, etc., Ry. Co.*, 111 Ill. 351, 53 Am. Rep. 628; *Rogers v. Place*, 29 Ind. 577; *American Ins. Co. v. McWhorter*, 78 Ind. 136; *McCormack v. Molburg*, 43 Iowa, 561; *Wallace v. Chicago, etc., Ry. Co.*, 67 Iowa, 547, 25 N. W. 772; *Bonnot Co. v. Newman*, 108 Iowa, 158, 78 N. W. 817; *Carper v. Ridpath*, 168 Ia. 22, 149 N. W. 841; *Custer v. Oliver*, 93 Kans. 760, 145 Pac. 554; *J. I. Case Threshing Machine Co. v. Mattingly*, 142 Ky. 581, 134 S. W. 1131; *J. M. Case Mill Mfg. Co. v. Vickers*, 147 Ky. 396, 144 S. W. 76; *United Talking Mach. Co. v. Metcalf*, 164 Ky. 258, 175 S. W. 357; *Bowen v. Chenoa Hig-nite Co.*, 168 Ky. 588, 182 S. W. 635; *Maine Mutual Marine Ins. Co. v. Hodgkins*, 66 Me. 109; *Eldridge v. Dexter & P. R. Co.*, 88 Me. 191, 33 Atl. 974; *Watkins Medical Co. v. Stahl*, 117 Me. 190, 103 Atl. 70; *Bakhaus v. Caledonian Ins. Co.*, 112 Md. 676, 77 Atl. 310; *McGrath v. Peterson*, 127 Md. 412, 96 Atl. 551; *Jackson v. Olney*, 140 Mass. 195, 4 N. E. 225; *Nourse v. Jennings*, 180 Mass. 592, 62 N. E. 974; *Fay v. Hunt*, 190 Mass. 378, 77 N. E. 502; *Cannon v. Burrell*, 193 Mass. 534, 79 N. E. 780; *McKinnon v. Boston, etc., R.*, 217 Mass. 274, 104 N. E. 446; *Liska v. Lodge*, 112 Mich. 635, 71 N. W. 171; *Zellar v. Ranson*, 140 Mo. App. 220, 123 S. W. 1016; *Sanden v. Northern Pac. Ry. Co.*, 43 Mont. 209, 115 Pac. 408; *Pragi v. Lehigh Coal & Nav. Co.*, 176 N. Y. App. D. 265, 162 N. Y. S. 1011; *Howell v. Bloom*, 117 N. Y. Supp. 893; *Dellinger v. Gillespie*, 118 N. C. 737, 24 S. E. 538; *Leonard v. Southern Power Co.*, 155 N. C. 10, 70 S. E. 1061; *Colonial Jewelry Co.*

however, as to hold a party who carelessly failed to read a paper which he signed, liable to one who knew of the signer's ignorance and fraudulently induced it or took advantage of it.⁸⁴ A similar principle is applicable to the offeror's conduct as to the offeree's. If the offeror prepared the writing and failed therein to express his meaning, he no more than the acceptor could evade its effect. Further, where a maker through confidence or neglect intrusts to a third party a blank non-negotiable bond which the latter completes by filling the blanks and delivers to an innocent obligee, the maker is bound by the terms of the completed instrument though filled out in violation of authority.⁸⁵ Here, however, there has been no real manifestation of assent by the maker. His liability depends rather on estoppel than on expressed mutual assent. Such estoppels have more generally been applied to negotiable paper,⁸⁶ than to other writings, but seem fairly applicable to the latter.⁸⁷ Even the drawing of negotiable paper without entire blanks, but in such form as to make alteration obviously possible has been held to render the maker liable to a *bona fide* purchaser. This, however, is disputed,⁸⁸ and it

v. Bridges, 43 Okl. 813, 144 Pac. 577; *Ames v. Milam*, (Okl. 1916), 157 Pac. 941; *Foster v. University Lumber Co.*, 65 Or. 46, 131 Pac. 736; *Hyde v. Kirkpatrick*, 78 Or. 466, 153 Pac. 41; *Greenfield's Estate*, 14 Pa. St. 489, 496; *Pennsylvania R. Co. v. Shay*, 82 Pa. St. 198; *Johnston v. Patterson*, 114 Pa. St. 398, 6 Atl. 746; *Weil v. Quidnick Co.*, 33 R. I. 58, 80 Atl. 447; *Bishop v. Allen*, 55 Vt. 423; *Sanger v. Dun*, 47 Wis. 615, 620, 3 N. W. 388, 32 Am. Rep. 789; *Ross v. Northrup*, 156 Wis. 327, 144 N. W. 1124; *International Text Book Co. v. Mabbott*, 159 Wis. 423, 150 N. W. 429; *McMillen v. Strange*, 159 Wis. 271, 150 N. W. 434. In *Williams v. Leisen*, 72 N. J. L. 410, 60 Atl. 1006, the defendant testified, when sued on a written contract for the purchase of books, that the plaintiff's agent told him that he wanted to get some influential citizens to indorse the work and the defendant signed the slip sup-

posing that it was merely an indorsement of the work. This was held insufficient to excuse him. That one's eyes are weak, and he is a poor reader, will not exonerate him. *McDonald v. McKinney Nursery Co.*, 44 Okl. 62, 143 P. 191. But in *Haskins v. Young*, 89 Conn. 66, 92 Atl. 877, the grantee of land was held not bound by an undertaking contained in the deed to assume a mortgage, in the absence of knowledge on his part that the deed contained such a provision. See *infra*, §§ 90, 95.

⁸⁴ See *infra*, §§ 1516, 1577.

⁸⁵ *Gronvold v. Federal Union Surety Co.*, 212 Fed. 908, 129 C. C. A. 428. See also *infra*, § 1247.

⁸⁶ *Negot. Inst. Law*, Sec. 14. See *infra*, § 1141; 1 *Daniel, Neg. Inst.*, §§ 142, 843.

⁸⁷ See *Union Credit Bank v. Mersey, etc.*, Board [1899], 2 Q. B. 205.

⁸⁸ See *infra*, § 1909. 2 *Daniel, Neg. Inst.*, § 1405.

seems clear that no court would apply such a doctrine to non-negotiable contracts.⁸⁹

§ 36. Offers implied in fact; contracts for services.

An offer need not be stated in words. Any conduct from which a reasonable person in the offeree's position would be justified in inferring a promise in return for a requested act or a requested promise by the offeree, amounts to an offer. The common illustration of this principle is where performance of work or services is requested. If the request is for performance as a favor, no offer to contract is made, and performance of the work or services will not create a contract; but if the request is made under such circumstances that a reasonable person would infer an intent to pay for them (and this is always a question of fact under all the circumstances of the case) the request amounts to an offer, and a contract is created by the performance of the work.⁹⁰ And even though no request is made for the performance of work or service, if it is known that it is being rendered with the expectation of pay, the person benefited is liable.⁹¹ It is a question of fact here whether a reasonable man in the position of the parties would have understood that the services were offered in return for a fair compensation, and that the offer was accepted, or whether they were performed gratuitously or if not that the recipient justifiably supposed so. It is customary to lay down presumptions, as that "with respect to strangers a contract for compensation will be implied unless a contrary situation is exhibited;" whereas as between relatives "a contract alleged to exist must be affirmatively shown."⁹²

⁸⁹ *Ibid.*

⁹⁰ *Kennedy v. Broun*, 13 C. B. N. S. 677, 740; *Stewart v. Casey* [1892], 1 Ch. 104, 115; *Spearman v. Texarkana*, 58 Ark. 348, 24 S. W. 883, 22 L. R. A. 855; *Clark v. Clark*, 46 Conn. 586; *Lockwood v. Robbins*, 125 Ind. 398, 25 N. E. 455; *Coleman v. Simpson*, 2 Dana (Ky.), 166; *Blaisdell v. Gladwin*, 4 Cush. 373; *Moore v. Elmer*, 180 Mass. 15, 61 N. E. 259; *Ten Eyck v. Pontiac, etc., R. Co.*, 74 Mich. 226, 41 N. W. 905, 3 L. R. A. 378, 16 Am. St.

Rep. 633; *Ryans v. Hesper*, 167 Mo. 342, 67 S. W. 285; *Pangborn v. Phelps*, 63 N. J. L. 346, 43 Atl. 977; *Raymond v. Sheldon's Est.* (Vt.), 104 Atl. 106.

⁹¹ *Lewis v. Meginniss*, 30 Fla. 419, 12 So. 19; *Emery v. Cobbey*, 27 Neb. 621, 43 N. W. 410; *Kiser v. Holladay*, 29 Ore. 338, 45 Pac. 759; *Miller v. Tracy*, 86 Wis. 330, 56 N. W. 866. And see *infra*, § 91.

⁹² *Ingram v. Basye*, 67 Oreg. 257, 135 Pac. 883, 884, and see *infra*, § 91.

But it is undesirable to lay too much stress on such presumptions. They are mere inferences of fact. Intimate friends sometimes render services gratuitously, and how close must relationship be to make one presumption or another applicable?⁹³ The question is purely one of fact, varying in every case, but with the burden always on the party who alleges a contract and seeks to enforce it, to prove its existence.⁹⁴ Family relationship is of course important, as is the fact that one who requested services did not receive the benefit from them. This may justify an inference that he expected any compensation to be sought from the person who received the benefit.⁹⁵ But circumstances vary in every case, and there should not be any attempt to build up a variety of legal presumptions to meet them.

§ 36a. Other offers implied in fact.

Such liability as that discussed in the preceding section depends not on quasi-contract but upon a real expression of agreement. In this case the person rendering the services makes an offer of them as consideration for a promise to pay and the offer is accepted by receiving them with knowledge that payment is expected; or a request for the services implies in fact an offer to pay for them, which is accepted by rendering the services. Similarly if goods are sent by a seller of a different sort from those ordered, the seller thereby impliedly makes an offer to sell which is accepted if the buyer takes the goods.⁹⁶ So if money is paid by one person at the request

⁹³ In *Hardiman's Adm. v. Crick*, 131 Ky. 358, 115 S. W. 236, 133 Am. St. Rep. 248, the relation of a son-in-law and mother-in-law was thought insufficiently close to subject him to a presumption that his services were performed gratuitously. On the other hand, persons bearing no relation to one another who become members of the same family are dealt with as blood relations. See *infra*, § 91.

⁹⁴ See *Harley v. United States*, 198 U. S. 229, 25 S. Ct. 634, 49 L. Ed. 1029; *Keel v. Larkins*, 52 Ala. 493; *Godfrey v. Haynes*, 74 Me. 96; *Pew v. First Nat. Bank*, 130 Mass. 391; *Wagner v. Edi-*

son &c. Co., 177 Mo. 44, 75 S. W. 966; *Re Bryant*, 73 Vt. 240, 50 Atl. 265; *Harshberger v. Alger*, 31 Gratt. 52; *Stansbury v. Stansbury*, 20 W. Va. 23; *Redmond v. Redmond*, 27 U. C. Q. B. 220.

⁹⁵ Thus physicians requested to render services to third persons have failed to recover from the person requesting that the service be rendered. *Meisenbach v. Southern Cooperage Co.*, 45 Mo. App. 232; *Rankin v. Beale*, 68 Mo. App. 325; *Crane v. Baudouine*, 55 N. Y. 256; *Smith v. Watson*, 14 Vt. 332.

⁹⁶ *Harris v. Lumber Co.*, 97 Ga. 465, 25 S. E. 519; *Garst v. Harris*, 177 Mass.

of another, the request, unless the circumstances are such that the inference of a requested gift is possible, implies an offer to repay the money if the requested payment is made.⁹⁷ For the same reason a request to another to incur liability as by becoming surety, carries with it an implied promise to indemnify.⁹⁸ The contracts implied in fact arising from offers of the sort mentioned in this section are closely connected in the history of the law with quasi-contracts. Indeed, quasi-contracts have largely grown up under the fiction of an implied request which enabled the courts to give the same remedy of *indebitatus assumpsit* to a plaintiff who had furnished a benefit to the defendant which the latter ought equitably to pay for, as was given to plaintiffs who had entered into a real though not express contract by furnishing consideration at the request of the defendant.

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§ 37. An offer when accepted must be capable of creating a definite obligation.

It is a necessary requirement in the nature of things that an agreement in order to be binding must be sufficiently definite to enable a court to fix an exact meaning upon it. If an offer contemplates an acceptance by merely an affirmative answer, the offer itself must contain all the terms necessary for the required definiteness. An offer may, however, contain a choice of terms submitted to the offeree from which he is to make a selection in his acceptance. Such an offer is necessarily indefinite but, if accepted in the way contemplated, the ultimate agreement of the parties is made definite by the acceptance.⁹⁹ A lack of definiteness in an agreement may concern

72, 58 N. E. 174; *Watters v. Glendenning*, 87 Wis. 250, 58 N. W. 404.

⁹⁷ *Littleton Savings Bank v. Land Co.*, 76 Ia. 660, 39 N. W. 201; *Armstrong v. Keith*, 3 J. J. Marsh. 153, 20 Am. Dec. 131; *Wheeler v. Young*, 143 Mass. 143, 9 N. E. 531; *Rosemond v. Register Co.*, 62 Minn. 374, 64 N. W. 925; *Albany v. McNamara*, 117 N. Y. 168, 22 N. E. 931, 6 L. R. A. 212.

⁹⁸ *Infra*, § 1274. Any implied obligation there may be to indemnify a surety

who did not become surety at the request of the principal debtor, however, is not contractual but quasi-contractual.

⁹⁹ Thus in *Averill v. Hedge*, 12 Conn. 424, the offer was to sell "ten or fifteen tons" of iron. Such an offer would require the offeree to fix the amount he wished. So in *Keller v. Ybarru*, 3 Cal. 147, an offer to sell as many of the defendant's grapes as the plaintiff wished to buy became a binding con-

the time of performance, the price to be paid, work to be done, property to be transferred, or to miscellaneous stipulations in the agreement. Especially a reservation to either party of a future untrammelled right to determine the nature of the performance, or a provision that some matter shall be settled by future agreement has often caused a promise to be too indefinite for enforcement. The principle governing all such cases is the same, however, and the classification is merely for convenience. In construing such agreements a court should endeavor, if possible, to attach a sufficiently definite meaning to a bargain of parties who evidently intended to enter into a binding contract^{99a} and ambiguous words in an obligation should be construed most strongly against the party who used them.¹

§ 38. Offers and agreements indefinite as to time.

The promise contained in an offer may not specify exactly the time at which performance is to be made and may

tract as soon as the plaintiff named the quantity which he wished to take. See also *Minneapolis & St. L. R. v. Rolling Mill*, 119 U. S. 149, 30 L. Ed. 376; *Emerson v. Stevens Grocer Co.*, 95 Ark. 421, 130 S. W. 541, 105 Ark. 575, 151 S. W. 1003; *Parks v. Griffith & Boyd Co.*, 117 Md. 494, 83 Atl. 559; *Chicago & Gt. Eastern Ry. Co. v. Dane*, 43 N. Y. 240; *Cochrane v. Mining Co.*, 16 Col. 415, 26 Pac. 780; *Seymour v. Armstrong*, 62 Kans. 720, 64 Pac. 612; *Storm v. Rosenthal*, 156 N. Y. App. Div. 544, 141 N. Y. Supp. 339; *College Mill Co. v. Fidler* (Tenn.), 58 S. W. 382; *Harty v. Gooderham*, 31 U. C. Q. B. 18.

Compare *Miller v. Sharp*, 52 Ind. App. 11, 100 N. E. 108, where an offer was made for certain old corn at a fixed price, and for certain new corn at a fixed price. Under the circumstances of the case it was held that the offer contemplated an acceptance for both lots of corn, and that an acceptance for the new corn only did not create a contract.

^{99a} See *infra*, § 619. *Solter v. Leedom & Worrell Co.*, 252 Fed. 133, 134, 164 C. C. A. 245; *Faucett v. Northern Clay Co.*, 84 Wash. 382, 146 Pac. 857.

¹ In *Monnett v. Monnett*, 46 Ohio St. 30, 34, the court said: "If possible with such helps, they should be given such construction as will uphold the contract, and give effect to the intention of the parties, rather than one which renders them void for uncertainty; and to avoid the latter alternative, the words will be taken most strongly against the person employing them, especially where he is the only party subscribing the contract. The words of obligation in a contract, 'are interpreted most strongly against the obligor, for it is presumed that he used those most favorable to his interests; and all doubtful terms or ambiguous words are to be construed against him. He who speaks, should speak plainly, or the other party may explain to his own advantage.' *State v. Worthington*, 7 Ohio, pt. 1, p. 171." See also—*Howard v. East Tenn.*, etc.,

not contemplate exact definition by the acceptor, and thus the ultimate agreement may be as indefinite as the offer. In such a case it is necessary first to construe the promise in the light of all surrounding circumstances, and with reference to its subject-matter, in order to ascertain the intention of the parties. It may be that so construed the promise means perpetual performance; but it may mean performance is to begin in a reasonable time or to be continued for a reasonable time; or it may mean that the time was simply left indefinite with the expectation that the parties might continue performance as long as they pleased or that they would subsequently settle that term of the promise. It is only in this last class of cases that the question of indefiniteness can arise. It is not often that a promise will properly be construed as calling for perpetual performance. Only in such negative promises as to forbear suit² or not to carry on a business or occupation³ is so broad a construction likely to be permissible. More commonly the true construction will mean some period short of infinity; and partly in order to carry out supposed actual intention of the parties and partly, doubtless, in order to prevent an offer or agreement from being ineffectual because too indefinite, courts will, where the contract contemplates a single act or exchange of acts unless the circumstances show a contrary intention, construe a promise which does not in terms state the time of performance as intending performance in a reasonable time. So far as this question of construction is concerned, it is immaterial whether the promise in question is in an offer or in a completed contract. Thus in an agreement of sale where no time is fixed for delivery, a reasonable time is intended.⁴ If the goods at the time of the bargain are in a deliverable state, a reasonable time for delivery would be

R. Co., 91 Ala. 268, 8 So. 868; *Ryan v. Hamilton*, 205 Ill. 191, 68 N. E. 781; *American Lithograph Co. v. Commercial Casualty Ins. Co.*, 81 N. J. L. 271, 80 Atl. 25. See further, *infra*, § 621.

² See *infra*, § 136.

³ Thus in *Hauser v. Harding*, 126 N. C. 295, 35 S. E. 586, a promise not to compete as a physician was held to

mean never to compete. See also *infra*, § 1638.

⁴ *Jones & Laughlin Steel Co. v. Abner Doble Co.*, 162 Cal. 497, 123 Pac. 290; *Western Securities Co. v. Atlee*, 168 Ia. 650, 151 N. W. 56; *Kidder v. Flanders*, 73 N. H. 345, 61 Atl. 675; *Gruen v. Ohl*, 81 N. J. L. 626, 80 Atl. 547; *Cameron Coal Co. v. Universal Metal Co.*, 26 Okl. 616, 119 Pac.

a very short time.⁵ So where a buyer is under a duty to take possession of goods, and no time has been fixed, he must do so within a reasonable time.⁶ Where work is to be done and the promise fixes no time for its completion, a reasonable time is intended,⁷ and if the time of payment is not fixed, that also must be made in a reasonable time.⁸ Money loaned under a contract must be repaid in a reasonable time if no time is fixed.⁹ An agreement to repurchase stock sold is subject to the same rule.¹⁰ Where the agreement contemplates a continuing performance, the matter is not so clear; but a promise to forbear suit is interpreted, in the absence of circumstances showing that perpetual forbearance, or forbearance for some other time was intended as calling for forbearance for a reasonable time.¹¹ In many cases, however, a promise which contemplates continuing performance for an indefinite time has been construed as stipulating only for performance terminable at the will of either party.¹² Thus an agreement to lease, with-

720; *Standard Elevator Co. v. Wilson*, 218 Pa. 280, 67 Atl. 463.

⁵ *Ellis v. Thompson*, 3 M. & W. 445; *American Extract Co. v. Ryan*, 104 Ala. 267, 50 So. 807; *Bearden Mercantile Co. v. Madison Oil Co.*, 128 Ga. 695, 18 S. E. 200; *Stange v. Wilson*, 17 Mich. 342; *Bolton v. Riddle*, 35 Mich. 13; *Pope v. Terre Haute Car & Mfg. Co.*, 107 N. Y. 61, 13 N. E. 592; *Dennis v. Stoughton*, 55 Vt. 371; *Boyd v. Gunnison & Co.*, 14 W. Va. 1; *Greenbrier Lumber Co. v. Ward*, 36 W. Va. 573, 15 S. E. 89.

⁶ *Blydenburgh v. Welsh*, Bald. 331, 3 Fed. Cas. 1,583; *Bolton v. Riddle*, 35 Mich. 13; *Mowry v. Kirk & Cheever*, 19 Oh. St. 375; *Simmons v. Green*, 35 Oh. St. 104; *Zueck v. McClure*, 98 Pa. St. 541; *Cameron v. Wells*, 30 Vt. 633.

⁷ *Manhattan Co. v. Boymann*, 137 N. Y. Supp. 883; *Browne v. Jno. P. Sharkey Co.*, 58 Or. 480, 115 Pac. 156.

⁸ *Stanton v. Dennis*, 64 Wash. 85, 116 Pac. 650.

⁹ *First Nat. Bank v. Eichmeier*, 153 Ia. 154, 133 N. W. 454.

¹⁰ *Spaeth v. Ocean Park, etc., Co.*, 16 Cal. App. 329, 116 Pac. 980.

¹¹ *Oldershaw v. King*, 2 H. & N. 517; *Moore v. McKenney*, 83 Me. 80, 21 Atl. 749, 23 Am. St. Rep. 753; *Haskell v. Tukesbury*, 92 Me. 551, 43 Atl. 500, 69 Am. St. Rep. 529; *Howe v. Taggart*, 133 Mass. 284; *Calkins v. Chandler*, 36 Mich. 320, 24 Am. Rep. 493; *Glasscock v. Glasscock*, 66 Mo. 627; *Hockenbury v. Meyers*, 34 N. J. L. 346; *Strong v. Sheffield*, 144 N. Y. 392, 39 N. E. 330; *Traders Nat. Bank v. Parker*, 130 N. Y. 415, 29 N. E. 1094; *Elting v. Vanderlyn*, 4 Johns. 237; *Citizens Bank v. Babbitt*, 71 Vt. 182, 44 Atl. 71; *Cp. Ward v. Wick*, 17 Oh. St. 159. Other illustrations of the rule that where no time is fixed for the performance of a promise, a reasonable time is intended, may be found in *McFadden v. Henderson*, 128 Ala. 221, 26 So. 640; *Wills v. Ross*, 77 Ind. 1, 40 Am. Rep. 279; *Leis v. Sinclair*, 57 Kans. 748, 74 Pac. 261; *Hunt v. Livermore*, 5 Pick. 395, 397; *Phelps v. Sheldon*, 13 Pick. 50, 23 Am. Dec. 659.

¹² In *Joliet Bottling Co. v. Joliet*

out limitation of time, imposes no obligation.¹³ Though such agreements while wholly executory create no obligation. If either party performs, he will be entitled to compensation according to the terms of the agreement.¹⁴ Cases may also arise where the parties have so far attempted to define the time of performance as to preclude the court from applying its own standard, and yet have not made such exact definition as to enable the agreement to be enforced.¹⁵ Nevertheless not infrequently promises requiring continuing performance (other than contracts of service) have been construed as requiring performance for a reasonable time, or until terminated by a reasonable notice. All the circumstances of each case must be considered in reaching a conclusion. Especially if consideration for such a promise is partly executed a court will be reluctant to hold that the promise is determinable at the promisor's pleasure.¹⁶

^ § 39. Offers and agreements of service indefinite as to time.

~ In contracts of service when no time of employment is fixed by the express terms of the contract, the apparent intention of the parties may be sought as a question of fact

Citizens' Brewing Co., 254 Ill. 215, 98 N. E. 263, where the contract in litigation required a brewing company to furnish beer without limitation of time, the court said: "No time being fixed during which the agreement should continue in force, it was terminable at the will of either party. *Davis v. Fidelity Fire Ins. Co.*, 208 Ill. 375, 70 N. E. 359; *Orr v. Ward*, 73 Ill. 318; *Irish v. Dean*, 39 Wis. 562." See also *Ashley &c. Ry. Co. v. Baggott*, 125 Ark. 1, 187 S. W. 649; *Garlock v. Motz Tire Co.*, 192 Mich. 665, 159 N. W. 344, and cases of contracts of service in the following section.

¹³ *Baurman v. Binszen*, 16 N. Y. Supp. 342, and cases cited.

¹⁴ See *Watkins v. Davison*, 61 Wash. 662, 112 Pac. 743.

¹⁵ In *Silverthorn v. Fowle*, 49 N. C. 362, a contract to tow a raft of timber

provided that the raft was "to be ready when corn was done." This was held too vague for enforcement.

¹⁶ *Carnig v. Carr*, 167 Mass. 544, 46 N. E. 117, 35 L. R. A. 512, 57 Am. St. Rep. 488; *Garlock v. Motz, etc., Co.*, 192 Mich. 665, 159 N. W. 344, 346, *Newhall v. Journal Printing Co.*, 105 Minn. 44, 117 N. W. 228, 20 L. R. A. (N. S.) 899; *Outerbridge v. Campbell*, 87 N. Y. App. D. 597, 599, 84 N. Y. S. 537; *Bailey v. S. S. Stafford, Inc.*, 179 N. Y. App. D. 811, 166 N. Y. S. 79; *Kenderdine &c. Fuel Co. v. Plumb*, 182 Pa. 463, 469, 38 Atl. 480. See further on the general question *McKell v. Chesapeake R. Co.*, 175 Fed. 321, 99 C. C. A. 109; *Willcox & Gibbs Co. v. Ewing*, 141 U. S. 627, 12 Sup. Ct. 94, 35 L. Ed. 882; *Kaufman v. Farley Mfg. Co.*, 78 Ia. 679, 43 N. W. 612, 16 Am. St. Rep. 462.

provided any circumstances can be shown which tend to prove that the parties were justified in assuming as against one another a definite intention in regard to the matter.¹⁷ But frequently no such evidence is possible, and in its absence the law of England has established the rule that the hiring is to be considered a hiring for a year.¹⁸ And the same rule has been adopted in Canada.¹⁹ This rule, however, has not been adopted in the United States, where it is held that a hiring indefinite as to time is terminable at the will of either party and therefore creates no executory obligations.²⁰ This has been held true even in regard to offers and agreements of service which

¹⁷ In *Tatterson v. Suffolk Mfg. Co.*, 106 Mass. 56, 58, the court said: "There was no express stipulation, either written or oral, which fixed the time for the continuance of the employment of the plaintiff by the defendant. That element of their contract depended upon the understanding and intent of the parties; which could be ascertained only by inference from their written and oral negotiations, the usages of the business, the situation of the parties, the nature of the employment, and all the circumstances of the case. It was an inference of fact, to be drawn only by the jury." See also *Pfister v. Western Union Tel. Co.*, 282 Ill. 69, 118 N. E. 407, 409, stated *infra*, n. 24.

¹⁸ *Lilley v. Elwin*, 11 Q. B. 742; *Williams v. Byrne*, 7 A. & E. 177; *Beeston v. Collyer*, 4 Bing. 309. Cf. *Evans v. Roe*, L. R. 7 C. P. 138; *Levy v. Goldhill* [1917], 2 Ch. 297. But in the case of a domestic servant, by custom the contract is terminable by a month's notice or payment of a month's wages. See *Moult v. Holliday* [1898], 1 Q. B. 125.

¹⁹ *Fortier v. Royal Canadian Ins. Co.*, 29 U. C., C. P. 353; *Watson v. Miller*, 23 U. C., Q. B. 217.

²⁰ *Warden v. Hinds*, 163 Fed. 201, 90 C. C. A. 449, 25 L. R. A. (N. S.) 529; *Carke v. Stevedore, etc., Co.*, 163 Fed. 243; *Lambie v. Sloss Iron & S. Co.*, 118.

Ala. 427, 24 So. 108; *Clarke v. Ryan*, 95 Ala. 406, 11 So. 22; *St. Louis, etc., Ry. Co. v. Matthews*, 64 Ark. 398, 42 S. W. 902, 39 L. R. A. 467; *Fulkerson v. Western Union Tel. Co.*, 110 Ark. 144, 161 S. W. 168; *DeBriar v. Minturn*, 1 Cal. 450; *Davidson v. Laughlin*, 138 Cal. 320, 68 Pac. 101; *Kansas Pac. R. Co. v. Roberson*, 3 Col. 142; *Parks v. Atlanta*, 76 Ga. 828; *Phillips Lumber Co. v. Smith*, 7 Ga. App. 222; *Davis v. Fidelity Fire Ins. Co.*, 208 Ill. 375, 70 N. E. 359; *Speeder Cycle Co. v. Teeter*, 18 Ind. App. 474, 48 N. E. 595; *Harrod v. Wyneman*, 146 Iowa, 718, 125 N. W. 812; *Louisville, etc., Co. v. Offutt*, 99 Ky. 427, 36 S. W. 181; *Hudson v. Cincinnati, etc., R. Co. (Ky.)*, 154 S. W. 47; *McCullough Iron Co. v. Carpenter*, 67 Md. 554, 11 Atl. 176; *Watson v. Gugino*, 204 N. Y. 535, 98 N. E. 18; *Martin v. New York Life Ins. Co.*, 148 N. Y. 117, 42 N. E. 416 (Cp. *Hotchkiss v. Godkin*, 63 N. Y. App. Div. 468, 71 N. Y. Supp. 629); *Milner v. Hill*, 19 Ohio Cir. Ct. 663; *Roddy v. United Mine Workers*, 41 Okl. 621, 139 Pac. 126; *Christensen v. Pacific Coast Borax Co.*, 26 Or. 302, 38 Pac. 127; *Kirk v. Hartman*, 63 Pa. 97, 105; *Coffin v. Landis*, 46 Pa. 426; *Booth v. National India Rubber Co.*, 19 R. I. 696, 36 Atl. 714; *St. Paul F. & M. Ins. Co. v. Ulbright (Tenn. Ch. App.)*, 48 S. W. 131; *St. Louis Southwestern R. Co. v. Griffin*, 106 Tex. 477, 171 S. W. 703.

specify that the employee shall receive a fixed sum for each day, week, month, or year of service.²¹ It would seem, however, that in reaching this result courts had failed to observe that such a construction should, if possible, be put upon the language of parties who enter into an agreement as will give rise to a legal obligation.²² It is true that a hiring at so much a day does not specify the length of time that the service may endure, but it may fairly be presumed that the parties intended the employment to last for at least one day. So if the payment is fixed by the week, month, or year. It is, of course, possible that this mode of expression was merely to fix the rate of compensation, but in the absence of evidence to the contrary, it seems a fair presumption that the parties intended the employment to last at least for one such period. The fact that they regarded it as possible that the employment should continue beyond one period would not prevent a definite contract being formed for the first period; and should the parties continue their relation after the expiration of the first period, another contract by implication of fact would arise for another similar period. This view is adopted by many courts of high standing.²³ It is believed these deci-

²¹ *The Pokanoket*, 156 Fed. Rep. 241, 84 C. C. A. 49 (monthly payment); *Warden v. Hinds*, 163 Fed. 201, 90 C. C. A. 449, 25 L. R. A. 529; *Howard v. East Tennessee R. Co.*, 91 Ala. 268, 8 So. 868 (monthly payment); (*cf.* *Moss v. Decatur Furnace Co.*, 92 Ala. 269, 9 So. 188, 30 Am. St. Rep. 55); *Haney v. Caldwell*, 35 Ark. 156; *Kansas Pacific R. Co. v. Robertson*, 3 Col. 142 (yearly salary); *Orr v. Ward*, 73 Ill. 318 (yearly salary); *Greer v. Arlington Mills Mfg. Co.*, 1 Pennewill, 581, 43 Atl. 609 (yearly salary); *McCullough Iron Co. v. Carpenter*, 67 Md. 554, 557, 11 Atl. 176. ("It is also well settled that hiring at so much a week, month, or year, no time being specified, does not of itself make more than an indefinite hiring.") *Evans v. St. Louis, etc., R. Co.*, 24 Mo. App. 114 (monthly payment); *Harrington v. Brockman Com. Co.*, 107 Mo. App.

418, 81 S. W. 629; *Watson v. Gugino*, 204 N. Y. 535, 98 N. E. 18 (weekly payment); *Martin v. New York Life Ins. Co.*, 148 N. Y. 117, 42 N. E. 416 (yearly salary); *Edwards v. Seaboard R. Co.*, 121 N. C. 490, 28 S. E. 137 (yearly salary); *Booth v. Natl. India Rubber Co.*, 19 R. I. 696, 36 Atl. 714 (yearly salary); *Resener v. Watts, Ritter & Co.*, 73 W. Va. 342, 80 S. E. 839 (monthly or annual salary); *Prentiss v. Ledyard*, 28 Wis. 131 (yearly payment); *Kosloski v. Kelly*, 122 Wis. 665, 100 N. W. 1037; (but see *Kellogg v. Citizens' Ins. Co.*, 94 Wis. 554, 69 N. W. 362); *Wilder v. United States*, 5 Ct. of Claims, 462.

²² See *infra*, § 620.

²³ *National L. Ins. Co. v. Ferguson*, 194 Ala. 658, 69 So. 823 (weekly payment); *Magarahan v. Wright*, 83 Ga. 773, 10 S. E. 584 (monthly payment); *Odom v. Bush*, 125 Ga. 184, 53 S. E.

sions are sound, but however this may be, certainly the period fixed for the payment of wages or salary is proper for consideration in connection with other incidents.²⁴ Such other circumstances may indeed lead the court to construe an agreement as a contract for a definite term exceeding in length the first period for which salary is payable.²⁵ Not in-

1013 (monthly payment); *Webb v. Mocranie*, 12 Ga. App. 269, 77 S. E. 175 (weekly payment); *Nichols v. Coolahan*, 10 Metc. 449 (monthly payment); (*cf.* *Maynard v. Royal Worcester Corset Co.*, 200 Mass. 1, 4, 85 N. E. 877); *Chamberlain v. Detroit Stove Works*, 103 Mich. 124, 61 N. W. 532 (annual salary); *Horn v. Western Land Assoc.*, 22 Minn. 233 (annual salary); *Capron v. Strout*, 11 Nev. 304 (price "per day payable monthly" held monthly hiring); *Beach v. Mullin*, 34 N. J. L. 343 (monthly payment); *Jones v. Manhattan Manure Co.*, 91 N. J. L. 405, 103 Atl. 984 (price "per year payable monthly," also providing for contingent payments at Christmas and Easter, held yearly hiring); *Lyons v. Pease Piano Co.*, (N. J. L., 1919) 107 Atl. 66 (weekly salary, but also commission on annual sales. Held to indicate yearly hiring); *Gressing v. Musical Instrument Sales Co.*, 222 N. Y. 215, 118 N. E. 627 (guaranteed income of a certain amount *per annum*); *Pinckney v. Talmage*, 32 S. C. 364, 10 S. E. 1083 (wages payable monthly "at the rate of \$500 a year" held monthly hiring); *Young v. Lewis*, 9 Tex. 73 (monthly payment); *San Antonio &c. Ry. Co. v. Sale* (Tex. Civ. App.), 31 S. W. 325 (monthly payment); *Crone-miller v. Milling Co.*, 134 Wis. 248, 114 N. W. 432 (monthly payment). So in California Civil Code, § 2010, it is provided that if payments are made at a fixed rate, a hiring is intended for the same period in the absence of express agreement. And in § 2011 it is provided that in the absence of agreement, custom, or fixed rate of hiring,

a month's employment is presumed. This California legislation has been copied in Mont. Rev. Codes (1907), §§ 5280, 5281; N. Dak. Rev. Codes (1905), §§ 5572, 5573; Okla. Gen. St. (1908), § 4044; S. Dak. Rev. Code (1903), §§ 1477, 1478. The statutes of these States also provide that on the termination of one period of service for a term thus implied, if the service continues without new agreement, another term of the same length is presumed. See also *Emmens v. Elderton*, 4 H. L. C. 624; *Buckingham v. Surrey & Hants Canal Co.*, 46 L. T. (N. S.) 885; *Foxall v. International Land Credit Co.*, 16 L. T. (N. S.) 637; *Smith v. Theobald*, 86 Ky. 141, 146, 5 S. W. 394; *Great Northern Hotel Co. v. Leopold*, 72 Ill. App. 108. In considering the English decisions cited above, it must be borne in mind that in England an indefinite hiring is presumptively for a year, and consequently a yearly salary merely adds force to the general presumption.

²⁴ *Evans v. Roe*, L. R. 7 C. P. 138; *Folts v. Fuller*, 38 App. D. C. 139; *Maynard v. Royal Worcester Corset Co.*, 200 Mass. 1, 5, 85 N. E. 877.

²⁵ In *Pfister v. Western Union Tel. Co.*, 282 Ill. 69, 118 N. E. 407, 409, the court said of an offer to a baseball player: "The message of the Milwaukee Club to plaintiff did not expressly say its offer was \$300 per month for the season, but both that club and the plaintiff knew the custom and practice of contracting for the playing season of some six months, and it will be implied, in the absence of an expressed contrary in-

frequently an offer or agreement attempts to specify the length of the hiring, but does so in such general language as to raise a question whether the promise is too indefinite for enforcement. Thus "permanent" employment is sometimes promised.²⁶ This may fairly be held to mean that the employee is to serve so long as he remains able to do his work properly, and the employer continues to be engaged in the business to which the hiring related.²⁷ So a promise to work as long as the promisor is able, is sufficiently definite.²⁸ Or to work as long as a business is carried on.²⁹ The fact that damages may be difficult to calculate if such a promise is broken is not an insuperable objection.³⁰ On the other hand, a promise for a "long engagement" is too indefinite for enforcement.³¹

§ 40. Offers and agreements defining incompletely the time of performance.

Frequently the nature of an offer or agreement or the surrounding circumstances will indicate sufficiently the time

tention, that it contracted with reference to such known custom and usage."

"While a contract providing for payment at or for stated intervals, may create a presumption that the hiring was for corresponding intervals, the circumstances attending the particular employment, should be looked to in determining the length of the employment. *Smith v. Theobald*, 86 Ky. 141, 5 S. W. 394. Applying this rule to the facts in this case, we think the contract, if entered into had the telegram been received and its terms accepted, would have been for the base ball season of 1912."

²⁶ See decisions in the following note.

²⁷ This was so held in *Carnig v. Carr*, 167 Mass. 544, 46 N. E. 117, 35 L. R. A. 512, 57 Am. St. Rep. 488. To the same effect are *Pennsylvania Co. v. Dolan*, 6 Ind. App. 109, 32 N. E. 802; *Harrington v. Kansas City Ry. Co.* 60

Mo. App. 223. But see *contra* *Roddy v. McGetrick*, 49 Ala. 159, 15 Am. St. Rep. 82; *Lord v. Goldberg*, 81 Cal. 596, 22 Pac. 1126, 15 Am. St. Rep. 82; *Davis v. Fidelity Fire Ins. Co.*, 208 Ill. 375, 70 N. E. 359; *Perry v. Wheeler*, 12 Bush, 541; *Sullivan v. Detroit, etc., R. Co.*, 135 Mich. 661, 98 N. W. 756, 64 L. R. A. 673, 106 Am. St. Rep. 403; *Milner v. Hill*, 19 Oh. Cir. Ct. 663; *Beck v. Walkers*, 24 Pa. County Ct. 403. See also *Christensen v. Pacific Coast Borax Co.*, 26 Or. 302, 38 Pac. 127.

²⁸ *Jeasup v. Chicago & Northwestern Ry. Co.*, 82 Iowa, 243, 48 N. W. 77; *Kelly v. Peter, etc., Stone Co.*, 130 Ky. 530, 113 S. W. 486.

²⁹ *McMullan v. Dickinson Co.*, 63 Minn. 405, 65 N. W. 661, 663; *Carter White Lead Co. v. Kinlin*, 47 Neb. 409, 66 N. W. 536.

³⁰ *Carnig v. Carr*, 167 Mass. 544, 46 N. E. 117, 35 L. R. A. 512, 57 Am. St. Rep. 488.

³¹ *Gray v. Wulff*, 68 Ill. App. 376.

within which performance of a promise was understood to take place though no express statement of the time is made. In a few such cases, definite rules of law have been established. Thus in a contract requiring mutual performances, if the performances are capable of being rendered simultaneously the law has established the rule that they are to be so performed.³² And therefore if the time for the performance of one promise is fixed, the time for the counter performance is also fixed.³³

A promise is not too indefinite for enforcement because of the use of such inexact words of definition of the time of performance as "immediately."³⁴ "As soon as possible."³⁵ "At once."³⁶ "Forthwith."³⁷ "Directly."³⁸ "Promptly."³⁹

³² *Bloxam v. Sanders*, 4 B. & C. 941; *Lehman v. Warren*, 53 Ala. 535, 540; *Merrill Furniture Co. v. Hill*, 87 Me. 17, 32, 32 Atl. 712; *Haskins v. Warren*, 115 Mass. 514, 533; *Delaware Trust Co. v. Calm*, 195 N. Y. 231, 88 N. E. 53; *Miner Lithographing Co. v. Mittenthal Co.*, 119 N. Y. Supp. 1066.

³³ *Morton v. Lamb*, 7 T. R. 125; *Withers v. Reynolds*, 2 B. & Ad. 882;

Parker v. Rawlings, 4 Bing. 280; *Brennan v. Ford*, 46 Cal. 7, 16; *Louisville Packing Co. v. Crain*, 141 Ky. 379, 132 S. W. 575; *Skillman Hardware Co. v. Davis*, 53 N. J. L. 114, 20 Atl. 1080; *Dunham v. Pettee*, 8 N. Y. 508; *Zeihen v. Smith*, 148 N. Y. 558, 42 N. E. 1080; *Catlin v. Jones*, 48 Or. 158, 85 Pac. 515, 52 Or. 337, 97 Pac. 546.

³⁴ This word was construed in cases

³⁵ *Attwood v. Emery*, 1 C. B. (N. S.) 110 (the construction was given that as soon as possible meant as soon as

was possible to the seller, considering his particular situation. It seems this construction might be a true one in

³⁶ *Wichita Mill & Elevator Co. v. Liberal Elevator Co.*, 243 Fed. 99, 155 C. C. A. 629; *Georgia Agricultural Works v. Price*, 11 Ga. App. 80, 74 S. E. 718; *Warder v. Horne*, 110 Iowa, 285, 81 N. W. 591; *Fisher v. Boynton*, 87 Me. 395, 32 Atl. 995; *Sharp v. Johnston*, 3 Lansing, 520, 41 How. Pr. 400; *Binger Co. v. Blumberg*, 134 N. Y. Supp. 1115, 76 N. Y. Misc. 432; *Lewis v. Hojer*, 16 N. Y. Supp. 534 (sooner than a reasonable time); *Victor Safe Co. v. O'Neil*, 48 Wash. 176, 93 Pac. 214. See also *Reg. v. Rogers*, 3 Q. B. D. 28.

³⁷ *Roberts v. Brett*, 11 H. L. Cas. 337 (not immediately, but within a reasonable time); *Burgess v. Boetefeur*, 7 M.

& G. 481, 494 (with all possible celerity); *Kenney v. Hutchinson*, 6 M. & M. 134 (as soon as reasonably possible). See also *Hyde v. Watts*, 12 M. & W. 254; *Boyes v. Bluck*, 13 C. B. 652; *Hudson v. Hill*, 43 L. J. C. P. (N. S.) 273; *Furber v. Cobb*, 18 Q. B. D. 494; *Staunton v. Wood*, 16 Q. B. 638 (goods to be delivered "forthwith," price to be paid within "fourteen days"—forthwith held to mean less than fourteen days); *Anderson v. Goff*, 72 Cal. 65, 13 Pac. 73, 1 Am. St. Rep. 34 (as soon as reasonably possible).

³⁸ *Duncan v. Tophan*, 8 C. B. 225 (sooner than a reasonable time, but not "instantly").

³⁹ *Soper v. Creighton*, 93 Me. 564,

"All convenient speed." ⁴⁰ "Shortly." ⁴¹ Frequently the time stated in a promise is qualified by the use of the word "about." This will not render the promise too indefinite for enforcement. The meaning must be construed with reference to the particular circumstances of the case.⁴² But a promise to pay \$900 "in monthly instalments" without indication of their numbers or amount is so indefinite that it can be construed only as a promise to pay in a reasonable time.⁴³ And a promise to continue a business as long as it is profitable or pays expenses, is too indefinite for enforcement.⁴⁴ So a promise to renew the plaintiff's notes "until such time as the improvement in the business situation should enable him to proceed in business without such assistance," is merely "a hopeful encouragement sounding only in prophecy," ⁴⁵ and a

relating to the sale of goods in *Woods v. Miller*, 55 Iowa, 168, 7 N. W. 484, 39 Am. Rep. 170 (eight days held too late); *Rhoades v. Cotton*, 90 Me. 453, 38 Atl. 367 (seventeen days held too late); *Rommel v. Wingate*, 103 Mass. 327, (nine days held too late). See also *McCormick Co. v. Brower*, 88 Iowa, 607, 55 N. W. 537; *Neldon v. Smith*, 36 N. J. L. 148. In the case last cited it was held that the word

"immediate" might be explained by custom as meaning even so late a time as the next month. The word is construed in cases other than in the law of sales, in *Pybus v. Mitford*, 2 Lev. 75, 77; *Thompson v. Gibson*, 8 M. & W. 281; *Hoggins v. Gordon*, 3 Q. B. 466; *Alexiadi v. Robinson*, 2 F. & F. 679; *Webster v. Appleton*, 62 L. T. (N. S.) 704; *Reg. v. Berkshire Justices*, 4 Q. B. D. 469.

some cases and not in others); *Hydraulic Engineering Co. v. McHaffie*, 4 Q. B. D. 670; *Egan v. Barclay Fibre Co.*, 61 Fed. Rep. 527; *Tufts v. Mc-*

Clure, 40 Iowa, 317; *Childs v. Omaha Paraphernalia House*, 80 Neb. 673, 114 N. W. 941; *National Cash Register Co. v. Brainson*, 37 R. I. 462, 93 Atl. 645.

45 Atl. 840, 74 Am. St. Rep. 375 (shipment ordered by the seller from a distant place involving transit of a month, not compliance with order for "prompt shipment"); *Brewer v. Lepman*, 127 Mo. App. 693, 106 S. W. 1107; *Tobias v. Lissberger*, 105 N. Y. 404, 12 N. E. 13, 59 Am. Rep. 509 (means immediately, or at once). See also *Elliott v. Lord*, 48 L. T. (N. S.) 542, *Doxey v. Coates*, 181 N. Y. App. D. 207, 168 N. Y. S. 76.

⁴⁰ *Gill v. Browne*, 53 Fed. Rep. 394, 3 C. C. A. 573.

⁴¹ *Cincinnati Glass Co. v. Stephens*, 3 Ga. App. 766, 60 S. E. 360.

⁴² See *Smiley v. Barker*, 83 Fed. Rep. 684, 28 C. C. A. 9; *Campbell Printing Press Co. v. Marsh*, 20 Colo. 22, 36 Pac. 799.

⁴³ *Hannan v. McNickle*, 82 Cal. 122, 23 Pac. 271.

⁴⁴ *Pulliam v. Schimpf*, 109 Ala. 179, 19 So. 428. See also *Davie v. Mining Co.*, 93 Mich. 491, 53 N. W. 625, 24 L. R. A. 357.

⁴⁵ *Hall v. First National Bank*, 173 Mass. 16, 53 N. E. 154, 44 L. R. A. 319, 73 Am. St. Rep. 255.

promise to "extend an obligation until a specified bank shall resume business," has also been held too indefinite for enforcement,⁴⁶ but this decision seems questionable.

§ 41. Offers and agreements indefinite as to price.

It is by no means uncommon for those who offer or agree to employ others, or to buy goods, to make no statement as to the wages or price to be paid. The law invokes here (as likewise where an agreement is indefinite as to time) the standard of reasonableness. Accordingly the fair value of the services or property is recoverable.⁴⁷ Sometimes, however, the terms of a promise exclude the supposition that the reasonable or market price was intended. In such a case no contract can arise.⁴⁸ Thus a promise may attempt to define the price but do so too indefinitely for enforcement, as by such words as "Not exceeding \$300 a week,"⁴⁹ the cost, plus a "nice" profit,⁵⁰ a division of profits "upon a very liberal basis,"⁵¹ "a reasonable amount from the profits,"⁵² "a portion" of the

⁴⁶ *Ahlstrom v. Fitzpatrick*, 17 Mont. 295, 42 Pac. 757.

⁴⁷ Illustrations of this rule in agreements for services may be found in the following, among other decisions: *Miller v. Ballerino*, 135 Cal. 566, 67 Pac. 1046, 68 Pac. 600; *Clark v. Clark*, 46 Conn. 586; *Rowell v. Ross*, 87 Conn. 157, 87 Atl. 355; *Wells v. Haynes*, 101 Ga. 841, 62 S. E. 968; *Lockwood v. Robbins*, 125 Ind. 398, 25 N. E. 455; *Clark v. Ellsworth*, 104 Ia. 442, 73 N. W. 1023; *Norwood v. Lathrop*, 178 Mass. 208, 59 N. E. 650; *Selover v. Bryant*, 54 Minn. 434, 56 N. W. 58, 21 L. R. A. 418, 40 Am. St. Rep. 349; *Swift v. Johnson*, 175 Mo. App. 660, 158 S. W. 96; *Randall v. Packard*, 142 N. Y. 47, 36 N. E. 823; *Perkins v. Hasbrouck*, 155 Pa. 494, 26 Atl. 695; *Standard Printing Co. v. Publishing Co.*, 87 Wis. 127, 58 N. W. 238; *McNamara v. McNamara*, 108 Wis. 613, 84 N. W. 901.

Illustrations of the rule in regard to the price of goods will be found in the following decisions: *Aoebal v. Levy*,

10 Bing. 376; *Hoadly v. M'Laine*, 10 Bing. 482; *Valpy v. Gibson*, 4 C. B. 837, 864; *Shealy v. Edwards*, 73 Ala. 175, 49 Am. Rep. 43; *Greene v. Lewis*, 85 Ala. 221, 4 So. 740, 7 Am. St. Rep. 42; *McEwen v. Morey*, 60 Ill. 32; *Jenkins v. Richardson*, 6 J. J. Marsh. 441, 22 Am. Dec. 82; *Taft v. Travis*, 136 Mass. 95; *Lovejoy v. Michels*, 88 Mich. 15, 49 N. W. 901, 13 L. R. A. 770; *Stout v. Caruthersville Hardware Co.*, 131 Mo. App. 520, 110 S. W. 619; *Livingston v. Wagner*, 23 Nev. 53, 42 Pac. 290.

⁴⁸ *Van Neeuwen v. Swanson*, 121 Minn. 250, 141 N. W. 112.

⁴⁹ *United Press v. New York Press Co.*, 164 N. Y. 406, 58 N. E. 527, 53 L. R. A. 288.

⁵⁰ *Gaines v. R. J. Reynolds Tobacco Co.*, 163 Ky. 716, 174 S. W. 482.

⁵¹ *Butler v. Kemmerer*, 218 Pa. 242, 67 Atl. 332. See also *Georgia Cane Products Co. v. Corn Products Refining Co.*, 141 Ga. 40, 80 S. E. 318.

⁵² *Canet v. Smith*, 86 N. Y. Misc. 99, 149 N. Y. S. 101.

promisor's estate,⁵³ "a part of the money,"⁵⁴ "to reduce the rent,"⁵⁵ "a due allowance,"⁵⁶ "money to enable them to carry on their business,"⁵⁷ "good wages,"⁵⁸ "the average price."⁵⁹ These have been held too indefinite for enforcement. But a promise that another shall be "well paid" may be enforced as a promise for reasonable compensation.⁶⁰ And a price qualified by a guarantee against decline of market prices of competitive goods prior to the time for performance of the contract is sufficiently definite.⁶¹ And a promise for services that a testator would leave the promisee "full and plenty after he was gone so that she need not work" was enforced as an obligation to leave an amount sufficient to buy an annuity that would support the promisee in the mode of life to which she had been accustomed.⁶² A promise to bequeath "as much as to any relation on earth" was held too indefinite by the same court;⁶³ but it would seem wrongly for a standard is furnished by the terms of the promise which can be applied with exactness.⁶⁴ Even a promise to an injured workman that in case he failed to recover his health within six weeks the employer would "make it right" was held not too indefinite.⁶⁵

124 § 42. Offers and agreements indefinite as to work or property to be given.

As a promise may insufficiently specify the price to be paid, so the consideration for which the price is to be paid may be

⁵³ Wall's Appeal, 111 Pa. 460, 5 Atl. 220, 56 Am. Rep. 288.

⁵⁴ Burney v. Jones, 140 Ga. 758, 79 S. E. 840.

⁵⁵ Smith v. Ankrum, 13 S. & R. 39.

⁵⁶ *In re Vince* [1892], 2 Q. B. 478.

⁵⁷ Erwin v. Erwin, 25 Ala. 236.

⁵⁸ Fairplay School Township v. O'Neal, 127 Ind. 95, 26 N. E. 686.

⁵⁹ Des Moines Water Works Co. v. City of Des Moines, 95 Iowa, 348, 64 N. W. 269. Perhaps the court was too strict in this case.

⁶⁰ Davis v. Teachout, 126 Mich. 135, 85 N. W. 475, 86 Am. St. Rep. 531. See also Levitt v. Miller, 64 Mo. App. 147.

⁶¹ Solter v. Leedom & Worrell Co., 252 Fed. 133, 164 C. C. A. 245.

⁶² Thompson v. Stevens, 71 Pa. 161.

⁶³ Graham v. Graham's Executors, 34 Pa. 475.

⁶⁴ So held in *Sylvester's Case*, Popham, 148.

⁶⁵ Brennan v. Employers' Liability Assur. Corp., 213 Mass. 365, 100 N. E. 632. Hammond, J., said: "The jury might have found that under the circumstances the words 'make it right' meant that in the contingency named the plaintiff's intestate should have fair compensation paid to him in money for the injuries suffered by him. . . . The promise is not void on the ground

left equally uncertain, and in such a case it is not usually possible to invoke the standard of reasonableness in order to give the promise sufficient definiteness to make it enforceable. Illustrations of such indefiniteness are as follows: A promise to give the buyer of a horse in a certain contingency "the buying of another horse;"⁶⁶ a promise to mine and deliver all "the outcrop" on certain lands.⁶⁷ A reservation of "the necessary line for making a railway;"⁶⁸ a promise to sell as many cross-ties as it is possible to accumulate at a certain point for 12 months were held not sufficiently certain.⁶⁹ Likewise a promise to erect buildings where the dimensions and plans are not specified,⁷⁰ or which refers to plans and specifications as a part of a contract though no plans and specifications are attached.⁷¹ So, to erect "a permanent and first-class hotel" in consideration of a promise of a railway "to maintain and support the hotel by the patronage of its road;"⁷² a promise to sell bank stock which did not specify whether the stock was to be part of the original issue or part of the stock as afterwards increased;⁷³ or to buy all the ties of certain grades that the plaintiffs "may be able to purchase or make, up to 200,000 ties, commencing on this date and ending June 1, 1911";⁷⁴ a promise to leave a business to the promisee if he should "attend to the business";⁷⁵ or to give 100 acres of land "for services to be rendered,"⁷⁶ or to give

that it is too indefinite. Juries are constantly solving such problems." Cf. *Bird v. J. L. Prescott Co.*, 89 N. J. L. 591, 99 Atl. 380.

⁶⁶ *Guthing v. Lynn*, 2 B. & Ad. 232.

⁶⁷ *Sloss-Sheffield Co. v. Payne*, 186 Ala. 341, 64 So. 617.

⁶⁸ *Pearce v. Watts*, L. R. 20 Eq. 492.

⁶⁹ *American Tie & Timber Co. v. Naylor Lumber Co.*, 190 Ala. 319, 67 So. 246.

⁷⁰ *Bissinger v. Prince*, 117 Ala. 480, 23 So. 67. See also *American, etc., Co. v. Bridge Co.*, 29 Ore. 549, 46 Pac. 138.

⁷¹ *Almine v. King*, 92 Ill. App. 276. But see *Bernard Gloekler v. Carr*, 72 W. Va. 720, 79 S. E. 732. And a power reserved to vary plans and specifica-

tions will not invalidate an agreement if provision is made for determining the compensation for such variations *United States v. McMullen*, 222 U. S. 460, 56 L. Ed. 269, 32 S. Ct. 128.

⁷² *Hart v. Georgia R. R. Co.*, 101 Ga. 188, 28 S. E. 637.

⁷³ *Feore v. Avent*, 4 Ala. App. 551, 58 So. 727.

⁷⁴ *Hudson v. Browning*, 264 Mo. 58, 174 S. W. 393; but see *Mitchell Taylor Tie Co. v. Whitaker*, 158 Ky. 651, 166 S. W. 193; *Ayer & Lord Tie Co. v. O'Bannon*, 164 Ky. 34, 174 S. W. 783.

⁷⁵ *Purves' Estate*, 196 Pa. 438, 46 Atl. 369.

⁷⁶ *Sherman v. Kitsmiller*, 17 S. & R. 45. See also *Briggs v. Morris*, 244 Pa. 139, 90 Atl. 532.

a younger brother "a good education" and "to fit him for a lawyer";⁷⁷ or "to give employment" without specifying its nature or compensation;⁷⁸ or to give plaintiff a "job for life" or so long as the defendant remained in business;⁷⁹ or to assist "to make a success of a business";⁸⁰ are all too vague.⁸¹ On the other side of the line, a promise to execute a deed "with usual covenants,"⁸² or to sign a lease in the form "usual in the locality,"⁸³ or to act as exclusive agent and use one's "best efforts";⁸⁴ or to subscribe for stock of a sufficient amount not in excess of \$19,000, to provide a corporation with sufficient working funds and capital⁸⁵ have been sustained.

Nor need a contract for the sale of goods define their quality. Merchantable goods of the kind promised are required to fulfill such a contract;⁸⁶ and a promise of a piece of land to the plaintiff if he married the promisee's daughter and was "good and kind" to her, was enforced.⁸⁷

§ 43. Offers and agreements where the promisor retains an option.

One of the commonest kind of promises too indefinite for legal enforcement is where the promisor retains an unlimited right to decide later the nature or extent of his performance.

⁷⁷ *Bumpus v. Bumpus*, 53 Mich. 346, 19 N. W. 29.

⁷⁸ *Shaw v. Glass Works*, 52 N. J. Law, 7, 18 Atl. 696.

⁷⁹ *Ingram-Day Lumber Co. v. Rodgers*, 105 Miss. 244, 62 So. 230. See also *Bird v. J. L. Prescott Co.*, 89 N. J. L. 591, 99 Atl. 380. But compare *Texas Cent. R. Co. v. Eldredge* (Tex. Civ. App.), 155 S. W. 1010, where it was held that a promise to employ for life was not too indefinite, though neither the character of the services nor the compensation was fixed, after the employee had worked for some years without dispute under the agreement.

⁸⁰ *Sutliff v. Seidenberg*, 182 Cal. 63, 64 Pac. 131, 469.

⁸¹ See also *McCaw Mfg. Co. v. Felder*, 115 Ga. 408, 41 S. E. 664.

⁸² *Hart v. Hart*, 18 Ch. Div. 670, 684.

⁸³ *Scholtz v. Northwestern Mutual Life Ins. Co.*, 100 Fed. 573, 40 C. C. A. 556. Cp. *Meixel v. Meixel*, 161 N. Y. App. Div. 518, 146 N. Y. Supp. 587, where it seems erroneously an agreement to give "a proper and sufficient mortgage to secure specified advances" was held too indefinite.

⁸⁴ *Emerson v. Pacific Coast, etc., Packing Co.*, 96 Minn. 1, 104 N. W. 573, 1 L. R. A. (N. S.) 445, 113 Am. St. Rep. 603. See also *Marin Water & Power Co. v. Sausalito*, 168 Cal. 587, 143 Pac. 767.

⁸⁵ *Sanders v. Barnaby*, 151 N. Y. S. 580, 166 N. Y. App. Div. 274.

⁸⁶ *Whitley v. Willingham*, 176 Ala. 264, 57 So. 816.

⁸⁷ *Winslow v. White*, 163 N. C. 29, 79 S. E. 258.

This unlimited choice in effect destroys the promise and makes it merely illusory.⁸⁸ Thus an agreement to pay such wages as the employer wishes is invalid.⁸⁹ Though an agreement to pay such wages as the employer considers "right and proper" is not too uncertain,⁹⁰ since performance of such a promise does not leave the promisor free to do as he may choose. He must in good faith make an honest estimate of what is proper. On the other hand a promise that, if satisfied with the promisee as a customer, the promisor "would favorably consider" an application to renew a subsisting contract, may be kept and yet leave the promisor free to exercise such choice as he wishes; and, therefore, is too indefinite.⁹¹ So a promise to employ another to do such work as the employer "may assign to him, from time to time, such services to continue only so long as satisfactory to the employer" is also too indefinite.⁹² So a promise to dispense with the building of a switch "so long as it pleased the promisor,"⁹³ a promise to leave by will "a share" of the testator's fortune⁹⁴ or "a child's part,"⁹⁵ or that a daughter should "be noticed" in the testator's will,⁹⁶ and a promise to give an increase in salary and an interest in the profits⁹⁷ are all illusory and unenforceable. On the other hand, a promise to pay for the negotiation of "a satisfactory lease,"⁹⁸ a promise to give "the first refusal" of certain property⁹⁹ a promise that if the promisee did such business

⁸⁸ "Nulla promissis potest consistere quæ ex voluntate promittentis statum capit." Dig. 45, 1, de verb. obl. 108, § 1. *In re Charles Wacker Co.*, 244 Fed. 483.

⁸⁹ *Roberts v. Smith*, 4 H. & N. 315; *Gulf, etc., Ry. Co. v. Winton*, 7 Tex. Civ. App. 57, 26 S. W. 770.

⁹⁰ *Butler v. Winona Mill Co.*, 28 Minn. 205, 9 N. W. 697, 41 Am. Rep. 277. See also *Bryant v. Flight*, 5 M. & W. 114; *Tennant v. Fawcett* (Tex. Civ. App.), 55 S. W. 611.

⁹¹ *Montreal Gas Company v. Vasey* [1900], A. C. 595.

⁹² *Vogel v. Pekoc*, 157 Ill. 339, 42 N. E. 386, 30 L. R. A. 491. See also *Goff v. Saxon*, 174 Ky. 330, 192 S. W. 24.

⁹³ *Sydick v. Baltimore & O. R. R. Co.*, 17 W. Va. 427.

⁹⁴ *Farina v. Fickus* [1900], 1 Ch. 331.

⁹⁵ *Sylvester's Case*, Poph. 148; *Wood v. Evans*, 113 Ill. 186, 55 Am. Rep. 409.

⁹⁶ *Moorhouse v. Colvin*, 15 Beav. 341.

⁹⁷ *Mackintosh v. Kimball*, 101 N. Y. App. Div. 494, 92 N. Y. Supp. 132.

⁹⁸ *Mullally v. Greenwood*, 127 Mo. 138, 29 S. W. 1001, 48 Am. Rep. 613. See also cases where the promisee's satisfaction is bargained for.

⁹⁹ *Manchester Ship Canal Company v. Racecourse Co.* [1901], 2 Ch. 37. These words were construed to mean that such a price should be fixed by the promisor as he was willing to accept from other buyers.

as agent for the promisor, as the latter might "reasonably expect," the agency contract would be renewed;¹ a promise to deliver as many ties as the promisor could;² a promise to convey a lot of ten acres out of a specified 80 acre lot "averaging in value and quality with the whole,"³ are sufficiently definite. It should be noticed further, that a promise is not too indefinite because it reserves to the promisor the right to choose which of two or more performances he will render. The damage to which the promisee would be entitled in case of breach of such a promise would be based on the least valuable of the alternative performances.⁴ It is only where the option reserved to the promisor is unlimited that his promise becomes illusory and incapable of forming part of a legal obligation. A promise to give such one of a thousand specified things as the promisor may choose cannot be enforced specifically, but it is not too indefinite to have a clear meaning, and the promisee's damages would be the value of the least valuable of the thousand things.⁵ So a promise to perform whenever within five years, the promisor may wish.⁶ But a promise to give anything whatever which the promisor may choose, or to do or give something whenever the promisor

¹ *Worthington v. Beeman*, 91 Fed. Rep. 232, 33 C. C. A. 475.

² *Ayer & Lord Tie Co. v. O'Bannon*, 164 Ky. 34, 174 S. W. 783; *Hudson v. Browning*, 264 Mo. 58, 174 S. W. 393. But see *Hazelhurst Lumber Co. v. Mercantile &c. Co.*, 166 Fed. 191.

³ *Burton v. Cabanne*, 42 Minn. 267, 44 N. W. 118. See also *Brown v. Munger*, 42 Minn. 482, 44 N. W. 519, where a promise to convey 320 acres of good tillable land in Dakota within nine miles of a railroad station was held sufficiently definite. Cp. *Nippolt v. Kammon*, 39 Minn. 372, 40 N. W. 266, where a promise to convey five acres out of lot 3, which contained a larger number, was held too indefinite. *Brockway v. Frost*, 40 Minn. 155, 41 N. W. 411, where a promise to convey 8 65/100 acres out of a larger tract was held similarly too indefinite. It may be

questioned whether these promises should not have been interpreted as agreements to convey the worst five acres or 8 65/100 acres which the promisor might select. So construed the promises, though not capable of specific enforcement, would not be too indefinite to create a legal obligation.

⁴ See *infra*, § 1407.

⁵ *Ibid.*

⁶ Thus in *Troy Fertilizer Co. v. Logan*, 96 Ala. 619, 12 So. 712, a promise to employ a person from a date not later than a specified future day, the precise day to be fixed by the employer, was held not too indefinite for enforcement. In *Dingley v. Oler*, 117 U. S. 490, 6 S. C. 850, 29 L. Ed. 984, the promisors had bound themselves to deliver a specified quantity of ice at such times during the ensuing season as they might elect.

pleases, is illusory, for such promises would be satisfied by giving something so infinitely near nothing or by performance so infinitely postponed as to have no calculable value. For the same reason if one party to an agreement reserves an unqualified right to cancel the bargain no legal rights can arise from it, while it remains executory.⁷ Likewise, also, an order taken by a travelling salesman will not immediately create a contract if confirmation by the salesman's principal is expressly or impliedly made a term or condition of the agreement.⁸ Nor will a contract arise from an offer or agreement which by its terms is "subject to alterations."⁹ But an agreement not to practice medicine in a certain place "unless forced to by some unforeseen circumstances" was held enforceable.¹⁰ And so a promise "subject to all unavoidable or unforeseen causes."¹¹ The difficulty with illusory promises may be twofold, indefiniteness and insufficiency of consideration. If definite enough to be interpreted plainly, but giving the promisor an unlimited option, such a promise may be assented to by the parties but will not serve as consideration for a counter promise.¹²

§ 44. Offers and agreements in which the promisee is given an option.

An unlimited option given to the promisee is theoretically not

⁷ *Velie Motor Car Co. v. Kopmeier Motor Co.*, 194 Fed. 324; *Ellis v. Dodge*, 237 Fed. 860. See also cases cited *infra*, § 55, n., and *Toledo Computing Scale Co. v. Stephens*, 96 Ark. 606, 132 S. W. 926. But where, as in *White v. McCullagh*, 74 W. Va. 116, 81 S. E. 720, the right of cancellation may not be exercised arbitrarily, but only in the exercise of the judgment of the promisor as a fiduciary for others, the reservation of the right does not prevent the existence of a contract. In *Cummer v. Butts*, 40 Mich. 322, 29 Am. Rep. 530, either party was given the right to terminate an agreement "for good cause." It was held that any revocation made in good faith by either party was effectual. And so where an agreement reserved a right to each party to terminate it "for just

cause." *Oakland Motor Car Co. v. Indiana Automobile Co.*, 201 Fed. 499, 121 C. C. A. 319. But see *infra*, § 60 n., as to damages which may arise from the exercise of a right of cancellation.

⁸ *Cable Co. v. Hancock*, 2 Ga. App. 73, 58 S. E. 319; *American Publishing & Co. v. Walker*, 87 Mo. App. 503; *Senner & Kaplan Co. v. Gera Mills*, 185 N. Y. App. D. 562, 173 N. Y. S. 205; *Thomas Mfg. Co. v. Lyons*, 29 S. Dak. 600, 137 N. W. 340; *Waco Mill Co. v. Allis-Chalmers Co.* (Tex. Civ. App.), 109 S. W. 224.

⁹ *Mayer v. McCreery*, 119 N. Y. 434, 23 N. E. 1045.

¹⁰ *Ryan v. Hamilton*, 205 Ill. 191, 68 N. E. 781.

¹¹ *Shadbolt, etc., Boyd Iron Co. v. Topliff*, 85 Wis. 513, 55 N. W. 854.

¹² See *infra*, § 104.

as destructive of the validity of the promise as such an option given to the promisor. Certainly the promise is not illusory where the option is given to the promisee; that is, it does not fail by its very terms to promise anything, as is the case where the promisor retains an unlimited option. Nor is there objectionable indefiniteness since a means is provided (the promisee's election) for determining the precise thing which the promisor is to do. Such difficulty as exists is the opposite from that where the promisor retains the choice. So much is promised by a promise to do or give whatever the promisee may choose, that an infinitely great performance may be demanded. And such a promise in many cases would be against public policy.¹³ But though a wholly unlimited option to the promisee may not be permitted, it is possible to give him a large choice of what performance he will demand or accept. A common illustration of such a promise is where a seller promises to deliver goods or render some other performance which shall be satisfactory to the buyer. Such a promise is usually considered as requiring the promisor to render performance which shall be satisfactory to the promisee if he exercises an honest judgment.¹⁴ But the promisee must

¹³ See *Crane v. Crane Co.*, 105 Fed. Rep. 869, 45 C. C. A. 96, and *infra*, § 1652. Cf. *Western Newspaper Union v. Kitchel*, 201 Mich. 121, 166 N. W. 1021.

¹⁴ Cases of promises or conditions requiring the satisfaction of the promisee are—*Andrews v. Belfield*, 2 C. B. (N. S.) 779 (sale of a carriage); *Diggle v. Ogston Motor Co.*, 112 L. T. 1029 (contract of employment); *Silsby Mfg. Co. v. Chico*, 24 Fed. Rep. 893 (sale of steam engine); *Campbell Printing Press Co. v. Thorp*, 36 Fed. Rep. 414 (sale of printing presses); *Re George M. Hill Co.*, 123 Fed. Rep. 866, 59 C. C. A. 354 (sale of machine); *Barnett v. Beggs*, 208 Fed. 255, 125 C. C. A. 455 (contract for plans and specifications); *American Music Stores v. Kussell*, 232 Fed. 306, 146 C. C. A. 354, L. R. A. 1916 F. 882 (contract of

employment); *Hallidie v. Sutter St. R. Co.*, 63 Cal. 575 (sale of steel rope or cable); *Koll v. Bush*, 6 Colo. App. 294, 40 Pac. 579 (contract of employment); *Zaleski v. Clark*, 44 Conn. 218, 26 Am. Rep. 446 (making plaster bust); *MacKenzie v. Minis*, 132 Ga. 323, 63 S. E. 900, 23 L. R. A. (N. S.) 1003 (contract of employment); *Goodrich v. Van Nortwick*, 43 Ill. 445 (sale of a fanning mill); *Buckley v. Meidroth*, 93 Ill. App. 460 (sale of acetylene gas generator and fixtures); *Inman Mfg. Co. v. American Cereal Co.*, 124 Iowa, 737, 100 N. W. 860 (sale of machine for mill); *Brown v. Foster*, 113 Mass. 136, 18 Am. Rep. 463 (sale of suit of clothes); *Gibson v. Cranage*, 39 Mich. 49, 33 Am. Rep. 351 (contract for enlarging a photograph); *Wood Reaping & Mowing Machine Co. v. Smith*, 50 Mich. 565, 45 Am. Rep. 57 (sale of

give fair consideration to the matter. A refusal to examine the promisor's performance,¹⁵ or a rejection of it not in reality based on its unsatisfactory nature¹⁶ but on fictitious grounds

agricultural machine); *Platt v. Broderick*, 70 Mich. 577, 38 N. W. 579 (sale of machine); *United States Fire Alarm Co. v. Big Rapids*, 78 Mich. 67, 43 N. W. 1030 (sale of fire alarm bell); *Housding v. Solomon*, 127 Mich. 654, 87 N. W. 57 (sale of horses); *Isbell v. Anderson Carriage Co.*, 170 Mich. 304, 136 N. W. 457 (contract of employment); *Schmand v. Jandorf*, 175 Mich. 88, 140 N. W. 996, 44 L. R. A. (N. S.) 680, Ann. Cas. 1915 A. 746 (contract of employment); *McCormick Machinery Co. v. Chesrown*, 33 Minn. 32, 21 N. W. 846 (sale of machinery); *Magee v. Scott Lumber Co.*, 78 Minn. 11, 80 N. W. 781 (contract to tow logs); *Beissel v. Vermillion Farmers' Elevator Co.*, 102 Minn. 229, 113 N. W. 577, 12 L. R. A. (N. S.) 403 (contract of employment); *Hayes v. Kluge*, 86 N. J. L. 657, 92 Atl. 358; *Gwynne v. Hitchner*, 66 N. J. L. 97, 48 Atl. 571 (contract of employment); *Potter Printing Press Co. v. Newark & Co. Pub. Co.*, 82 N. J. L. 671, 83 Atl. 969 (sale of machine); *Hoffman v. Gallaher*, 6 Daly, 42 (contract to paint a portrait); *Tyler v. Ames*, 6 Lans. 280 (contract to employ an agent); *Gray v. Central R. R. Co.*, 11 Hun, 70 (sale of a steamboat); *Moore v. Goodwin*, 43 Hun, 534 (contract for crayon portrait); *Haven v. Russell*, 34 N. Y. Supp. 292 (contract for playwright to write a play); *Garland v. Keeler*, 15 N. Dak. 548, 108 N. W. 484 (sale of machine); *Diamond v. Mendelsohn*, 156 N. Y. App. D. 636, 141 N. Y. S. 775 (contract as foreman); *Singerly v. Thayer*, 108 Pa. St. 291, 2 Atl. 230, 56 Am. Rep. 207 (sale of hydraulic elevator); *Seeley v. Welles*, 120 Pa. St. 69, 13 Atl. 736 (sale of reaper and binder); *Corgan v. Lee Coal Co.*, 218 Pa. 386, 67 Atl. 655 (contract of employment); *Half Co. v. Jones*

(Tex. Civ. App.), 169 S. W. 906 (sale of automobile); *Rossiter v. Cooper*, 23 Vt. 522 (contract for labor); *McClure v. Briggs*, 58 Vt. 82, 2 Atl. 583, 56 Am. Rep. 557 (sale of organ); *Tatum v. Geist*, 46 Wash. 226, 89 Pac. 547 (sale of machine); *Exhaust Ventilator Co. v. Chicago, etc., Ry. Co.*, 66 Wis. 218, 28 N. W. 343, 57 Am. Rep. 257, 69 Wis. 454, 34 N. W. 509 (sale of exhaust fans).

¹⁵ *Sidney School Furniture Co. v. Warsaw School District*, 130 Pa. St. 76, 18 Atl. 604. See also *Williams v. Hirshorn*, 91 N. J. L. 419, 103 Atl. 23.

¹⁶ *Richardson v. Coffman*, 87 Iowa, 121; *McCormick Co. v. Ockerstrom*, 114 Iowa, 260, 86 N. W. 284; *Hawkins v. Graham*, 149 Mass. 284, 21 N. E. 312, 14 Am. St. Rep. 422; *Lockwood Mfg. Co. v. Mason Co.*, 183 Mass. 25, 66 N. E. 420; *Frary v. American Rubber Co.*, 52 Minn. 264, 53 N. W. 1156, 18 L. R. A. 644; *Williams v. Hirshorn*, 91 N. J. L. 419, 103 Atl. 23. In *Noa Spears Co. v. Inbau* (Tex. Civ. App.), 186 S. W. 357, an employee who had undertaken to work to his employer's satisfaction was discharged, though no fault was found with his work, but apparently because of his infidelity to his wife. The court held the discharge a breach of contract. There is no warrant for the statement in *Joliet Bottling Co. v. Joliet Brewing Co.*, 254 Ill. 215, 98 N. E. 263, 265, that where a contract provided that the quality of beer was to be satisfactory to the appellant it "had the option of refusing to accept beer from the appellee at its pleasure, upon the ground that it was not satisfactory." A similar misconstruction was made in *Texas Produce Exchange v. Sorrell* (Tex. Civ. App.), 168 S. W. 74.

or none at all will amount to prevention of performance of the condition and excuse it.¹⁷ In New York and some other States a broader and artificial meaning is given to such a promise. It is construed as matter of law as imposing upon the promisor the duty only of satisfying a reasonable man,¹⁸ unless the subject-matter of the contract involves personal taste. In such a case even in these latter States the contract is held to require the actual satisfaction of the promisee.¹⁹ Frequently, no doubt, on a true construction of promises for satisfactory performance, reasonable satisfaction and not actual satisfaction of the promisee is all that is required. Especially is this likely to be the case where the contract provides definite tests or specifications for the required performance, and

¹⁷ See *infra*, § 677.

¹⁸ *Gladding v. Montgomery*, 20 Cal. App. 276, 128 P. 790; *McCartney v. Badovinac* (Colo. 1916), 160 Pac. 190, L. R. A. 1917, A. 1146; *Fuchs & Lang Mfg. Co. v. Kittredge*, 242 Ill. 88, 89 N. E. 723; *Keeler v. Clifford*, 165 Ill. 544, 46 N. E. 248; *Bridgeford v. Meagher*, 144 Ky. 479, 139 S. W. 750; *Union League Club v. Blymyer Ice Machine Co.*, 204 Ill. 117, 68 N. E. 409; *Schmand v. Jandorf*, 175 Mich. 88, 140 N. W. 996; *Boyd v. Hallowell*, 60 Minn. 225, 62 N. W. 125; *Barnett v. Sweringen*, 77 Mo. App. 64; *Waite v. Shoemaker*, 50 Mont. 264, 146 Pac. 736; *Doll v. Noble*, 116 N. Y. 230, 22 N. E. 406, 15 Am. St. Rep. 398; s. c. *sub nom. Doll v. Noble*, 5 L. R. A. 554; *Hummel v. Stern*, 164 N. Y. 603, 58 N. E. 1088; *Miller v. Phillips*, 39 R. I. 416, 98 Atl. 59; *Richison v. Mead*, 11 S. Dak. 639, 80 N. W. 131.

¹⁹ *Devine v. Chicago &c. R. Co.*, 266 Ill. 248, 107 N. E. 593, 595. In *Doll v. Noble*, 116 N. Y. 230, 22 N. E. 406 15 Am. St. Rep. 398; s. c. *sub nom. Doll v. Noble*, 5 L. R. A. 554, a contract to "finish woodwork to the entire satisfaction of the owner" was held complied with by finishing the work in a workmanlike manner. So in *Hummel v. Stern*, 164 N. Y. 603,

58 N. E. 1088, the same doctrine was applied in regard to a contract for ventilating machinery which it was agreed should ventilate the premises to the satisfaction of the buyer. On the other hand, in *Haven v. Russell*, 34 N. Y. Supp. 292, a contract to write a play to the satisfaction of a theatrical manager was held to make the actual satisfaction of the manager the only test. So in *Gray v. Alabama Natl. Bank*, 14 N. Y. Supp. 155, a contract to make a lithographic design subject to a similar condition, and in *Crawford v. Mail & Express Pub. Co.*, 163 N. Y. 404, 57 N. E. 616, a contract to write articles for a newspaper, to the satisfaction of the defendant were held to mean actual satisfaction. In *Diamond v. Mendelsohn*, 156 N. Y. App. D. 636, 141 N. Y. S. 775, the contract of a foreman for employment was similarly treated. It will be observed that the line of distinction between these cases is rather fine. The finish of woodwork and the ventilation of a room are matters involving a good deal of personal taste to some people—as much perhaps as the writing of a newspaper article. See also *Waldt v. Goodwin Mfg. Co.*, 165 N. Y. App. D. 244, 150 N. Y. S. 831.

the satisfaction of one of the parties is not made the sole determining factor.²⁰ Other promises are not infrequent where the promisee is given an option to determine within specified limits or as to a particular matter the performance which he wishes. Sometimes this choice on the part of the promisee must be exercised when the offer is accepted.²¹ In other cases the option need not be exercised until the time for performance of the contract. Frequently such a choice is given in regard to the time of performing a contract.²² So the place of performance;²³ the quantity of goods to be sold,²⁴ the kind of goods,²⁵ the method of shipment,²⁶ or any other matter²⁷ may be left optional to the promisee. But though such promises may give rise to a binding obligation, if consideration is given, at the time of the promise no liability can arise for breach of them until the promisee exercises his option and gives notice of his choice to the promisor.²⁸ Frequently in a bilateral

²⁰ *Fechteler v. Whittemore*, 205 Mass. 6, 91 N. E. 155; *Hawkins v. Graham*, 149 Mass. 284, 21 N. E. 312, 14 Am. St. Rep. 422; *Wentworth v. Manhattan Market Co.*, 218 Mass. 91, 106 N. E. 118. See also *Devine v. Chicago &c. Co.*, 266 Ill. 248, 107 N. E. 593.

²¹ See *supra*, § 34.

²² *Empire State Phosphate Co. v. Heller*, 61 Fed. 280, 20 U. S. App. 589, 9 C. C. A. 504; *Colvin v. Weedman*, 50 Ill. 311, *Henkle v. Smith*, 21 Ill. 238; *Posey v. Scales*, 55 Ind. 282; *Bell v. Hatfield*, 121 Ky. 560, 89 S. W. 544, 2 L. R. A. (N. S.) 529; *Sousely v. Burns's Adms.*, 10 Bush, 87; *Russell v. Clark*, 112 Me. 160, 91 Atl. 602; *Bolles v. Sachs*, 37 Minn. 315, 33 N. W. 862; *Cullum v. Wagstaff*, 48 Pa. 300; *Lockhart v. Bonsall*, 77 Pa. 53.

²³ *Warner v. Wilson*, 4 Cal. 310; *Weill v. American Metal Co.*, 182 Ill. 128, 54 N. E. 1050; *Hunter v. Wetsell*, 84 N. Y. 549, 38 Am. Rep. 544; *Lockhart v. Bonsall*, 77 Pa. 53.

²⁴ *Kingman v. Hanna Wagon Co.*, 176 Ill. 545, 52 N. E. 328; *Harrow Spring Co. v. Whipple Harrow Co.*, 90 Mich. 147, 51 N. W. 197, 30 Am. St.

Rep. 421; *Burstein v. Phillips*, 154 Wis. 591, 143 N. W. 679.

²⁵ *Whitman v. Namquit Worsted Co.*, 206 Fed. Rep. 549; *Consolidated Coal Co. v. Smelting Co.*, 53 Ill. App. 565; *Storm v. Rosenthal*, 141 N. Y. Sup. 339, 156 N. Y. App. Div. 544.

²⁶ *Wackerbarth v. Masson*, 3 Campb. 270; *Armitage v. Insole*, 14 Q. B. 728; *Sutherland v. Allhusen*, 14 L. T. (N. S.) 666; *Walton v. Black*, 5 Houst. 149; *Dwight v. Eckert*, 117 Pa. 490, 12 Atl. 32.

²⁷ *Hinckley v. Pittsburg Steel Co.*, 121 U. S. 264, 30 L. Ed. 967; *United States v. McMullen*, 222 U. S. 460, 56 L. Ed. 269, 32 S. Ct. 128; *Aller v. Pennell*, 51 Ia. 537, 2 N. W. 385; *Butler v. Butler*, 77 N. Y. 472, 33 Am. Rep. 648; *Hurd v. Gill*, 45 N. Y. 341; *Eisel v. Hayes*, 141 Ind. 41, 40 N. E. 119 (a promise not to become a competitor with the buyer of a business, while the business was carried on by the latter).

²⁸ See cases cited in the preceding five notes. If the choice related to time limited by an ultimate day, the failure of the promisee expressly to exercise his option operates as a tacit

agreement the same option is contained in both promises, in one promise being given to the promisee, in the other reserved to the promisor. As where one party agrees to buy what he wishes or needs, and the other party agrees to sell what the first party wishes or needs. In such an agreement the seller's promise is not too indefinite. It promises the buyer an option; but the buyer's promise, if it reserves an unlimited option which may be exercised without incurring a detriment, will be insufficient consideration for the seller's promise.²⁹

§ 45. Offers and agreements where something is reserved for future determination.

Although a promise may be sufficiently definite when it contains an option given to the promisor or promisee, yet if something is reserved for the future agreement of both parties, the promise can give rise to no legal obligation until such future agreement. Since either party by the very terms of the promise may refuse to agree to anything to which the other party will agree, it is impossible for the law to affix any obligation to such a promise.³⁰ It should be observed, however, that though such a promise is invalid, it will not necessarily invalidate an entire agreement of which it forms a part. Whether

choice of the latest time. *Sousely v. Burns's Adm.*, 10 Bush, 87. See also *Troy Fertilizer Co. v. Logan*, 96 Ala. 619, 12 So. 712.

²⁹ See *infra*, § 104.

³⁰ *Olmstead v. Distilling & Cattle Feeding Co.*, 77 Fed. Rep. 265, 267; *Gunn v. Newcomb*, 82 Iowa, 468, 48 N. W. 989; *Anderson v. Dezonis*, 23 Ill. App. 422; *Denton v. Booth*, (Mich. 1919) 168 N. W. 491; *Jamestown Portland Cement Corp. v. Bowles*, 228 Mass. 176, 117 N. E. 41; *Shepard v. Carpenter*, 54 Minn. 153, 55 N. W. 906; *Davila v. United Fruit Co.*, 88 N. J. Eq. 602, 103 Atl. 519; *Mayer v. McCreery*, 119 N. Y. 434, 23 N. E. 1045; *Elks v. North State Life Ins. Co.*, 159 N. C. 619, 75 S. E. 806; *Holts v. Olds*, 84 Oreg. 567, 164 Pac. 583, 1184; *Pennsylvania Lubri-*

cating Co. v. Wilhelm, 255 Pa. 390, 100 Atl. 93. And see cases in the preceding sections *passim*. In *Weeghman v. Killifer*, 215 Fed. 168, 170, s. c. affd. 215 Fed. 289, 131 C. C. A. 558, an agreement to play baseball "at a salary to be determined by the parties," was said to be invalid. An agreement which in terms is open to the objection stated in the text, may be definite enough when applied to existing facts. Thus in *Kresge v. Taylor*, 194 Fed. Rep. 379, there was a contract to sell a stock of merchandise, the saleable merchandise to be taken at cost and that which was "damaged, soiled, or out of date" at a price to be agreed upon. This was held a binding contract, since there were no damaged, soiled or out of date goods in the stock.

it will have this effect depends upon its relative importance and its severability from the remainder of the contract of which it forms a part.³¹

§ 46. Miscellaneous indefinite promises.

Other illustrations of promises too indefinite for legal enforcement may be suggested. A promise by a physician to remove if he fails to obtain an appointment "or the field is not larger then than now;"³² a promise to pay a note "if the grain market shall advance enough to justify it;"³³ a promise "to live in harmony" and not to "make any more trouble about money lent forty years ago;"³⁴ a promise "not to complain,"³⁵ or "not to bother."³⁶ A promise to apply "part" of certain wages to a debt,³⁷ or to pay "part" of the cost of a building,³⁸ or an added price for a horse if the buyer "did well and had no bad luck with the horse;"³⁹ a promise to "help another out on his pay roll,"⁴⁰ or to sell oil to a retail dealer "on terms so favorable that he can compete with others,"⁴¹ are all too indefinite.

§ 47. A promise is not too indefinite if it can be made certain by reference to outside matters.

It is not necessary that a promise should within itself be certain if it contains a reference to some document or transaction which makes the meaning clear. Thus a promise to marry another when a third person shall die,⁴² a promise to pay one-third of the receipts from the sale of certain priv-

³¹ See *infra*, § 48.

³² *Teague v. Schaub*, 133 N. C. 458, 45 S. E. 762.

³³ *Thomson v. Gortner*, 73 Md. 474, 21 Atl. 371.

³⁴ *Howlett v. Howlett*, 115 Mich. 75, 72 N. W. 1100.

³⁵ *White v. Bluett*, 23 L. J. (N. S.) Exch. 36.

³⁶ *Grant v. Appanna*, 9 Burma Law Rep. 221. Cp. *Sharon v. Sharon*, 68 Cal. 29, 8 Pac. 614, where a promise "not to disturb or annoy or make any demands" was held sufficiently definite. Also a promise "to satisfy an

heir if he became dissatisfied." *Crawley v. Blackman*, 81 Ga. 775, 8 S. E. 533.

³⁷ *Vansickle v. Fergeson*, 122 Ind. 450, 23 N. E. 858.

³⁸ *Thomas v. Shooting Club*, 123 N. C. 285, 31 S. E. 654.

³⁹ *Burks v. Stam*, 65 Mo. App. 455.

⁴⁰ *Blakistone v. Bank*, 87 Md. 302, 39 Atl. 855.

⁴¹ *Marble v. Standard Oil Co.*, 169 Mass. 553, 48 N. E. 783.

⁴² *Brown v. Odill*, 104 Tenn. 250, 56 S. W. 840, 52 L. R. A. 660, 78 Am. St. Rep. 914. So a negotiable instrument may be payable at a time which is

ileges,⁴³ a promise to allow the deduction from an agreed price for stock of an amount equal to the unpaid debts of a corporation,⁴⁴ or to furnish sufficient natural gas to operate a plant as long as a gas well would supply the needed amount,⁴⁵ are all sufficiently definite. Perhaps the commonest illustration of agreements containing a reference to future events for a definition of their meaning, is to be found in agreements to furnish what the purchaser requires or what a certain plant or undertaking requires,⁴⁶ or to sell the output of a certain plant or business. Questions frequently arise on such agreements as to the sufficiency of the consideration.⁴⁷ But there is no doubt that if the consideration is valid such promises are sufficiently definite for enforcement. An offer or agreement may also refer to another agreement for a definition of terms,⁴⁸ even to a contract to be made subsequently.⁴⁹

§ 48. A contract is enforceable though subsidiary promises are too indefinite.

It frequently happens in elaborate contracts that certain minor matters are expressly left for future agreement; or are left in such an indefinite way as to be incapable of enforcement. A building contract may provide that the form of window fastenings shall be afterwards agreed upon by the parties. This would not make the entire building contract unenforceable, though if the nature of the window fastenings

certain to happen though the time of happening is uncertain. Negotiable Instruments Law, § 4 (3).

⁴³ *Dargin v. Hewlitt*, 115 Ala. 510, 22 So. 128.

⁴⁴ *Northern Central Ry. Co. v. Walworth*, 193 Pa. 207, 44 Atl. 253. See also *Wehner v. Bauer*, 160 Fed. 240.

⁴⁵ *Xenia, etc., Co. v. Macy*, 147 Ind. 568, 47 N. E. 147.

⁴⁶ *Foote & Davies Co. v. Southern Wood Preserving Co.* (Ga. App.), 74 S. E. 1037.

⁴⁷ See *infra*, § 104.

⁴⁸ *Shipman v. Mining Co.*, Ct. 158 U. 356, 39 L. Ed. 1015, 15 S. Ct. 886 (all coal needed to fulfil existing contracts

with buyer's customers); *Walsh v. Myers*, 92 Wis. 397 (certain goods to be supplied "as heretofore").

⁴⁹ *Foster v. Wheeler*, 38 Ch. D. 130; *Blaney v. Hoke*, 14 Oh. St. 292. See also *Work v. Welsh*, 160 Ill. 468, 43 N. E. 719; *Lungerhausen v. Crittenden*, 103 Mich. 173, 61 N. W. 270. If the subsequent contract is to include as a party either of the parties to the earlier agreement, there would be no legal bond until the subsequent agreement was made, if the earlier agreement left it optional to such party to refuse to make the later contract, or only to do so upon such terms as he chose. See *supra*, § 45.

was fixed by the agreement while the dimensions of the building were left to future agreement, there would be no enforceable obligation. It is evident that the question must be one of degree:—Is the indefinite promise so essential to the bargain that inability to enforce that promise strictly according to its terms would make it unfair to enforce the remainder of the agreement.⁵⁰ If the contract cannot be performed without settlement of the undetermined point, each party will be bound to agree to a reasonable determination of the unsettled point in order that the main promise may be enforced.⁵¹ If the undetermined matter does not preclude performance of the remainder of the contract and is of comparatively little importance, the uncertain promise may be left unperformed and the remainder of the contract enforced.

§ 49. The effect of part performance upon indefinite promises.

The indefiniteness of promises is important not simply because of the inherent difficulty of enforcing a promise to which no exact meaning can be attached, but also because such a promise is insufficient consideration for another promise. In the latter aspect the question will be hereafter discussed.⁵²

⁵⁰ A contract to sell bales of cotton of average weight as specified "basis 4's" reweighed and f.o.b. cars, the difference for the grades above and below to be settled at the time of delivery, is sufficiently certain. *Baker v. Lehman*, 186 Ala. 493, 65 So. 321. See also *United States v. McMullen*, 222 U. S. 460, 56 L. Ed. 269, 32 S. Ct. 128.

⁵¹ *Ramot v. Schotenfels*, 15 Iowa, 457, 83 Am. Dec. 425; *Page v. Cook*, 164 Mass. 116, 41 N. E. 115, 28 L. R. A. 759, 49 Am. St. Rep. 449; *Spiritusfabrik Astra v. Sugar Products Co.*, 163 N. Y. Supp. 516, 176 N. Y. App. Div. 829. In the Massachusetts case above cited, the court held that a demand promissory note "payable when payor and payee mutually agree" was payable "when and after the payor ought . . . to have agreed." In the New

York decision a contract for the delivery from 6000 to 12,000 tons of molasses "buyer's option" to be delivered within three years at times to be arranged between buyer and seller, was held enforceable as amounting to an agreement "to do what the law would require to be done in case the clause was absent from the contract, that is, to deliver within a reasonable time after demand." See also *infra*, § 1421. The Swiss Code of Obligations (Art. 2) provides: "If the parties have come to an agreement on all essential matters, the contract is regarded as concluded even though secondary matters have been reserved. In default of agreement on secondary matters, the judge determines them taking into consideration the nature of the transaction."

⁵² See *infra*, § 104.

It is important at this point to observe only that a promise too indefinite for enforcement will, for that very reason, be insufficient consideration for a counter-promise. If one promise of a bilateral agreement is too indefinite, neither promise will be enforceable. The indefinite promise cannot be enforced because of its indefiniteness, and the counter-promise even though in itself definite, cannot be enforced because of lack of consideration. It may be supposed, however, that such an agreement is performed either wholly or partly by one party or the other. Let it be supposed first that the promise which originally was definite is performed, this cannot make the indefinite promise enforceable but may give rise to a quasi-contractual obligation to pay the fair value of what has been given.⁵³ If, however, the side of the agreement which was originally too vague for enforcement becomes definite by entire or partial performance, the other side of the agreement (or a divisible part thereof, corresponding to the performance received), though originally unenforceable, becomes binding.⁵⁴ And even without performance on either

⁵³ Thus in a contract for employment the employer may have promised to pay whatever he thought right. It is conceivable that this may mean that the employee is to be bound by the employer's judgment in any event. If this is the meaning no quasi-contractual right will arise. See *Roberts v. Smith*, 4 H. & N. 315. But such a promise may also mean that the parties understood reasonable compensation was to be paid, and in such a case if the employer failed to exercise an honest or perhaps a reasonable judgment, as the means provided in the contract failed, the law would impose a quasi-contractual obligation. See *Bryant v. Flight*, 5 M. & W. 114.

⁵⁴ *Levy v. Goldhill*, [1917] 2 Ch. 297; *ElDorado Co. v. Kinard*, 96 Ark. 184, 131 S. W. 460; *Marin Water, etc., Co. v. Sausalito*, 168 Cal. 587, 143 Pac. 767; *Work v. Welsh*, 160 Ill. 468, 43 N. E. 719; *Gould v. Gunn*, 161 Iowa, 155, 140 N. W. 380; *Curry v. Kentucky*

Western Ry. Co., 25 Ky. L. Rep. 1372, 78 S. W. 435; *Caddo Oil, etc., Co. v. Producers' Oil Co.*, 134 La. 701, 64 So. 684; *Parks v. Griffith & Boyd Co.*, 123 Md. 232, 91 Atl. 581; *Moselage v. Benevolent &c. Order*, 118 Miss. 5, 78 So. 947; *Nicholson v. Acme Cement Co.*, 145 Mo. App. 523, 122 S. W. 773; *Atlantic Pebble Co. v. Lehigh Valley R.*, 89 N. J. L. 336, 98 Atl. 410; *Chard v. Ryan-Parker Const. Co.*, 182 N. Y. App. D. 455, 169 N. Y. S. 622; *Watkins v. Davison*, 61 Wash. 662, 112 Pac. 743. In *Raymond v. White*, 119 Mich. 438, 78 N. W. 469, a promise was made to "pay a certain sum for the use of patents as long as the promisor used them." Such a promise would be illusory when made, but after use of the patents, the promisor was held bound to pay the agreed sum.

So an agreement to buy and sell "as many goods as the buyer shall order" imposes no legal obligation, but after some goods have been accepted the

side the original indefiniteness may sometimes be cured by a subsequent definition of the intended performance.⁵⁵ But if, in spite of part performance by one party to an indivisible agreement his promises still remain indefinite, he cannot enforce the promises of the other party, unless what has been done amount to substantial performance.⁵⁶

buyer must pay the price for them, and after a specific quantity of goods has been ordered the seller is bound to furnish that quantity. *Great Northern Ry. Co. v. Witham*, L. R. 9 C. P. 16; *Buick Motor Co. v. Thompson*, 138 Ga. 282, 75 S. E. 354. So a contract of employment lacking in mutuality at first becomes binding in so far as the employee performs. *Little Butte Co. v. Girand*, 14 Ariz. 9, 123 Pac. 309.

⁵⁵ *Stanley v. Sumrell* (Tex. Civ. App.), 163 S. W. 697. In *Lawrence v. Prosser*, 89 N. J. Eq. 248, 101 Atl. 1040, 1042, the court said: "Was the contract sufficiently specific to warrant equitable relief? In the first instance, perhaps it was not. As made just before the time of the transfer in August, 1911, it was, merely, 'amply to provide for Luman [by will in consideration of a transfer of property]. But when Luman made the transfer, and when Mrs. Dean executed her will and specifically defined the ample provision, in terms satisfactory to both, the contract was completely executed on one side and completely defined on the other, and could, therefore, only be varied by the consent of both. If she had made the will contemporaneously with the transfer of the property and because of the transfer, it is clear under the authorities that a contractual obligation would have been imposed upon her. Because she waited a while, the obligation all the time resting upon her to do the very thing which she did, it does not seem to me that the effect of the transaction, looked at as one whole, is different."

⁵⁶ In *Woerheide v. Barber Asphalt Paving Co.*, 251 Fed. 196 (C. C. A.), the court said: "Although appellee's performance of this part of the contract must be regarded as substantially complete, yet complete performance of only one of its five or six important executory contract obligations cannot prevent the avoidance of the contract, if others equally important remain executory and are legally uncertain. *Santaella v. Lange*, 155 Fed. 719, 84 C. C. A. 145; *Cold Blast Transp. Co. v. Kansas City Bolt & Nut Co.*, 114 Fed. 77, 52 C. C. A. 25, 57 L. R. A. 696; *Oakland Motor Co. v. Indiana Automobile Co.*, 201 Fed. 499, 121 C. C. A. 319; *Velie Motor Car Co. v. Kopmeier Motor Car Co.*, 194 Fed. 324, 114 C. C. A. 284; *Hudson v. Browning*, 264 Mo. 58, 174 S. W. 393; *Higbie v. Rust*, 211 Ill. 333, 71 N. E. 1010, 103 Am. St. Rep. 204; *Killebrew v. Murray*, 151 Ky. 345, 151 S. W. 662; *Hopkins v. Iron Co.*, 137 Wis. 583, 119 N. W. 301. That every part of the consideration be definite or every part be indefinite is not the gauge of the validity of a contract. However the law requires that the important, essential elements in the consideration be ascertainable with reasonable certainty. This is true because the law will not hold a party bound to a contract against his will, when the substance of what he is to get in return is executory, and is so shadowy in its outline that the other party can refuse to perform with impunity." See further *infra*, § 842.

CHAPTER IV

DURATION AND TERMINATION OF OFFERS

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§ 50. How offers may be terminated.

It seems formerly to have been supposed that an offer must be accepted instantaneously, or that it ceased to exist.¹ This idea was doubtless based on the theory that the offer was only important as evidence of a state of mind. Since then in the nature of things an offer could be evidence of the offerer's mental attitude only at or about the time he spoke, it was essential that the offer and acceptance should be contemporaneous.²

The necessity of contemporaneous existence of offer and acceptance has sometimes been met by the fiction of a re-

¹ The often cited case of *Cooke v. Oxley*, 3 T. R. 653, shows this conception. There the offer was by its terms to remain open until 4 o'clock, and an acceptance was made before 4 o'clock. The court held that there was no contract either at the time when the offer was made, nor at the later time, because at neither time did both parties

assent to the bargain. The same assumption that the acceptance must be contemporaneous with the offer even though the offer expressly state that it shall remain open for a given time, is to be found in *Head v. Diggon*, 3 Man. & Ry. 97.

² See *infra*, §§ 95, 1536, 1537.

lation back of the acceptance to the offer.³ It is of course true that offer and acceptance must exist at the same time, but the offer is not merely evidence of a state of mind; it is an element in the formation of a contract irrespective of the offerer's mental attitude, and may continue effective in spite of a change in that attitude. It is, therefore, unnecessary to resort to a fiction that the acceptance relates back, in order to support the validity of a contract made without practically simultaneous expressions of assent.⁴ It is the only accurate way to express the matter to say that the offer continues till the acceptance, rather than that the offer relates back to the acceptance. It is now well settled that an offer will continue in force subject to the limitations hereafter stated.⁵

The ways in which an offer may be terminated other than by an acceptance, which changes it into a contractual obligation, are: (1) Rejection by the offeree; (2) Expiration of a time stated in the offer itself as the limit allowed for acceptance; (3) Expiration of a reasonable time, if no time limit is fixed by the offer; (4) Revocation by the offeror; (5) Death or insanity of either party.

§ 51. Rejection by the offeree.

When an offer has been rejected it ceases to exist and cannot thereafter be accepted even though the acceptance is

³In *Kennedy v. Lee*, 3 Mer. 441, 454, Lord Ellenborough speaking of a contract by mail, said: "the acceptance must be taken as simultaneous with the offer;" and a similar assumption was made in *Potter v. Sanders*, 6 Hare, 1, by Wigram, V. C.; and in *Dickinson v. Dodds*, 2 Ch. Div. 463, where Bacon, Vice Chancellor, said that "it would be related back in point of date to the offer." The same fiction is repeated in *Grossman v. Schenker*, 206 N. Y. 466, 100 N. E. 39.

⁴Langdell, *Summary of Cont.*, § 7.

⁵The doctrine of a continuing offer

was first clearly stated in *Adams v. Lindsell*, 1 B. & Ald. 681, [1818] a case of contract by mail, but the doctrine was not at once applied in other cases. See *Head v. Diggon*, 3 Man. & Ry. 97 [1828]. The modern law is of course perfectly clear. See *Ide v. Leiser*, 10 Mont. 5, 24 Pac. 695, 24 Am. St. Rep. 17; *Gordon v. Darnell*, 5 Colo. 302, 304; *Railroad Co. v. Bartlett*, 3 Cush. (Mass.) 224, 227; *South Branch Cheese Co. v. American Butter & Cheese Co.*, 191 Mich. 507, 158 N. W. 158; *Bradford v. Foster*, 87 Tenn. 4, 8, 9 S. W. 195; and cases in the following sections *passim*.

made within a time which would have been sufficiently early had there been no rejection.⁶

This principle is most commonly illustrated where a counter offer or a conditional acceptance which amounts to a counter offer is made by the offeree. This operates as a rejection of the original offer.⁷

The reason is that the counter-offer is construed as being in effect a statement by the offeree not only that he will enter into the transaction on the terms stated in his counter-

⁶ *Sheffield Canal Co. v. Sheffield, etc.*, R. Co., 3 Ry. & Can. Cas. 121, 132; *Pope v. Hoopes*, 90 Fed. 451, 33 C. C. A. 595; *Travis v. Nederland L. Ins. Co.*, 104 Fed. 486, 43 C. C. A. 653; *Richardson v. Lenhard*, 48 Kans. 629, 29 Pac. 1076. Where plaintiff refused to accept the reward for the recovery of a stolen automobile as too small, he could not recover the amount offered, though the machine was ultimately returned through information obtained from him. *Hart v. Hopwood*, 151 N. Y. S. 871, 89 N. Y. Misc. 414. The principle is necessarily involved in the cases cited in the following note. See especially *Minneapolis &c. R. v. Rolling Mill Co.*, 119 U. S. 149, 30 L. Ed. 376; *Henson v. Wilson*, 21 Ky. Law Rep. 1382, 55 S. W. 209; *Lewis v. Johnson*, 123 Minn. 409, 143 N. W. 1127; *Sypherd v. Myers*, 80 N. J. L. 321, 79 Atl. 340.

⁷ *Hyde v. Wrench*, 3 Beav. 334; *National Bank v. Hall*, 101 U. S. 43, 50, 25 L. Ed. 822; *Minneapolis, etc., R. Co. v. Columbus Rolling Mill Co.*, 119 U. S. 149, 30 L. Ed. 376; *Beaumont v. Prieto*, (U. S.) 39 Sup. Ct. 383, *Ortman v. Weaver*, 11 Fed. Rep. 358; *Arthur v. Gordon*, 37 Fed. Rep. 558; *Goulding Co. v. Hammond*, 54 Fed. 639, 4 C. C. A. 533; *James v. Darby*, 100 Fed. 224, 40 C. C. A. 441; *Travis v. Nederland L. Ins. Co.*, 104 Fed. 486, 43 C. C. A. 653; *Sloan v. Wolf Co.*, 124 Fed. 196, 59 C. C. A. 612; *National Trading Co. v.*

Vulcanite Portland Cement Co., 159 Fed. 403, 86 C. C. A. 341; *Doyle v. Hamilton Fish Co.*, 234 Fed. 47, 148 C. C. A. 63; *Cage v. Black*, 97 Ark. 613, 134 S. W. 942; *Meux v. Hogue*, 91 Cal. 442, 27 Pac. 744; *Niles v. Hancock*, 140 Cal. 157, 73 Pac. 840; *McRae v. Ross*, 170 Cal. 74, 148 Pac. 215; *Anglo American Co. v. Prentiss*, 157 Ill. 506; *Fox v. Turner*, 1 Ill. App. 153; *Kansas City, etc., R. Co. v. McGuire Co.*, 108 Ill. App. 258; *Baker v. Johnson Co.*, 37 Ia. 186, 189; *Shaw v. Ingram-Day Lumber Co.*, 152 Ky. 329, 153 S. W. 431; *Wheaton Building & L. Co. v. Boston*, 204 Mass. 218, 90 N. E. 598; *Kehlror Flour Mills Co. v. Linden*, 230 Mass. 119, 119 N. E. 698; *Eggleston v. Wagner*, 46 Mich. 610, 10 N. W. 37; *Grenier v. Cota*, 92 Mich. 23, 52 N. W. 77; *Langellier v. Schaefer*, 36 Minn. 361, 31 N. W. 690; *Kileen v. Kennedy*, 90 Minn. 414, 97 N. W. 126; *Bastian Bros. Co. v. Wemott Howard Co.*, 113 Minn. 196, 129 N. W. 369; *Lewis v. Johnson*, 123 Minn. 409, 143 N. W. 1127; *Egger v. Nesbitt*, 122 Mo. 667, 27 S. W. 385, 43 Am. St. Rep. 596; *Twentieth Century Mach. Co. v. Excelsior Springs Co.* (Mo. App.), 171 S. W. 944; *Harris v. Scott*, 67 N. H. 437, 32 Atl. 770; *Virginia Hot Springs Co. v. Harrison*, 93 Va. 569, 25 S. E. 888; *Lynchburg Hosiery Mills v. Chesterfield Mfg. Co.*, 107 Va. 73, 77, 57 S. E. 606; *Weaver v. Burr*, 31 W. Va. 736, 744, 8 S. E. 743, 3 L. R. A. 94. See also *infra*, §§ 78, 79.

offer, but also by implication that he will not assent to the terms of the original offer. An answer purporting to accept upon condition is not an acceptance but is in effect a counter-offer, because it states in substance that the offeree will contract on the terms of the original offer if some addition or subtraction is made from them,⁸ but implies that otherwise he will not contract.⁹ It is not true, however, that any communication from the offeree other than an unequivocal acceptance is necessarily a rejection. Thus an inquiry by the offeree in regard to the possibility of other terms is not a counter-offer either in the form of a conditional acceptance or otherwise, and does not reject the offer.¹⁰ Nor does a statement by the offeree that he will "delay coming to determination."¹¹ Nor does a request for a qualification of the offer coupled with an unqualified acceptance not dependent on the granting of the request.¹² Nor does mere silence of the offeree.¹³

§ 51a. Acceptance to take effect in the future.

A nice distinction may be taken here between (1) a so-called acceptance by which the acceptor agrees to become

⁸ The suggestion in *Acme Grain Co. v. Wenaus*, 36 Dom. L. Rep. 347, that a telegram purporting to "accept" a supposed offer cannot itself be an offer is unsound. It is immaterial that parties put an erroneous legal label on their acts.

⁹ "Acceptance upon terms varying from those offered is a rejection of the offer." *Bank v. Hall*, 101 U. S. 43, 50, 25 L. Ed. 822.

¹⁰ *Stevenson v. McLean*, 5 Q. B. D. 346. In this case in reply to an offer for iron at 40 shillings, the offeree replied—"please wire whether you would accept forty for delivery over two months, or, if not, longest limit you would give." After receiving this reply the offeror sold his iron and dispatched a notification of the sale to the offeree. Before this notice was received, however, the offeree had dispatched an unconditional acceptance.

It was held that a contract was thereby created.

¹¹ *Mactier v. Frith*, 6 Wend. 103, 21 Am. Dec. 262. Compare *Howells v. Stroock*, 50 N. Y. App. D. 344, 347, 63 N. Y. Supp. 1074, where the court intimate that a suggestion in the reply of an offeree that he would "submit the defendants' offer to the mill" was "in the nature of a counter-proposition or offer." Undoubtedly the offer had lapsed in this case by failure to accept promptly, but the intimation that the reply amounted to a counter-offer and therefore rejection seems unwarranted.

¹² *Addinell's Case*, L. R. 1 Eq. 225; *Culton v. Gilchrist*, 92 Ia. 718, 61 N. W. 384; *Purrrington v. Grimm*, 83 Vt. 466, 76 Atl. 158.

¹³ *Pennsylvania & Delaware Oil Co. v. Klipstein*, 175 N. Y. S. 540.

immediately bound on a condition not named in the offer, and (2) an acceptance which adopts unequivocally the terms of the offer but states that it will not be effective until a certain contingency happens; or that it will become ineffective in a certain contingency. In the first case there is a counter-offer and rejection of the original offer; in the second case there is no counter-offer, since there is no assent to enter into an immediate bargain. There is, so to speak, an acceptance in escrow, which is not to take effect until the future. In the meantime, of course, neither party is bound and either may withdraw. Moreover, if the time at which the acceptance was to become effectual is unreasonably remote, the offer may lapse before the acceptance becomes effective. But if neither party withdraws and the delay is not unreasonable, a contract will arise when the contingency happens.¹⁴

§ 52. When rejection by mail takes effect.

When a rejection sent by mail takes effect is a question that does not seem to have been yet authoritatively decided. If such a rejection does not become effective until it reaches the offeror, a subsequent acceptance by telegraph will make a binding contract. And since an acceptance takes effect when mailed or dispatched by telegraph, if communication by such means is authorized,¹⁵ even an acceptance by mail sent after the rejection had been mailed but before it had reached the offeror would create a contract. The analogy of the law governing a revocation¹⁶ may be urged in support

¹⁴ The case of *Farmers' Handy Wagon Co. v. Newcomb*, 192 Mich. 634, 159 N. W. 152, seems to afford an illustration of this. In an agreement for the purchase of a silo the buyer reserved till a certain day the right "to reconsider" the purchase. The court said that there was a "contract" subject to a right on the part of the buyer to withdraw within the time stated. It seems clear that there was at the outset no contract and that each party must have had the right to withdraw, since the seller could not be bound in

consideration of a promise by the buyer which was purely illusory until the time had passed within which reconsideration was possible. As the buyer did not reconsider before the day named, the court rightly held him liable.

¹⁵ See *infra*, §§ 81, 82. It was held in *Waster v. Casein Co.*, 206 N. Y. 506, 100 N. E. 488, that repudiation by one party to a contract previously formed, also takes effect as a breach when dispatched.

¹⁶ See *infra*, § 56.

of an argument that the rejection amounts to nothing until received, but the practical injustice of allowing the offeree to hold the offeror bound by an acceptance unknown to the latter until after he has received the rejection and is justified in supposing the offer at an end makes it not unlikely that the analogy of acceptance by mail would be followed and the rejection held effective from the time when it was mailed, if communication by mail was authorized.¹⁷ Such expression of judicial opinion as there is, however, following the analogy of the law of revocation, regards the receipt and not the dispatching of the rejection as the effective moment.¹⁸

It seems impossible to discuss the matter very satisfactorily on principle because of the two opposing analogies. As an original question the decisions of the courts that a contract becomes complete on the mailing of a letter of acceptance seems open to criticism;¹⁹ but that rule must be taken as established and it may therefore equally well be argued—

1. All answers by mail or telegram when that mode of communication is authorized, take effect when dispatched.

2. Any communication destroying or determining an offer takes effect only when received. On the first line of argument

¹⁷ This difficulty may perhaps be avoided by the doctrine of estoppel. See *infra*, § 98.

¹⁸ In *James v. Darby*, 100 Fed. Rep. 224, 229, 40 C. C. A. 341, the court said of a letter of rejection: "After [the offeror] received this letter [the offeree] would not have been allowed, if he had so desired, to have recalled it, and then accepted in unconditional terms . . . The receipt by [the offeror] of that letter rendered the option nugatory;" but the facts involved no question of the precise time when the rejection became effectual.

In *Harris v. Scott*, 87 N. H. 437, 439, 32 Atl. 770, the court said of the defendant who had made an offer by mail: "She made the public post her agent to receive from the plaintiff an unqualified acceptance of her offer, but not to receive a counter-proposal

or conditional acceptance." The question the court was deciding in this case, however, was that the counter-offer was not effective as an offer until received, not that letter might not operate as a rejection. It may seem odd to suggest the possibility that a letter containing a rejection of an offer, and also a new offer might become effective as to the rejection immediately, but as to the offer not until communication was complete; but if it is remembered that a letter revoking one offer and accepting another unquestionably takes effect at two different times there will seem less reason for surprise. The acceptance and revocation, however, though in the same letter are two distinct things whereas the counter-offer is itself the rejection. See an article by Dean Ashley in 12 Yale L. J. 419.

¹⁹ See *infra*, § 81.

rejection is analogous to an acceptance because coming from the offeree. On the second line of argument it is analogous to a revocation because destructive of the offer.

§ 53. Expiration of time stated in the offer.

As the offeror is at liberty to make no offer at all he is also at liberty to dictate whatever terms he sees fit if he chooses to make an offer. Among his requirements may be acceptance within a specified time, and if no acceptance is made within that time the offer necessarily expires.²⁰ The limitation of time may be exactly fixed, or it may be fixed by words of somewhat indefinite meaning. Thus an offer may require telegraphic acceptance on receipt.²¹ An offer requiring "prompt wire acceptance" is not fulfilled by answering at 2:45 P. M. a telegraphic offer received at 11:30 A. M.,²² and a telegraphic offer with a requirement of "immediate" designation of the route for shipment, delivered early in the day was not accepted sufficiently early by a reply sent at night rates at 6:25 P. M. of the same day.²³ A common requirement is an answer by return mail. This requirement must be complied with though the words would probably not be literally construed. An acceptance by any method of communication actually arriving as soon as return mail would reach the offeror would doubtless be held sufficient.²⁴ And in a city where mails are very frequent it is probable that a prompt reply would be held sufficient though the reply did not go out in the next mail leaving the city after the delivery of the offer.²⁵

²⁰ *Tinn v. Hoffman*, 29 L. T. (N. S.) 271; *Waterman v. Banks*, 144 U. S. 394, 36 L. Ed. 479, 12 S. C. Rep. 646; *MacLay v. Harvey*, 90 Ill. 525; *Miller v. Sharp*, 52 Ind. App. 11, 100 N. E. 108; *Potts v. Whitehead*, 20 N. J. Eq. 55; *Longworth v. Mitchell*, 26 Ohio St. 334, and see cases in the following notes.

²¹ *Eagle Mill Co. v. Caven*, 76 Mo. App. 458. An acceptance on the following day was held insufficient. *Horne v. Niver*, 168 Mass. 4, 46 N. E. 393.

²² *Brewer v. Lepman*, 127 Mo. App. 693, 106 S. W. 1107.

²³ *Van Camp Packing Co. v. Smith*, 101 Md. 565, 61 Atl. 284.

²⁴ *Tinn v. Hoffman*, 29 L. T. (N. S.) 271; *Bernard v. Torrance*, 5 G. & J. 383. So in *Eliason v. Henshaw*, 4 Wheat. 225, 4 L. Ed. 556, where the offer required an answer "by return of wagon" the court said an acceptance would be sufficient which "was not delayed beyond the time ordinarily employed by wagons."

²⁵ *Ortman v. Weaver*, 11 Fed. Rep. 358, 362; *Palmer v. Phoenix Mut. L. I. Co.*, 84 N. Y. 63.

A condition is imposed by the offer, making an answer by return mail essential, though the offeror merely requests such an answer,²⁶ and introduces the request with the word "please"²⁷ or with "you will confer a favor."²⁸ Not infrequently an offeror who has imposed a limit of time in his offer does not care to insist upon it and by further negotiations may indicate a continued willingness to stand by the terms of his offer. Any such manifestation of continued willingness is in effect a new offer, which may be accepted and if accepted will ripen into a contract.²⁹

§ 54. Expiration of a reasonable time.

If no time is fixed in the offer within which acceptance must be made, it is a rule of law that acceptance must be within a reasonable time. What amounts to a reasonable time, however, varies within wide limits. A reasonable time for the acceptance of an offer made on a commercial exchange is within a few seconds. A delay of some days might not be unreasonable in answering some offers of other kinds. A reasonable time for the acceptance of most offers made in conversation will not extend beyond the time of the conversation unless special words or circumstances indicate an intention on the part of the offeror that it shall do so.³⁰ The question usually arises when the parties are at a distance from one another, and here only general rules can be laid down. The length of time which is reasonable must depend on all the circumstances of the case, but especially upon the nature of the proposed contract. If it involves the sale of property which is subject to rapid fluctuations in price, a reasonable time will

²⁶ *Carr v. Duval*, 14 Pet. 77, 82, 10 L. Ed. 361; *Taylor v. Rennie*, 35 Barb. 272.

²⁷ *Howells v. Stroock*, 50 N. Y. App. D. 344, 63 N. Y. Supp. 1074.

²⁸ *MacLay v. Harvey*, 90 Ill. 525; *Palmer v. Phoenix Mut. L. I. Co.*, 84 N. Y. 63.

²⁹ Where the vendors, after expiration of the time limit on an option to sell land, treated the contract as be-

ing alive and continued negotiations, they waived their right to insist that the contract had expired by limitation. *McCarty v. Helbling*, 73 Or. 356, 144 P. 499. See further, *infra*, § 92.

³⁰ The Swiss Code of Obligations provides (Art. 4): "When the offer has been made to a person present without fixing a time for acceptance, the offeror is freed if the acceptance is not made immediately."

be short.³¹ Generally an offer to buy or sell real estate may be supposed to continue longer than an offer to sell personal property.³² The method of communication used by the offeror is also important as indicating the degree of haste which he deems necessary, or which the circumstances make appropriate.

If the offer is made in course of personal conversation an immediate answer will generally be required.³³ If the offer is sent by messenger or by mail no positive rule can be laid down. Frequently an answer by return of messenger or by return mail may be required by the nature of the offer even though no express limit of time is fixed. But certainly where a number of mails go out each day, a reply either by return mail or upon the day when the offer was received will be sufficient.³⁴ So early a reply would be necessary only in commercial transactions, and not always even in such transac-

³¹ In *Minnesota Oil Co. v. Collier Lead Co.*, 4 Dillon, 431, a telegraphic offer to sell oil then subject to rapid fluctuations in price was held not accepted within a reasonable time by a telegraphic reply 24 hours later. In *Van Camp Packing Co. v. Smith*, 101 Md. 565, 61 Atl. 284, a telegraphic offer to sell, imposing a requirement of "immediate" designation of route for shipment, sent on the evening of Oct. 1st and delivered early on the next day, was held not seasonably accepted by a telegraphic reply at night rates sent at 6:25 P. M. on that day. See also *Dunlop v. Higgins*, 1 H. L. C. 381; *Ferguson v. West Coast Shingle Co.*, 96 Ark. 27, 130 S. W. 527; *Emerson v. Stevens Grocer Co.*, 95 Ark. 421, 130 S. W. 541, 105 Ark. 575, 151 S. W. 1003; *Roberts v. Evans*, 43 Cal. 380; *Averill v. Hedge*, 12 Conn. 424; *Trounstone v. Sellers*, 35 Kans. 447, 11 Pac. 441; *Allen B. Wrisley Co. v. Mathieson Alkali Works*, 107 Ill. App. 379; *Ferrier v. Storer*, 63 Ia. 484, 19 N. W. 288, 50 Am. Rep. 752; *Bowser v. Fountain*, 128 Minn. 198, 150 N. W. 795; *Mi-*

sell v. Burnett, 4 Jones L. 249, 69 Am. Dec. 744.

³² See as to real estate: *Roberts v. Evans*, 43 Cal. 380; *Phillips v. Deck*, 76 Cal. 384, 18 Pac. 336; *Kempner v. Cohn*, 47 Ark. 519, 1 S. W. 869, 58 Am. Rep. 775 (five days not as matter of law unreasonable); *Stone v. Harmon*, 31 Minn. 512, 19 N. W. 88. But a delay of over two weeks in answering such an offer was held excessive in *Ortman v. Weaver*, 11 Fed. Rep. 358, and where the offerer said in his offer that he "would not agree to keep the offer good a great while" even a shorter period would be unreasonable. *Baker v. Holt*, 56 Wis. 100, 14 N. W. 8. And with land of a speculative character, for instance oil land, much delay would be unreasonable. *Vincent v. Woodland Oil Co.*, 165 Pa. 402, 30 Atl. 991.

³³ *Mactier's Administrators v. Frith*, 6 Wend. 103, 114, 21 Am. Dec. 262. See also *Vincent v. Woodland Oil Co.*, 165 Pa. 402, 30 Atl. 991.

³⁴ *Dunlop v. Higgins*, 1 H. L. C. 381; *Mitchell v. Wallace*, 27 Ky. L. Rep. 937, 87 S. W. 303.

tions.³⁵ Business customs in the locality or between the parties may be most important.³⁶ The offer itself also, though not expressly limiting the time for acceptance, may afford indications of what is reasonable by reference to some future time or transaction.³⁷

In offers for reward a reasonable time has been held to continue for a very long time. An offer for the conviction of an offender for a particular crime has been held not to lapse until the Statute of Limitations barred conviction.³⁸ On the other hand, it has been held that twelve years from the time when a reward was offered is unreasonable.³⁹ And generally

³⁵ In *South Branch Cheese Co. v. American Butter & Cheese Co.*, 191 Mich. 507, 158 N. W. 158, an offer for the sale of cheese received by mail on Saturday was held properly accepted by a telegram sent and received on the following Monday.

³⁶ *Ferguson v. West Coast Shingle Co.*, 96 Ark. 27, 130 S. W. 527.

³⁷ Thus an offer to buy stock "at any time after January 1, 1886, if at that time you desire to have me do so" may be accepted within a reasonable time after January 1, 1886. *Park v. Whitney*, 148 Mass. 278, 19 N. E. 161. Compare *Cabot v. Kent*, 20 R. I. 197, 37 Atl. 945, where it was held that an offer "to take back said stock . . . upon January 1st, 1895" could not be accepted after the precise day stated in the offer. In *Dawley v. Potter*, 19 R. I. 372, 36 Atl. 92, there was an offer to buy a colt if it was "a filly all right and sound at five months old . . . should you wish to sell her." It was held this offer might be accepted within a reasonable time after the colt was five months old. Were it not for the final words of the offer it would apparently contemplate an immediate bilateral agreement, the performance of which was to be conditional upon the character of the foal at five months. So an offer made Aug. 23 to discount bills "after the 15th" it was held might be ac-

cepted Sept. 10th. *Sherley v. Peehl*, 84 Wis. 46, 54 N. W. 267.

So an offer for reward for the conviction of any person engaged in incendiary attempts was held to contemplate a reward not simply for attempts which had already taken place, but those which might take place in the immediate future and any performance by one seeking the reward within a reasonable time after such a future crime, would justify recovery. See *Loring v. Boston*, 7 Metc. 409; *Langdell*, Summary, § 155.

Again, an offer to subscribe to shares in a new corporation may remain open until a reasonable time after the corporation has been organized, or the full subscription obtained, if this seems to have been within the original contemplation of the offer. See *Rams-gate Hotel Co. v. Goldsmid*, L. R. 1 Exch. 109; *Baily's Case*, L. R. 5 Eq. 428, 3 Ch. 592.

³⁸ *The Matter of Kelly*, 39 Conn. 159. See also *Schaub v. Lancaster*, 156 Pa. 362, 26 Atl. 1067, and in *Drummond v. The United States*, 35 Court of Claims, 356, the offer was held open after ten years, the criminal still being a fugitive from justice.

³⁹ *Mitchell v. Abbott*, 86 Me. 338, 29 Atl. 1118, 25 L. R. A. 503, 41 Am. St. Rep. 559.

in offers for unilateral contracts as a reasonable time for accepting the offer is necessarily a reasonable time for doing the act requested, if the act from its nature is likely to take a considerable time, the offer will remain open for that length of time.⁴⁰

§ 55. Revocation.

114 It is a consequence of the rule that unsealed promises without consideration are not binding, that offers unless under seal or given for consideration may be revoked at any time prior to the creation of a contract by acceptance.⁴¹ Therefore, even though a definite time in which acceptance may be made, is named in such an offer, the offerer may, nevertheless, revoke his offer within that period.⁴² And even though the offer expressly states that it shall not be withdrawn, nevertheless, it may be.⁴³ What communication amounts to a revocation is a question of construction. Any

⁴⁰ In *Morse v. Bellows*, 7 N. H. 549, 28 Am. Dec. 372, the offer requested the obtaining of a debtor's discharge from his creditors. Two years was held a reasonable time for this. On the other hand, in *Smith v. Bruner*, 68 Ill. App. 61, two years was held an unreasonable time for sinking a mining shaft.

⁴¹ *Dickinson v. Dodds*, 2 Ch. Div. 468; *Byrne v. Van Tienhoven*, 5 C. P. Div. 344; *Stevenson v. McLean*, 5 Q. B. Div. 346; *Moffett & Co. v. Rochester*, 178 U. S. 373, 44 L. Ed. 1108; *Borst v. Simpson*, 90 Ala. 373; *Timmons v. Bostwick*, 141 Ga. 713, 82 S. E. 29; *Crandall v. Willig*, 166 Ill. 233, 46 N. E. 755; *Miller v. Douville*, 45 La. Ann. 214, 12 So. 132; *Lincoln v. Gay*, 164 Mass. 537, 42 N. E. 95, 49 Am. St. Rep. 480; *Brown v. Snider*, 126 Mich. 198, 85 N. W. 570; *Storch v. Duhnke*, 76 Minn. 521, 79 N. W. 533; *Winders v. Kenan*, 161 N. E. 628, 77 S. E. 687; *Outcault Advertising Co. v. Wilson*, 186 Mo. App. 492, 172 S. W. 394; *Brown v. Farmers' & Co. Bank*, 76 Or. 113, 147 Pac. 537; *Her-*

rin v. Scandinavian-American Bank, 65 Wash. 569, 118 Pac. 648; *Brown Bros. Lumber Co. v. Preston Mill Co.*, 83 Wash. 648, 145 Pac. 964. And see cases in this section *passim*.

⁴² *Bristol & Co. v. Maggs*, 44 Ch. Div. 616; *Brown v. Savings Union*, 134 Cal. 448, 66 Pac. 592; *Cooper v. Lansing Wheel Co.*, 94 Mich. 272, 54 N. W. 39, 34 Am. St. Rep. 341; *Davis v. Petty*, 147 Mo. 374, 48 S. W. 944; *Bosshardt Co. v. Crescent Oil Co.*, 171 Pa. 109, 32 Atl. 1120; *Weaver v. Burr*, 31 West Va. 736, 8 S. E. 743.

⁴³ *Toledo Computing Scale Co. v. Stephens*, 96 Ark. 606, 132 S. W. 926; *Outcault Advertising Co. v. Young Hardware Co.*, 110 Ark. 123, 161 S. W. 142; *Hargrove v. Crawford*, 159 Ia. 522, 141 N. W. 423; *Challenge & Co. Mill Co. v. Kerr*, 93 Mich. 328, 53 N. W. 555; *Peck v. Freese*, 101 Mich. 321, 59 N. W. 600; *Cary v. Appo*, 84 N. Y. S. 569; *Howe Scale Co. v. Wolfshaut*, 170 N. Y. S. 943; *National Refining Co. v. Miller*, 1 S. Dak. 548, 553, 47 N. W. 962.

statement which clearly implies unwillingness to contract according to the terms of the offer is sufficient, though the word *revoke* is not used.⁴⁴

After an offer has been duly accepted, it is fundamental that revocation is no longer possible. Thus when parties have had a number of communications with one another by letter or otherwise regarding a proposed bargain, all should be considered, yet if once a definite offer has been made and it has been accepted without qualification, the complete contract thus arrived at cannot be affected by subsequent negotiations unless they amount to an agreement to modify or rescind the contract.⁴⁵

§ 56. Revocation is not effectual until communicated.

If the formation of a simple contract depended upon the existence of mutual assent in fact in the minds of the contracting parties, a change of mind on the part of either one before the requisite mutual assent was reached would prevent the formation of the contract.⁴⁶ No case, however, goes so far as to hold material a change of mind on the part of the offerer not manifested by an overt act,⁴⁷ but several cases near the beginning of the nineteenth century show that the conception of the court at that time was that a manifestation by an overt act of a change of mind on the part of the offerer would operate as a revocation, though not communicated to the other party.⁴⁸ This conception has found expression in the Civil Code of California,⁴⁹ which, though providing

⁴⁴ A letter by one who had ordered advertising matter asking that it be not forwarded until he felt in a better condition to handle it was not a sufficient revocation of the order. *Out-cant Advertising Co. v. Buell*, 71 Or. 52, 141 P. 1020.

⁴⁵ *Bellamy v. Debenham*, 45 Ch. D. 481; *Perry v. Suffields, Limited* [1916], 2 Ch. D. 187. See also *infra*, §§ 81, 82.

⁴⁶ See *infra*, §§ 95, 1536, 1537.

⁴⁷ See, however, *supra*, § 50.

⁴⁸ In *Cooke v. Oxley*, 3 T. R. 653, where an offer to sell tobacco was made by the defendant, and the court

held no contract was created by an acceptance later in the day, though within the time specified in the offer, Buller, J., said that "it is not stated that . . . the goods were kept until that time," evidently supposing that a sale of the goods, though without notice, would revoke the offer. The same implication is made in—*Adams v. Lindsell*, 1 B. & Ald. 681; *Head v. Diggon*, 3 M. & R. 97; *Hebb's Case*, L. R. 4 Eq. 9; *Routledge v. Grant*, 4 Bing. 653.

⁴⁹ Sec. 1587. The code was adopted in 1872.

for communication of "notice of revocation," also provides not only with reference to acceptance but also with reference to revocation⁵⁰ that communication is complete when put in course of transmission.⁵¹ At the present day, however, it is almost universally settled that a revocation requires communication and that, therefore, an acceptance prior to a communicated revocation will make a binding contract.⁵² It has been suggested that though manifest principles of justice require that a revocation should not be effectual against an acceptor of an offer until the revocation has been received, the revocation should bind by estoppel the offeror from the time when it was dispatched; but such a result could not be reached "without infringing upon the inexorable rule that one party to a contract cannot be bound unless the other be also, notwithstanding that the principle of mutuality thus applied may enable a party to take advantage of the invalidity of his own act."⁵³ Revocation may be indicated by acts as well as words. Thus, after an offer of sale to one person, a sale of the same property to another person, if brought to the knowledge of the person to whom the offer was first made, will amount to a revocation.⁵⁴ A revocation "should be as direct and explicit as the acceptance."⁵⁵ What amounts to a receipt of a revocation must be the same as receipt of

⁵⁰ Sec. 1583.

⁵¹ No decision has yet been made in California upon the matter, but in *Watters v. Lincoln* (So. Dak.), 135 N. W. 712, it was held under similar provisions in the South Dakota Code, §§ 1212, 1215, 1216, that a revocation of an offer was effected as soon as deposited in the post-office.

⁵² *Stevenson v. McLean*, 5 Q. B. D. 346; *Henthorn v. Fraser*, [1892] 2 Ch. 27; *Re London & Northern Bank* [1900] 1 Ch. 220; *Tayloe v. Merchants' Fire Ins. Co.*, 9 How. 390, 13 L. Ed. 187; *Patrick v. Bowman*, 149 U. S. 411, 424, 37 L. Ed. 790; *The Palo Alto*, 2 Ware, 343; *Weld v. Victory Mfg. Co.*, 205 Fed. 770; *Kempner v. Cohn*, 47 Ark. 519, 1 S. W. 869, 58 Am. Rep. 775; *Sherwin v. Nat. Cash Register*

Co., 5 Col. App. 162, 38 Pac. 392; *Wheat v. Cross*, 31 Md. 99, 1 Am. Rep. 28; *Brauer v. Shaw*, 168 Mass. 198, 46 N. E. 617, 60 Am. St. Rep. 387; *Peck v. Freese*, 101 Mich. 321, 59 N. W. 600; *Farmers' Handy Wagon Co. v. Newcomb*, 192 Mich. 624, 159 N. W. 152; *Pennsylvania & Delaware Oil Co. v. Klipstein*, 175 N. Y. S. 540; *Malloy v. Drumheller*, 68 Wash. 106, 122 Pac. 1005.

⁵³ *Patrick v. Bowman*, 149 U. S. 411, 424, 37 L. Ed. 790.

⁵⁴ *Thurber v. Smith*, 25 R. I. 60, 54 Atl. 790. See also *Larmor v. Jordan*, 56 Ill. 204; *Wardell v. Williams*, 62 Mich. 50, 28 N. W. 796, 4 Am. St. Rep. 814, and cases in the following section.

⁵⁵ *Linn v. McLean*, 80 Ala. 360, 366.

an acceptance, or other communication.⁵⁶ Difficulties may arise where circumstances make it impracticable to notify the offeree of revocation. Thus, the offeree may have gone to a distance from the mails, or his address may be unknown. It is perhaps still open to question whether the law should cast the burden upon the offeror who has put forth an offer or should adopt a rule analogous to that adopted in case of public offers,⁵⁷ and hold the offer revoked if such an attempt is made to communicate a revocation in the same way that the original offer was communicated. Presumably, however, the burden would be thrown upon the offeror, unless the offeree purposely prevented communication.

§ 57. Indirect communication of revocation.

It is not yet perhaps fully settled whether an offer is revoked by knowledge on the part of an acceptor that the offeror is no longer willing to enter into such a contract as was proposed by his offer, when that knowledge comes not from the offeror himself or with his cognizance, but through other channels. It was held by the English Court of Appeal that knowledge on the part of an offeree that land which had been offered to him for sale had subsequently been sold to another, prevented him from making an effectual acceptance of the offer.⁵⁸ This case has been followed in the United States;⁵⁹ but has also been severely criticised.⁶⁰ Certainly there are

⁵⁶ See *infra*, § 89.

⁵⁷ See *infra*, § 59.

⁵⁸ *Dickinson v. Dodds*, 2 Ch. D. 463. Comments on this case in Henthorn *v. Fraser* [1892] 2 Ch. 27, indicate that the English court regards the knowledge of the offeree as the vital circumstance.

⁵⁹ *Coleman v. Applegarth*, 68 Md. 21, 11 Atl. 284, 6 Am. St. Rep. 417; *Watters v. Lincoln* (S. Dak.), 135 N. W. 712; *Frank v. Stratford-Handcock*, 13 Wyo. 37, 77 Pac. 134, 67 L. R. A. 571, 110 Am. St. Rep. 963. But *cp. Sherley v. Peehl*, 84 Wis. 46, 54 N. W. 267. In this case an offer to discount a note was made to the holder

and later the maker failed. The holder knowing of the failure accepted the offer, and was allowed to enforce a contract against the offeror. Also *Arentsen v. Moreland*, 122 Wis. 167, 99 N. W. 790, 65 L. R. A. 973, where knowledge that a vendor had contracted to sell the timber on certain land did not preclude the vendee from taking an option to buy the land, with the timber, accepting the option and, on refusal of the vendor to convey the timber, recovering damages for its value.

⁶⁰ Langdell, *Summary of Contracts*, § 181; Wald's *Pollock, Contracts* (3d. ed.), 32.

both theoretical and practical difficulties involved in any rule allowing an effective revocation to be made by any one but the offeror. In theory, as an offer must be made by an act of the offeror moving toward the offeree, and no statement by third persons is sufficient,⁶¹ so it would seem that an offer could only be withdrawn by a direct expression of volition on the part of the offeror to the person to whom he had previously made the offer. Though the expression is common especially in the earlier cases of "communication" or "notice" of revocation as if communication or notice were made of a revocation that had previously taken place, this use of language has descended from a time when mutual assent in contracts meant actual mutual assent, not that expressed by one party to the other. At the present day it is more accurate to say that communication is essential to the existence of revocation, indeed is the revocation. If so, it seems that the act of the offeror is as essential to withdraw his offer as to create it, and that the only way he can make his act effective is by communication from himself or his agent.⁶² From a practical standpoint, also, there is difficulty in deciding when knowledge received in a roundabout way through third persons indicates with sufficient clearness that the offeror is no longer disposed to keep his offer good. Must the offeree give credit at his peril to haphazard information, or what degree of certainty or probability must exist in order to make the words of an outsider effectual to revoke the offer? Nevertheless in view of the uniformity of the few decisions directly in point, and of the manifest lack of equity in an attempt to enforce a contract which the acceptor knew at the time of his acceptance was contrary to the wishes of the offeror, it is likely that the English case on the point will be followed.

§ 58. Revocation of offer contemplating a series of performances.

Most offers contemplate a single acceptance by the offeree by an indivisible act or by an indivisible promise or set of promises. It is possible, however, to make a divisible offer requesting a series of acts or promises to be given from time

⁶¹ See *supra*, § 23.

⁶² See *supra*, § 23.

to time, and agreeing in return to give a series of performances each of which is to be set off against a corresponding act or promise of the offeree. If an offer is of this divisible character it may be revoked not only before any acceptance but also as to any portion of the offer still unaccepted even after acceptance of some of the series of transactions proposed by the offer.⁶³ It is often a difficult question of construction whether an offer contemplates a series of contracts, as thus suggested or requests a single immediate promise to perform the whole series of acts. If the latter construction is the true one an acceptance creates an immediate bilateral contract which binds both parties irrevocably to perform all the acts.⁶⁴

§ 59. Revocation of general offer.

The requirement that a revocation must be received in order to be effectual creates difficulty where an offer has been extended to a large and indefinite class of persons, as an offer

⁹²₂₁₀ "In *Offord v. Davies*, 12 C. B. (N. S.) 748, an offer was made to guarantee such of B's bills of exchange as the plaintiff might discount within twelve months to the extent of £300. Some discounts took place, but subsequently, within the year, the offer was revoked. The court held the offer not bound by discounts made after the revocation. The same result was reached in *Grob v. Gross*, 83 N. J. L. 430, 84 Atl. 1064, where the promise was to guarantee payment for goods sold to another to any amount up to \$500. In *Great Northern Ry. Co. v. Witham*, L. R. 9 C. P. 16, there was an offer to supply the railway company with such quantities of certain specified goods as it might order, from time to time, at certain fixed prices. It was held that the defendant was bound to furnish goods which had been ordered by the railway in conformity with the offer, but Brett, J., said: "I agree that this judgment does not decide the question whether the defendant might have absolved himself from further performance of the con-

tract by giving notice." See also *Buick Motor Co. v. Thompson*, 138 Ga. 252, 75 S. E. 354, 356; *Picker v. Fitzelle*, 60 N. Y. App. D. 451, 69 N. Y. S. 902; *White v. Allen-Kingston & Co.*, 69 N. Y. Misc. 627, 126 N. Y. Supp. 150; *Butchers' Advocate Co. v. Berkof*, 94 N. Y. Misc. 299, 158 N. Y. S. 160 (*cf.* *North Side News Co. v. Cypres*, 75 N. Y. Misc. 129, 132 N. Y. S. 806; *Post v. Frank*, 75 N. Y. Misc. 130, 132 N. Y. S. 807); *American Steel & Wire Co. v. Copeland*, 159 N. C. 556, 75 S. E. 1002.

⁶⁴ *American Publishing Co. v. Walker*, 87 Mo. App. 503. In this case an offer for certain publishing matter weekly, for the term of one year, at a fixed price per week, was held to create a single contract for the year incapable of revocation after acceptance. Similar cases are *Imperial Curtain Co. v. Strauss*, 135 N. Y. S. 577; *Post v. Frank*, 132 N. Y. Supp. 807, 75 N. Y. Misc. 130. See also cases of divisible contracts, *infra*, §§ 861, *et seq.*

of reward issued by advertisement to the public. In such a case it is obviously impossible to communicate a change of purpose to every one who may have seen the original offer. The only alternatives possible for the law are either to admit that such an offer is irrevocable as to any person who is not actually notified of the revocation, or to treat a reasonable effort to bring notice home to the public by publishing the revocation as fully, and so far as possible in the same way, as the original offer as an effectual revocation. The Supreme Court of the United States has chosen the latter alternative.⁶⁵ But where the reward for the apprehension of a murderer was offered at the place where the shooting occurred and at a railroad station, an offer of a reward in different terms at another station did not constitute a revocation of the first offer.⁶⁶

§ 60. Revocation of offers for unilateral contracts.

It seems impossible on theory successfully to question the power of one who offers to enter into a unilateral contract to withdraw his offer at any time until performance has been completed by the offeree, though obvious injustice may arise in such a case. For instance, if A offers one hundred dollars if B will complete a piece of work, and B sets about the work and nearly finishes it, it is a hardship upon B if while the work is still incomplete, A may revoke his offer. Yet any other result involves either a violation of recognized principles of contract, or the invention of new ones. To say that the beginning of work by B amounts to an assent binding both A and B to the performance and payment is to change the hypothesis that A offered, not to make a bilateral contract, but a unilateral one, and in effect to deny the right of an offeror to dictate the terms of his offer. Doubtless wherever possible, as matter of construction, a court would and should construe an offer as contemplating a bilateral rather than a unilateral contract; since in a bilateral contract both parties are protected from a period prior to the beginning of performance-

⁶⁵ *Shuey v. United States*, 92 U. S. 73, 23 L. Ed. 697. See also *Sullivan v. Phillips*, 178 Ind. 164, 98 N. E. 868.

⁶⁶ *Hoggard v. Dickerson*, 180 Mo. App. 70, 165 S. W. 1135.

on either side.⁶⁷ But the case supposed is one where the offer is so clearly for the formation of a unilateral contract, that no other reasonable construction is possible than that the offeror demands as an exchange for his promise, not a promise but a completed act. After the offeree has begun to perform under such an offer he may unquestionably stop performance halfway if he concludes that after all he does not care to enter into the contract, and if the offeror also may not revoke at that time he is bound by a promise for which he has not received, and may never receive, the consideration requested, since the whole transaction is still optional with the offeree.

The suggestion has been made to avoid the hardship of denying relief to the offeree that if the consideration requested in an offer of a unilateral contract, will necessarily take time for its performance, the offer should be regarded as containing by implication a subordinate offer to hold the main offer open for a reasonable time in consideration of the beginning of performance of the offeree.⁶⁸ This analysis finds some support in the English cases which hold that a collateral contract is formed by attending an auction sale,⁶⁹ but is open to the criticism made of those cases; namely, that the necessary assumptions of fact are artificial. Moreover, if the doctrine is adopted, there seems no reason why the principle should not cover other cases. If beginning performance of an act requested, indicates assent to and constitutes the consideration for a contract to hold the offer open, it would seem that making preparation and taking trouble and expense preliminary to any requested performance would likewise create a similar contract, yet the contention could certainly not be maintained as a general principle.⁷⁰ Indeed, if a col-

⁶⁷ See *Lennox v. Murphy*, 171 Mass. 370, 50 N. E. 644; *Lascelles v. Clark*, 204 Mass. 362, 90 N. E. 875; *Post v. Frank*, 132 N. Y. Supp. 807, 75 N. Y. Misc. 130; *Senter v. Senter*, 87 Ohio, 377, 101 N. E. 272. So a promise to convey the plaintiff a piece of land if he married the promisor's daughter, and was "good and kind" to her was interpreted as entitling the promisee on his marriage to a deed, which should

contain a condition subsequent of goodness and kindness. *Winslow v. White*, 163 N. E. 29, 79 S. E. 258.

⁶⁸ See an article in 27 Harv. L. Rev. 644, by Professor D. O. McGovney.

⁶⁹ See *supra*, § 30.

⁷⁰ In *Stensgaard v. Smith*, 43 Minn. 11, 44 N. W. 669, 19 Am. St. Rep. 205, it appeared that the defendant had promised the plaintiff the exclusive agency for three months of certain

lateral contract such as is suggested is to be imported into the law, there seems logically little reason to exclude any offer from the same construction. If beginning performance is requested as the consideration of a collateral contract in the case of an offer for a unilateral contract, taking the offer under advisement is equally requested in an offer for a bilateral contract and should equally make it necessary for the offerer to hold his offer open for a reasonable time. This may well be desirable, but would better be reached as it has been in many European countries⁷¹ by statute.

It is urged in support of the suggestion of a collateral contract, that the parties cannot contemplate that the offer may be revoked after part performance. Doubtless this is true. It is equally true that parties do not generally understand that when an offer is given, which is expressed to be open for a stated time, that it may nevertheless be revoked before that time. In other words, parties do not altogether understand the law governing the formation of contracts, but mutual assent to rules of law is not necessary, though it is certainly true that a rule of law which is opposed to the understanding of business men is undesirable unless there are strong reasons of policy in its favor.⁷²

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§ 60a. Attempted solutions of the difficulty.

The same problem exists in the civil law and has been met in modern codes by enacting that the offer is irrevocable until the offeree has had a reasonable time for performance.⁷³

property, and a commission for making a sale. The plaintiff endeavored to make such a sale, published advertisements and solicited purchasers, but, about a month after making the offer, the defendant himself sold the property. It was held that the plaintiff had no cause of action. The facts were similar in *Kolb v. Bennett Land Co.*, 74 Miss. 567, 21 So. 233; *Taylor v. Barbour*, 90 Miss. 888, 44 So. 988, 122 Am. St. Rep. 328.

⁷¹ Valéry, *Contrats par Correspondance*, p. 167.

⁷² See further a discussion of the problem by Professor Corbin, 26 Yale L. J. at pp. 194-196.

⁷³ See Valéry, *Contrats par Correspondance*, § 172. In the absence of such legislation the weight of opinion in the civil law is that an offer may be revoked, *id.*, § 170, though it is to be observed that the fundamental reason why an offer is revocable in our law—namely, because no consideration has been given for it, and promises without consideration are not binding, does not exist in the Civil Law.

This solution seems desirable but hardly attainable without a statute. It has also been suggested in the Civil Law that the offeror should be held liable in tort for inducing the offeree to begin performance and then withdrawing the offer.⁷⁴ There seems little warrant for such a suggestion in our law. No doubt in so far as the offeror has accepted a benefit from the offeree's part performance, he would be liable on principles of quasi-contract for its value.⁷⁵ Frequently, however, part performance by the offeree will not enure to the offeror's benefit, and unless the defendant has violated a legal duty the right to recover on a *quantum meruit* based on a quasi-contractual obligation is based not on the detriment which the plaintiff may have suffered, but upon the benefit which the defendant has received.⁷⁶ The remedy previously suggested of holding the offeror liable in tort for inducing the offeree to begin performance and then withdrawing the offer, seems therefore, if it were permissible, more complete and satisfactory.⁷⁷ As a matter of positive decision the right of

⁷⁴ This theory of the offeror's liability was first carefully elaborated by von Ihering, *Jahrbücher für Dogmatik*, IV. p. 1 *seq.*, under the designation of *culpa in contrahendo*. For the varying views of other writers, see Windecheid, *Lehrbuch des Pandektenrechts*, II, § 307, n. 5 (8th ed.); Valéry, § 185; Swiss Code of Obligations, Art. 8.

⁷⁵ In *Blain v. Pacific Express Co.*, 69 Tex. 74, 78, 6 S. W. 679. The court said, *obiter* in regard to partial performance of an offer of reward for the arrest of two persons, "No facts are stated, such as that the plaintiffs were prevented from arresting both the persons for whom a reward was offered by the fault or fraud of the defendant, from which the law would raise a new contract and give a remedy on a *quantum meruit*." And in *Zwolanek v. Baker Mfg. Co.*, 150 Wis. 517, 137 N. W. 769, 44 L. R. A. (N. S.), 1214 the court said, speaking of such an offeree, "he is entitled to the whole

reward, or at least to compensation on *quantum meruit*."

⁷⁶ *Infra*, § 1478, *et seq.*

⁷⁷ The case of *G. Ober & Sons Co. v. Katzenstein*, 160 N. C. 439, 76 S. E. 476, lends some support to one who claims such a remedy. The court there held that though an agreement for the sale of fertilizer gave the seller the option to cancel the order, the seller was liable on cancelling it for damages sustained by the buyer before exercise of the option, such as the expense of preparing the land for the crops, which was useless because of lack of fertilizer, and the loss of profits on such part thereof as the buyer before exercise of the option, had contracted to resell, unless the buyer could have obtained, and his customers would have taken, any other brand. An agreement with an absolute right reserved to either party to cancel it, is not a contract. See *supra*, § 45. It seems in effect an offer for a unilateral contract. See also *Welch v. Lawson*, 32 Miss. 170.

the offeror to revoke his offer even after part performance by the offeree has the support of a few American cases,⁷⁸ but in view of the practical hardship of the situation it is by no means improbable that the theory of a collateral contract will find favor.⁷⁹ In most of the few cases where the question has arisen, the offeror has been held bound, but it is not clear on what theory. Sometimes at least the court seems to have thought it possible to turn the transaction into a bilateral contract by a beginning of performance on the part of the offeree. What obligations the offeree assumes by beginning to perform is, however, not always considered.⁸⁰ The death

⁷⁸ *Biggers v. Owen*, 79 Ga. 658, 5 S. E. 193; *Lascelles v. Clark*, 204 Mass. 362, 372, 90 N. E. 875; *Smith v. Cauthen*, 98 Miss. 746, 54 So. 844. See also *Stensgaard v. Smith*, 43 Minn. 11, 44 N. W. 669, 19 Am. St. Rep. 205; *Cook v. Casler*, 87 N. Y. App. D. 8, 83 N. Y. Supp. 1045; *White v. Allen, Kingston & Co.*, 69 N. Y. Misc. 627, 126 N. Y. Supp. 150; *Butchers' Advocate Co. v. Berkof*, 94 N. Y. Misc. 299, 158 N. Y. S. 160 (*cf.* *North Side News Co. v. Cypres*, 75 N. Y. Misc. 129, 132 N. Y. S. 806, *Post v. Frank*, 75 N. Y. Misc. 130, 132 N. Y. S. 807).

⁷⁹ In *Brackenbury v. Hodgkin*, 116 Me. 399, 102 Atl. 106, the court admitted that "the offer was the basis, not of a bilateral contract requiring a reciprocal promise, a promise for a promise, but of a unilateral contract requiring an act for a promise," yet held that in spite of repudiation by the promisor after part performance, there was "a completed and valid contract" because the plaintiffs had in acceptance of the offer moved from Missouri to Maine, entered upon the performance of the specified acts and continued performance as long as they were permitted to do so.

⁸⁰ The only reference to the matter in the English books is in *Offord v. Davies*, 12 C. B. (N. S.) 748, where in the course of the argument Williams, J., asked: "Suppose I guarantee the

price of a carriage to be built for a third party who, before the carriage is finished, and consequently before I am bound to pay for it, becomes insolvent, may I recall my guaranty?" The counsel replied "Not after the coach builder has commenced the carriage," and Erle, C. J., added; "Before it ripens into a contract, either party may withdraw, and so put an end to the matter. But the moment the coach builder has prepared the materials he would probably be found by the jury to have contracted." A somewhat similar suggestion is made by the Illinois Supreme Court in *Plumb v. Campbell*, 129 Ill. 101, 107, 18 N. E. 790. The court says that the appellant (the offeror) could be bound in three ways: "First by appellee engaging within a reasonable time to perform the contract on his part; second, by beginning such performance in a way which should bind him to complete it, and, third, by actual performance." See also *A. B. Dick Co. v. Fuller*, 213 Fed. 98; *Blumenthal v. Goodall*, 89 Cal. 251, 26 Pac. 906; *Los Angeles Traction Co. v. Wilshire*, 135 Cal. 654, 658, 67 Pac. 1086; *Miller v. Moffat*, 153 Ill. App. 1; *Vigo Agricultural Soc. v. Brumfiel*, 102 Ind. 146, 1 N. E. 382, 52 Am. Rep. 657; *Loyd Mercantile Co. v. Long*, 123 La. 777, 49 So. 521. In *Zwolaneck v. Baker Mfg. Co.*, 150 Wis. 517, 137 N. W. 769, 773, the court said, "It is true, as a

of either party after part performance but before full performance by the offeree under an offer for a unilateral contract, since death effects a revocation of an offer which has not yet ripened into a contract,⁸¹ presents the same problem.⁸²

§ 60b. Whether refusal of tendered performance prevents unilateral contract.

An analogous difficulty concerning revocation of offers for unilateral contracts exists where the act requested by the offer is one which can be performed only with the cooperation of the offeror as by accepting goods tendered. It may be supposed that the offeror refuses to give such cooperation when tender of performance is made to him. On theory it seems impossible to say that a contract has been formed in such a case and yet the hardship ensuing may be great. There can be no doubt that where the offer contemplates either a unilateral or bilateral contract, the offeror may revoke up to the very instant that acceptance is made. The offeror may see the approach of the offeree and know that an acceptance is contemplated. If the offeror can say "I revoke" before the offeree accepts, however brief the interval of time between the two acts, there is no escape from the conclusion that the offer is terminated. Where, however, the offeree actually tenders performance while the offer is still open, the same result though no less clear in theory, seems harsher. Doubtless the difficulty would generally be avoided in practice by dealing with the offer as if it were for a bilateral contract

general proposition, that a party making an offer of a reward may withdraw it before it is accepted. But persons offering rewards must be held to the exercise of good faith, and cannot arbitrarily withdraw their offers, for the purpose of defeating payment, when to do so would result in the perpetration of a fraud upon those who, in good faith, attempted to perform the service for which the reward was offered. *First Natl. Bank v. Hart*, 55 Ill. 62." See also *Ashley on Contracts* § 30 and 28 L. Qu. Rev. 101, and *cf.* cases of subscriptions held binding as soon as

expenses have been incurred. See *infra*, § 116.

⁸¹ See *infra*, § 62.

⁸² In *Ridlon v. Davis*, 51 Vt. 457, the performance by the plaintiff was in part rendered after the offeror's death, as was indeed the offeror's expectation. The court enforced the promise, but it does not clearly appear that a unilateral contract was requested, and no recognition is given of the importance of distinguishing in this matter between a unilateral and a bilateral agreement.

contemplating a promise by the offeree of immediate performance, which being tendered gives a right of action on the contract. This method of reasoning, however, evades rather than meets the problem for it seems undeniable that an offeror may propose a unilateral contract which shall be preceded by no bilateral agreement, and shall require as consideration not the mere tender of an act, but actual performance, which can only be accomplished with the coöperation of the offeror.⁸³ If it be conceded that no bilateral contract existed and the offeree was under no obligation to perform,⁸⁴ does the tender create such an obligation? If not what is the nature of the contract? The offeror has received no consideration, and the fact that this is his own fault, seems insufficient to supply this requisite.

§ 61. When offers are irrevocable.

Every offer, as has already been seen, is a promise.⁸⁵ It follows that if a seal is put upon an offer, it becomes a binding promise.⁸⁶ The promise is, of course, conditional and until the performance of the condition is made or tendered, there will be no liability upon the promise, but in this respect the promise does not differ from any conditional promise in a contract. So, if consideration is paid for an offer, though no seal is attached, the offer is a contract. Such contracts are generally called options.⁸⁷

⁸³ A typical case of this sort is an offer to buy or sell for cash. In *Ide v. Leiser*, 10 Mont. 5, 24 Pac. 695, 24 Amer. St. Rep. 17, the plaintiffs pleading stated an offer by the defendant to sell land for \$1000. The plaintiff alleged tender within the time limited by the offer and a refusal. The court without discussing the point suggested, and assuming apparently that a bilateral contract was formed (and it is not perhaps clear that the offer might not properly have been so construed), held the defendant liable. So *McKenzie v. Stewart*, 196 Ala. 241, 72 So. 109; *Fisk v. Batterson*, 165 N. Y. App. Div. 952, 150 N. Y. S. 242, where the offers were for the purchase of stock.

⁸⁴ As it was in *McKenzie v. Stewart*, 196 Ala. 241, 72 So. 109.

⁸⁵ See *supra*, § 25.

⁸⁶ *O'Brien v. Boland*, 166 Mass. 481, 44 N. E. 602; *Thomason v. Bescher*, 176 N. Car. 622, 97 S. E. 654, 2 A. L. R. 626, and note 2 A. L. R. 631; *Gaar Scott Co. v. Ottoson*, 21 Manitoba L. R. 462, 19 West. L. R. 472. See also *infra*, § 217.

⁸⁷ "In the case of *Black v. Maddox*, 104 Ga. 157, 30 S. E. 723, an option is defined to be 'the obligation by which one binds himself to sell and leaves it discretionary with the other party to buy . . . which is simply a contract by which the owner of property agrees with another person that he shall have

Instead of making the promise contained in an offer directly enforceable by means of a seal or consideration, not infrequently a collateral promise is made by the offerer that he will leave the offer open for a specified time, and this collateral promise is supported by seal or consideration. It has been suggested that in such cases the offeror has the power to revoke his offer, thereby rendering himself liable in damages, not on the main contract which he offered to enter into but on the subsidiary promise to leave his offer open;³⁸ but since the agreement on the part of the offeree that his offer shall remain open can readily be enforced, and the intention of the parties carried out by simply regarding the offer as irrevocable during the agreed period, it is hard to find a good reason why the law should not thus specifically enforce the contract; and, in fact, without regard to whether the offeror expressly promised for consideration to leave his offer open for a fixed period by a collateral promise, or simply made the main promise in the offer though conditional upon some future performance binding by present consideration, the courts in both cases have held the offer irrevocable.³⁹

the right to buy the property at a fixed price within a certain time.' See also *Lits v. Goosling*, 93 Ky. 185, 19 S. W. 527, 21 L. R. A. 127; *Trogdon v. Williams*, 144 N. C. 192, 56 S. E. 865, 10 L. R. A. (N. S.) 867." *Swift v. Erwin*, 104 Ark. 459, 148 S. W. 267, 269. It is, of course, equally possible for the discretion to be given to the seller, while the buyer is under an absolute obligation.

■ *Langdell, Summary*, § 178; *Ashley on Contracts*, § 13.

■ *Mathews Slate Co. v. New Empire Slate Co.*, 122 Fed. 972; *Johnston v. Trippe*, 33 Fed. 530; *Ross v. Parks*, 93 Ala. 153, 8 So. 368, 11 L. R. A. 148; *Walter G. Reese Co. v. House*, 162 Cal. 740, 124 Pac. 442; *Marsh v. Lott*, 8 Cal. App. 384, 97 Pac. 163; *Simpson v. Sanders*, 130 Ga. 265, 60 S. E. 541; *Hayes v. O'Brien*, 149 Ill. 403, 37 N. E. 73, 23 L. R. A. 555; *Seyferth v. Groves &c. R. Co.*, 217 Ill. 483, 75

N. E. 522; *Adams v. Peabody Coal Co.*, 230 Ill. 469, 82 N. E. 645; *Souffrain v. MacDonald*, 27 Ind. 269; *Herrman v. Babcock*, 103 Ind. 461, 3 N. E. 142; *Thompson v. Reid*, 31 Ky. L. Rep. 176, 101 S. W. 964; *Gustin v. Union School District*, 94 Mich. 502, 54 N. W. 156, 34 Am. St. Rep. 361; *Cameron v. Shumway*, 149 Mich. 634, 113 N. W. 287; *Smith v. Cauthen*, 98 Miss. 746, 54 So. 844; *Hawralty v. Warren*, 18 N. J. Eq. 124, 90 Am. Dec. 613; *New England Box Co. v. Prentiss*, 75 N. H. 246, 72 Atl. 826; *Fuller v. Artman*, 69 Hun, 546, 24 N. Y. Supp. 13; *Winders v. Kenan*, 161 N. C. 628, 77 S. E. 687; *House v. Jackson*, 24 Ore. 89, 32 Pac. 1027; *Bradford v. Foster*, 87 Tenn. 4, 9 S. W. 195; *Walker v. Bamberger*, 17 Utah, 239, 54 Pac. 108; *Cummins v. Beavers*, 103 Va. 230, 48 S. E. 891, 106 Am. St. Rep. 881; *Baker v. Shaw*, 68 Wash. 99, 122 Pac. 611; *Weaver v. Burr*, 31 W. Va. 736, 743, 8 S. E. 743,

And so in jurisdictions where a seal still has its early significance if the offer was under seal.⁹⁰

Most of the cases cited on the point relate to options for the sale of land, and the suggestion is possible that as the contract proposed by the offer in such a case would be specifically enforceable because it relates to land the subsidiary contract to keep the offer open might also be specifically enforced, without admitting that such subsidiary agreements are spe-

3 L. R. A. 94; *Tibbs v. Zirkle*, 55 W. Va. 49, 46 S. E. 701, 104 Am. St. Rep. 977; *Rease v. Kittle*, 56 W. Va. 269, 49 S. E. 150; *Pyle v. Henderson*, 65 W. Va. 39, 63 S. E. 762; *Peterson v. Chase*, 115 Wis. 239, 91 N. W. 687; *Frank v. Stratford-Handcock*, 13 Wyo. 37, 77 Pac. 134, 67 L. R. A. 571, 119 Am. St. Rep. 963; *Mueller v. Nortman*, 116 Wis. 468, 93 N. W. 538. In *Mier v. Hadden*, 148 Mich. 488, 495, 111 N. W. 1040, 118 Am. St. Rep. 586; *Ostrander, J.*, said, "While it may seem at first blush a legal paradox that a contract for the sale of land, mutual and enforceable, can be made when at the time it is claimed to have been made one party to it is openly protesting that he will make no such contract, and while reasons may be advanced to support the proposition that the option holder should be in such a case remitted to an action for damages for refusal to hold the offer open for the stipulated time, there is reason and precedent for holding that the offer to sell, if paid for, may not be withdrawn during the stipulated time, being, in law, a continuing offer to sell." Though such an option to buy land is a contract, it should be observed it is a contract to buy only if the buyer chooses to do so. Accordingly it will not make the buyer in any sense the equitable owner of the property until he exercises his right to buy. *Rease v. Kittle*, 56 W. Va. 269, 274, 278, 49 S. E. 150. See *infra*, § 936, also *Barton v. Thaw*, 246 Pa. 348, 92 Atl. 312. Equity will, however,

specifically enforce his right to become owner on acceptance of the option, not only against the original vendor who gave the option, but also against one who purchases the land from the latter with notice of the option. *Tibbs v. Zirkle*, 55 W. Va. 49, 46 S. E. 701, 104 Am. St. Rep. 977; *Frank v. Stratford-Handcock*, 13 Wyo. 37, 77 Pac. 134, 67 L. R. A. 571, 119 Am. St. Rep. 963, and equity will also enjoin a proposed sale by the offeror during the time when he had contracted to hold the offer open. *Manchester Ship Canal Co. v. Manchester Racecourse Co.*, [1901] 2 Ch. D. 37.

⁹⁰ *Xenos v. Wickham*, L. R., 2 H. L. 296; *Willard v. Taylor*, 8 Wall. 557, 19 L. Ed. 501; *Hayes v. O'Brien*, 149 Ill. 403, 411, 37 N. E. 73, 23 L. R. A. 555; *Adams v. Peabody Coal Co.*, 230 Ill. 469, 82 N. E. 645; *Mansfield v. Hodgdon*, 147 Mass. 304, 307, 17 N. E. 544; *O'Brien v. Boland*, 166 Mass. 481, 44 N. E. 602; *McMillan v. Ames*, 33 Minn. 257, 22 N. W. 612; *Barnes v. Rea*, 219 Pa. 287, 68 Atl. 839; *Watkins v. Robertson*, 105 Va. 269, 54 S. E. 33. But see *Cortelyou v. Barnsdall*, 236 Ill. 138, 86 N. E. 200; *Averill v. Boston*, 193 Mass. 488, 80 N. E. 583; *Storch v. Duhnke*, 76 Minn. 521, 79 N. W. 533. In *Cortelyou v. Barnsdall* and *Storch v. Duhnke*, the court assumed that because a voluntary covenant will not be specifically enforced (see *infra*, § 1418) an offer under seal might be revoked, but this assumption is unwarranted.

cifically enforceable when the offer is of a different character. But none of the cases take this distinction and there is authority for the same rule in the case of an offer to sell chattel property.⁹¹ An offer or option made binding by consideration or a seal differs only in this respect from other conditional contracts:—In most contracts, even conditional contracts, it is the giving of the consideration, if the contract is unilateral, or the performance of the promise given as consideration if the contract is bilateral, which is the real price or equivalent of the performance of the promise by the other side. The performance of conditions, however essential to the right to enforce performance from the opposite party, is not itself the performance requested in exchange by that party. But in an option performance of the condition is also giving the requested price for the performance of the other side to the contract.

An attempt is sometimes made to make offers binding by some consideration not beneficial to the offeror, but involving a detriment to the offeree in investigating or considering the terms of the offer. In an early case⁹² the plaintiff stated as the consideration for a promise by the defendant that the offeree "agreed to keep in consideration the expediency" of accepting the offer. The court stated that in the view taken by them of the case "no importance is attached to the consideration set out" in the plaintiff's pleading; and presumably the mere mental reflection upon the desirability of accepting an offer would be insufficient;⁹³ but a promise to keep an offer open in consideration of an agreement to examine the land, which is the subject-matter of the offer, and to investigate the title, is sufficiently supported.⁹⁴ The mere fact, however, that

⁹¹ *Simpson v. Sanders*, 130 Ga. 265, 60 S. E. 541. See also *Walker v. Bamberger*, 17 Utah, 239, 54 Pac. 108.

⁹² *Boston & Maine Railroad v. Bartlett*, 3 Cush. 224.

⁹³ In *Sooy v. Winter*, 188 Mo. App. 150, 175 S. W. 132, 134, the court said: "Though both Wharton (section 13) and Story, in his work on Sales (section 127), and on Contracts (section 496), materially qualify this rule [of the revocability of an offer], by an ar-

gument to the effect that the proposal or offer promised to be kept open for a certain or a reasonable time, the other party agreeing to consider it, itself shows a consideration. The suggestions and illustrations of these learned authors in support of their criticism of the rule are not looked upon with favor. Benjamin on Sales, § 41; *Weaver v. Burr*, 31 W. Va. 736, 755-758, 8 S. E. 743, 3 L. R. A. 94."

⁹⁴ *Weaver v. Burr*, 31 W. Va. 736,

the offeree incurs detriment by going to expense or trouble in investigating the offer is not sufficient to make it irrevocable since the detriment incurred was not requested by the offeror in return for a promise on his part.⁵⁵ An attempt is sometimes made to prevent the revocation of an offer by requiring the offeror to deposit money or a check at the time of making the offer. It is evident that this cannot make the offer irrevocable since the offeror receives no consideration, and the offeree parts with nothing. But if the offeror withdraws his offer, and the understanding of the parties has been made clear that the deposit is to be forfeited if the offer is revoked, the agreed consequence would follow the revocation.⁵⁶ Most of the decisions, however, in regard to this matter relate to public contracts. Where tenders are made in conformity with certain statutory requirements, such statutes may perfectly well make tenders or offers irrevocable, and equally clearly may subject the deposit or certified check required by the law to be forfeited.⁵⁷

§ 62. Termination of offers by death or insanity.

If the formation of a contract required mutual mental assent of the parties, and offer and acceptance were merely evidence of such assent, it would be obviously impossible that a contract should be formed where either party to the transaction died before this assent was obtained. That such assent was at least formerly thought necessary seems probable, and as to death at least this theory still maintains itself.

8 S. E. 743, 3 L. R. A. 94. See also *Comstock v. North*, 88 Miss. 754, 768, 41 So. 374.

⁵⁵ *Comstock v. North*, 88 Miss. 754, 41 So. 374; *Brown Bros. Lumber Co. v. Preston Mill Co.*, 83 Wash. 648, 145 Pac. 964. See also cases on Revocation, *supra*, §§ 55-60, *passim*.

⁵⁶ If instead of money an uncertified check were deposited, the offeror need, however, forfeit nothing by revoking the offer, since he could stop payment of the check, and his own promise as drawer of the check being without good consideration, would not be binding. If the check were certified, how-

ever, payment of it could not be stopped.

⁵⁷ See *Turner v. Fremont*, 170 Fed. 259, 95 C. C. A. 455; *Robinson v. Board of Education*, 98 Ill. App. 100; *Morgan Park v. Gahan*, 136 Ill. 515, 26 N. E. 1085; *Wheaton Building, etc., Co. v. Boston*, 204 Mass. 218, 90 N. E. 598; *Davin v. Syracuse*, 69 N. Y. Misc. 285, 126 N. Y. Supp. 1002. Even though the bid was made under a mistake the result is the same. *Baltimore v. Robinson Construction Co.*, 123 Md. 660, 91 Atl. 682. As to the right to maintain a bill for reformation of the bid see *infra*, §§ 1577-1579.

Accordingly, it is generally held that the death of the offeror,⁸⁸ or offeree⁸⁹ terminates the offer. But in most of the cases so holding, however, it was not important to determine whether lack of notice of the death would make a difference.

On principle under the modern view of the formation of contracts which makes the expression of mutual assent the determining factor, notice of the death should be required to end the offer, since until notice, the apparent effect of the offer continues. Probably a statute would be necessary to bring this result about.¹

Insanity of either party would presumably, a century ago, have been treated in the same way as death; but since the middle of the nineteenth century there has been a growing

⁸⁸ *Dickinson v. Dodds*, 2 Ch. D. 463, 475; *The Palo Alto*, 2 Ware, 343, 359; *Paine v. Mutual Life Insurance Co.*, 51 Fed. 689, 2 C. C. A. 459; *Grand Lodge v. Farnham*, 70 Cal. 158, 11 Pac. 592; *Pratt v. Baptist Soc.*, 93 Ill. 475, 34 Am. Rep. 187; *Beach v. First M. E. Church*, 96 Ill. 177; *Aitken v. Lang's Adm.*, 106 Ky. 652, 51 S. W. 154, 90 Am. St. Rep. 263; *Busher v. New York L. I. Co.*, 72 N. H. 551, 58 Atl. 41; *Twenty-third St. Church v. Cornell*, 117 N. Y. 601, 23 N. E. 177, 6 L. R. A. 807; *Wallace v. Townsend*, 43 Ohio St. 537, 3 N. E. 601; *Phipps v. Jones*, 20 Pa. 260, 59 Am. Dec. 708; *Helfenstein's Est.*, 77 Pa. 328, 18 Am. Rep. 449; *Foust v. Board of Publication*, 8 Lea, 552. See also *Jordan v. Dobbins*, 122 Mass. 168, 23 Am. Rep. 305; *Browne v. McDonald*, 129 Mass. 66. This rule is the same in the civil law. Valéry, *Contrats par Correspondance*, § 204; Windscheid, *Pandektenrecht*, § 307 (2); *The Bürgerliches Gesetzbuch*, however, has changed the rule in Germany. It provides, § 153, "A contract is not prevented from coming into existence by the death or incapacity of the offeror before acceptance, unless the offeror has expressed a contrary intention."

⁸⁹ *In re Cheshire Banking Co.*, 32 Ch.

D. 301; *Sutherland v. Parkins*, 75 Ill. 338; *Mactier v. Frith*, 6 Wend. 103, 21 Am. Dec. 262; *Newton v. Newton*, 11 R. I. 390, 23 Am. Dec. 476.

¹ Notice was held unnecessary in *Aitken v. Lang's Adm.*, 106 Ky. 652, 51 S. W. 154; *Illinois Roofing, etc., Co. v. Gorton*, 19 Pa. Co. Ct. 124; *Wallace v. Townsend*, 43 Oh. St. 537, 3 N. E. 601, 54 Am. Rep. 829; *Michigan State Bank v. Leavenworth Estate*, 28 Vt. 209. See also cases cited in previous notes, in this section, and in regard to agents, *infra*, § 279. But in *Bradbury v. Morgan*, 1 H. & C. 249, 250, 255, Bramwell, B., said (the words, however, not being necessary to the decision of the case): "If the guarantee had been in these terms:—'I request you to deliver to A, to-morrow morning goods of the value of 50l., and in consideration of your so doing I will pay you,' and before the morning the guarantor died, but the goods were duly delivered; I can see no reason why the personal representative of the guarantor should not be liable." And see *Garrett v. Trabue, Davis & Co.*, 82 Ala. 227, 3 So. 149; *Davis v. Davis*, 93 Ala. 173, 9 So. 736, where an agent's authority was held not revoked until after notice of his principal's death.

recognition of the capacity of insane persons to make contracts, at least under some circumstances,² based on the apparent effect of the insane person's conduct and on the ignorance of any impropriety in the transaction by the other party. There can be no doubt that known insanity on the part of either offeror or offeree would terminate an offer.³ But if the insanity were unknown the question would depend on whether the legal incapacity of an insane person to contract is complete.⁴

§ 63. Effect of delay in the delivery of the offer.

It occasionally happens that an offer is not delivered to the offeree until a later time than might have been expected by the offeror. The delay may even be so great that at the time the offer is first delivered to the offeree, more than a reasonable time for the acceptance of the offer would already have elapsed, had the offer been promptly delivered.⁵ If the offer contains on its face a limitation of the right to accept to a specific day or hour, it is clear that if this day or hour has passed no effectual acceptance can be made. The offer may, however, merely direct that the acceptance must be returned by return mail or in course of post; or, may contain no express provision as to the time of acceptance. In such a case, if the acceptance is dispatched by a return mail, or in course of post, or within a reasonable time after the receipt of the offer, a contract will be formed, provided the offeree was not aware of the delay in the delivery of the offer.⁵

If, however, the offeree knew, or ought to know that the

² See *infra*, § 254.

³ *Beach v. First M. E. Church*, 96 Ill. 177.

⁴ See *infra*, §§ 250-254.

⁵ *Adams v. Lindsell*, 1 B. & Ald. 681. In this case an offer was misdirected and, consequently, arrived a day or two later than if correctly addressed. The offer required an answer in course of post, and the offeree promptly, on receipt of the offer, accepted it. The court held that as the delay in the acceptance arose entirely from the mis-

take of the offeror, the acceptance must be taken as received in course of post. *Chesebrough v. Western Union Tel. Co.*, 135 N. Y. Supp. 583, 76 N. Y. Misc. 516. In this case a telegraphic offer was delayed, by fault of the telegraph company, for an hour. The consequence of this short delay was that when a telegraphic acceptance, promptly sent, was received by the offeror (a coffee broker) the coffee exchange had closed. It was held that a contract had been formed.

offer had been delayed, he should not be allowed to take advantage of the error, even though it was due to the negligence of the offeror; and if when the offer is received it is impossible to dispatch an acceptance within the time that would have been allowed had the offer been promptly received, no contract can be formed.⁶

⁶Though no case involving these precise facts have been found, the text is supported by decisions holding that in any case where an obvious mistake has been made in the terms of an offer, the acceptor will not be allowed to force a contract on the offeror which the acceptor knew was not intended. *Tam-*

plin v. James, 15 Ch. D. 215; *Germain Fruit Co. v. Western Union Tel. Co.*, 137 Cal. 598, 70 Pac. 658, 59 L. R. A. 575; *Cunningham Mfg. Co. v. Rotograph Co.*, 30 Dist. C. App. 524; *Central of Georgia Ry. Co. v. Gortatowsky*, 123 Ga. 366, 51 S. E. 469.

CHAPTER V

ACCEPTANCE OF OFFERS

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§ 64. Necessity of acceptance.

Acceptance of an offer is necessary to create a simple contract, since it takes two to make a bargain. An offer to contract is a proposal to exchange a promise or an act for a specified promise or act of another, and obviously requires the latter's assent in order that the transaction shall be complete. Moreover, the so-called acceptance of the offeree is frequently more than an acceptance, it is also a giving of the consideration requested by the offer by the same words or acts which indicate assent.

§ 65. Difference between acceptance in unilateral and bilateral contracts.

An offer for a unilateral contract generally requires an act on the part of the offeree to make a binding contract. This act is consideration for the promise contained in the offer and doing it with intent to accept without more will create a contract.¹ But an expression of mutual assent is necessary to the formation of simple contracts as well as consideration, and the fact that the same act must also be a manifestation of acceptance by the offeree is not always observed. On the other hand, an offer for a bilateral contract requires a promise from the offeree in order that there may be a binding contract. This promise may be inferred from any words of the

¹ See *infra*, § 68.

offeree indicating assent to the proposed bargain and, generally, must be found by interpretation of language which does not in terms state a promise. That is, the offeree will say or write "I accept your proposition," or words to that effect, instead of saying "I promise to do what you request."² So that in bilateral contracts the fact that the offeree's acceptance is also a promise, furnishing the requisite consideration, is not always observed.

§ 66. Intention to accept is unimportant except as expressed.

It is not infrequently said that the offeree must intend to accept. If formation of simple contracts depends upon actual intention, this is true. If, however, as seems to be the case, the formation of such contracts depends merely upon expressions of assent, it is not true that an intention to accept is of any importance except where the acts or words of the offeree are ambiguous.³ A manifestation of apparent intention to accept is, however, necessary and no contract can be made without it. Thus, though an offer states that the offeror will treat a failure to reply to his offer as an acceptance, no contract will ordinarily arise without an acceptance;⁴ though it seems that if the offeree's silence was intended as an acceptance, the offeror having specified that as a satisfactory means of indicating assent cannot complain of its insufficiency as a manifestation.⁵

§ 67. An intention not to accept may prevent the formation of a contract, where words or acts are ambiguous.

Though if an offeree of a bilateral contract should say "I accept the offer," he would not thereafter be allowed to say that his words were not an acceptance because he did not really intend to accept the offer,⁶ yet where an act is requested by the offeror and performed by the offeree, it may be shown that the performance of the act did not indicate assent to

² See *infra*, § 90.

³ See *supra*, § 20.

⁴ *Felthouse v. Bindley*, 11 C. B. (N. S.) 869; *Prescott v. Jones*, 69 N. H. 305, 41 Atl. 352.

⁵ *Cavanaugh v. D. W. Ranlet Co.*, 229 Mass. 366; 118 N. E. 650, and see *infra*, § 91a.

⁶ See *infra*, §§ 94, 95, 1535-1537.

the offer. Even though the offeree knew of the offer, he has a right, if he chooses to do the act requested and still refuse to accept the offer. Thus in case of an offer of reward for the finding of a watch, the finder may state that though he returns the watch, he does not accept the offer. And even though he makes no such express disclaimer, it is still true that the finding and return of the watch is an ambiguous act which may mean assent to the offer, or which may mean merely that the finder is sufficiently honest to return property which does not belong to him without desiring a reward. The act may mean either of these things. If in a particular case it indicates assent to the offer, there is a contract; but it may be evident, when all the facts are known, that the act did not mean assent to the offer. In that event there is no contract.⁷ And similarly if the language in an offer for a bilateral contract is ambiguous, it may be shown that what is apparently an acceptance in terms is not a real acceptance and no contract has been formed.⁸

37
 88/ § 68. Acceptance of unilateral contracts where the offeree is the promisee, needs no communication.

It is often said that "notice" of acceptance is necessary for the completion of a contract, but it is not true and never has been true as a general proposition that where an offeror requests an act in return for his promise, and the act is performed, that notice to the offeror of the performance is necessary to create a contract.⁹ The performance of the act

⁷ In *Hewitt v. Anderson*, 56 Cal. 476, 38 Am. Rep. 65, and in *Vitty v. Eley*, 51 N. Y. App. 44, 64 N. Y. Supp. 397, it was held that in order for the plaintiff to become entitled to a reward the act must have been done with a view to obtaining it, and where the circumstances clearly showed another exclusive motive no recovery was allowed, and the same point seems involved in decisions denying recovery of a reward to one who had done the act requested in ignorance of the offered reward. See *supra*, § 33. The contrary result has been reached in *Williams v. Carward-*

ine, 4 B. & Ad. 621; *Gibbons v. Proctor*, 64 L. T. (N. S.) 594, where the plaintiff knew of the offered reward and in several cases where the plaintiff did not know of it. See *supra*, § 33.

⁸ See *infra*, § 94.

⁹ *Brogden v. Metropolitan Ry. Co.*, 2 App. Cas. 666, 691; *Carlill v. Carbolic Smoke Co.*, [1892] 2 Q. B. 484, [1893] 1 Q. B. 256, p. 262, per Lindley, L. J., p. 269, per Bowen, L. J.; *Mathewson v. Fitch*, 22 Cal. 86; *Perkins v. Hadsell*, 50 Ill. 216; *Merchants Building Imp. Co. v. Chicago Exchange Building Co.*, 210 Ill. 26, 33, 71 N. E. 22; *Hanson v.*

requested furnishes consideration for the offerer's promise, and is also an overt manifestation of assent. The general rule is that if the offeror wishes notice he must make that a condition of his offer, otherwise he must inform himself whether the act requested has been done.¹⁰

21 § 69. Communication may be necessary to acceptance of unilateral contracts when the act requested is peculiarly within the knowledge of the promisee; guaranties.

Though ordinarily the offeror in a unilateral contract can find out for himself whether the act which he has requested has been done, in some cases the act is of such a character that the offeror cannot easily determine whether it has been done unless he is notified by the promisee. It is settled law that whenever in a bilateral contract the completion of his performance by one party is peculiarly within his own knowledge, a condition is implied in fact requiring him to notify the other party of his performance, as a condition precedent to holding the latter liable.¹¹ A corresponding need for implication arises in the case of an offer requesting performance peculiarly within the knowledge of the offeree. Notice in such a case, however, is not a necessary element in the creation of the contract. If this were true the offeror might revoke his offer after performance of the act requested, but prior to notification. Such a result would be unjust, and is required neither by the necessities of the case nor the authorities.¹² The contract is complete on the performance of the act but is subject to

Pike, 16 Ind. 140; *Hayden v. Souger*, 56 Ind. 42, 26 Am. Rep. 1; *Kelly v. Stone*, 94 Ia. 316, 62 N. W. 842; *Springfield v. Harris*, 107 Mass. 532; *First Nat. Bank v. Watkins*, 154 Mass. 385, 28 N. E. 275; *Bishop v. Eaton*, 161 Mass. 496, 37 N. E. 665; *Niedermeyer v. Curators of University of Missouri*, 61 Mo. App. 654; *Morse v. Bellows*, 7 N. H. 549, 28 Am. Dec. 372; *Smith v. Dann*, 6 Hill, 544; *Todd v. Weber*, 95 N. Y. 181, 191, 47 Am. Rep. 20; *Miller v. McKenize*, 95 N. Y. 575, 47 Am. Rep. 85; *Fry v. Insurance Co.*, 40 Ohio St. 108; *Cooper v. Altimus*, 62

Pa. 486; *Patton's Ex. v. Hassinger*, 69 Pa. 311; *Reif v. Paige*, 55 Wis. 496, 13 N. W. 473, 42 Am. Rep. 731.

¹⁰ "If the person making the offer expressly or impliedly intimates in his offer that it will be sufficient to act on the proposal without communicating acceptance of it to himself, performance of the condition is a sufficient acceptance without notification." *Carlill v. Carbolic Smoke & Chemical Co.* [1893] 1 Q. B. 256, 269, per Bowen, J. J.

¹¹ See *infra*, § 89.

¹² See the next section.

a condition subsequent that if notice of the performance of the act is not given within a reasonable time by the promisee, the promisor is freed from obligation.

This principle has been applied most frequently to guaranties. Of course where an offer of guaranty requests as consideration a promise on the part of the offeree, unquestionably communication is necessary to make the bilateral contract proposed; but generally the guarantor in terms agrees to guarantee payment for goods, services or money if given a third person, requesting merely the giving of credit, and not an antecedent promise to give it. The law concerning the necessity of notice of performance of an act thus requested as consideration for such an offer of guaranty is indeed in much confusion. In some jurisdictions the rule ordinarily applicable to unilateral contract is held controlling and no notice is required.¹³ But more commonly notice is held requisite,¹⁴ though difficult and technical distinctions are often attempted in the cases

¹³ *Somersall v. Barneby*, Cro. Jac. 287; *Oxley v. Young*, 2 H. Bl. 613; *Lysaght v. Walker*, 5 Bligh (N. S.), 1, 19, 22-23; *Olderahaw v. King*, 2 H. & N. 399, 403, 517; *White v. Woodward*, 5 C. B. 810, 814, 816; *Jays, Ltd., v. Sala*, 14 T. L. R. 461; *McCarroll v. Red Diamond Clothing Co.*, 105 Ark. 443, 151 S. W. 1012; *Reese v. W. T. Raleigh Medical Co.*, 115 Ark. 606, 172 S. W. 820; *Fisk v. Stone*, 6 Dak. 35; *Carman v. Ellege*, 40 Iowa, 409; *Case v. Howard*, 41 Iowa, 479; *Davis Co. v. Mills*, 55 Iowa, 543, 8 N. W. 356, (but see *German Sav. Bank v. Drake Roofing Co.*, 112 Ia. 184, 83 N. W. 960, 51 L. R. A. 758, 84 Am. St. Rep. 335); *Platter v. Green*, 26 Kans. 252; *F. W. Heitmann Co. v. Kansas City &c. R. Co.*, 136 La. 825, 67 So. 895; *Hibernia Bank & Trust Co. v. Cancienne*, 140 La. 969, 74 So. 267, L. R. A. 1917 D, 402; *Boyd v. Snyder*, 49 Md. 325; *Booth v. Irving Nat. Exch. Bank*, 116 Md. 668, 676 (see also *Heyman v. Dooley*, 77 Md. 162, 26 Atl. 117); *Crittenden v. Fiske*, 46 Mich. 70, 8 N. W. 714, 41 Am. Rep. 146; *State*

Nat. Bank v. Wernicke, 185 Mich. 281, 151 N. W. 1033 (cp. *De Cremer v. Anderson*, 113 Mich. 578, 71 N. W. 1090); *Wilcox v. Draper*, 12 Neb. 138, 10 N. W. 579, 41 Am. Rep. 763; *Klosterman v. Olcott*, 25 Neb. 382, 41 N. W. 250; *Whitney v. Groot*, 24 Wend. 81; *Smith v. Dann*, 6 Hill, 543; *City Nat. Bank v. Phelps*, 86 N. Y. 484; *Niles Co. v. Reynolds*, 4 N. Y. App. Div. 24, 38 N. Y. Supp. 1028; *American Woolen Co. v. Moskowitz*, 159 N. Y. App. Div. 382, 144 N. Y. Supp. 532; *Powers v. Bumcratz*, 12 Oh. St. 273 (overruling *dictum* in *Taylor v. Wetmore*, 10 Ohio, 490); *Wise v. Miller*, 45 Oh. St. 388, 14 N. E. 218; *Masters v. Boyes*, 44 Okl. 526, 145 Pac. 363; *Bright v. McKnight*, 1 Sneed, 158; *Yancey v. Brown*, 3 Sneed, 89; *Wells, Fargo & Co. v. Davis*, 2 Utah, 411 (but see *Lester Piano Co. v. Romney*, 41 Utah, 436, 126 Pac. 325); *McNaughton v. Conkling*, 9 Wis. 316.

¹⁴ *Davis v. Wells*, 104 U. S. 159, 26 L. Ed. 686; *Davis Sewing Machine Co. v. Richards*, 115 U. S. 524, 29 L. Ed. 480, 6 Sup. Ct. 173 (cf. *United*

as to when notice of assent is necessary to hold the guarantor and when it is not. Decisions holding notice requisite often fail to distinguish the reason for the necessity in such a case from that requiring acceptance of an offer of a bilateral contract.¹⁵ It is of course possible to have a promise to guarantee

States &c. Co. v. Riefler, 239 U. S. 17, 60 L. Ed. 121, 38 Sup. Ct. 12; *Barnes Cycle Co. v. Reed*, 84 Fed. 603, 91 Fed. 481, 33 C. C. A. 646; *Cahuzac v. Samini*, 29 Ala. 288; (cp. *Shows v. Steiner*, 175 Ala. 363, 57 So. 700); *McCollum v. Cushing*, 22 Ark. 540; (cp. *McCarroll v. Red Diamond Clothing Co.*, 105 Ark. 443, 151 S. W. 1012); *Falls City Const. Co. v. Boardman*, 111 Ark. 415, 163 S. W. 1134; *Henderson v. Reilly*, 1 McArthur. 25; *Craft v. Isham*, 13 Conn. 28; *Farmers' Bank v. Tatnall*, 7 Houst. 287; *Claffin v. Briant*, 58 Ga. 414; *Meyer v. Ruhstadt*, 66 Ill. App. 346 (cp. *Pressed Radiator Co. v. Hughes*, 155 Ill. App. 80), *State Bank v. King*, 244 Pa. 29, 90 Ark. 453; *Milroy v. Quinn*, 69 Ind. 406, 35 Am. Rep. 227; *Hasselman v. Japanese Co.*, 2 Ind. App. 180, 27 N. E. 318, 28 N. E. 207 (cp. *Kline v. Raymond*, 70 Ind. 271); *Snyder v. Click*, 112 Ind. 293, 13 N. E. 581; *Nading v. McGregor*, 121 Ind. 465, 23 N. E. 283, 6 L. R. A. 686; *Lowe v. Beckwith*, 14 B. Mon. 184, 58 Am. Dec. 659; *Eaton v. Harris*, 19 Ky. L. Rep. 1236, 43 S. W. 199 (cp. *J. R. Watkins Medical Co. v. Brand*, 143 Ky. 468, 136 S. W. 867); *Bank of Illinois v. Sloo*, 16 La. 539, 35 Am. Dec. 223; *Menard v. Scudder*, 7 La. Ann. 385, 36 Am. Dec. 610; *Lachman v. Block*, 47 La. Ann. 505, 17 So. 153, 28 L. R. A. 255; *American Agricultural Chem. Co. v. Ellsworth*, 109 Me. 195, 83 Atl. 546; *Bishop v. Eaton*, 161 Mass. 496, 37 N. E. 665, 42 Am. St. Rep. 437; *Bascom v. Smith*, 164 Mass. 61, 41 N. E. 130; *Cumberland Glass Mfg. Co. v. Wheaton*, 208 Mass. 425, 431, 94 N. E. 803; *Black v. Grabon*, 216 Mass. 516, 104 N. E. 346 (cf.

Stauffer v. Koch, 225 Mass. 525, 114 N. E. 750); *Winnebago Mills v. Travis*, 56 Minn. 480, 58 N. W. 36; *Straight v. Wight*, 60 Minn. 515, 63 N. W. 105; *Taylor v. Shouse*, 73 Mo. 361; *Mitchell v. Railton*, 45 Mo. App. 273; *Tolman Co. v. Means*, 52 Mo. App. 385; *American Nat. Bank v. Pillman*, 176 Mo. App. 430, 158 S. W. 433; *Ellis v. Jones*, 70 Miss. 60, 11 So. 566; *McDougal v. Calef*, 34 N. H. 534 (but see *Bank of Newberry v. Sinclair*, 60 N. H. 100, 49 Am. Rep. 307); *Shewell v. Knox*, 1 Dev. (N. C.) 404; *Rothchild v. Lomax*, 75 Or. 395, 146 Pac. 479; *Patterson v. Reed*, 7 W. & S. 144; *Coe v. Buehler*, 110 Pa. 366, 5 Atl. 20; *Evans v. McCormick*, 167 Pa. 247, 31 Atl. 563; *King v. Batterson*, 13 R. I. 117, 43 Am. Rep. 13; *Wardlaw v. Harrison*, 11 Rich. 626; *Duncan v. Heller*, 13 S. C. 94; *Smith v. Kimble*, 31 S. Dak. 18, 139 N. W. 348; *Deering v. Mortell*, 21 S. Dak. 159, 110 N. W. 86, 16 L. R. A. (N. S.) 352; *Mayfield v. Wheeler*, 37 Tex. 256; *Wilkins v. Carter*, 84 Tex. 438, 19 S. W. 997; *Carter v. Wilkins* (Tex. Civ. App.), 29 S. W. 1102 (cp. *Danner v. Walker-Smith Co.* (Tex. Civ. App.), 154 S. W. 295; *Lester Piano Co. v. Romney*, 41 Utah, 436, 126 Pac. 325; *Train v. Jones*, 11 Vt. 444; *Noyes v. Nichols*, 28 Vt. 189. The authorities are collected and their effect stated in 16 L. R. A. (N. S.) 353. Where the guarantor's promise is under seal, no notice was held necessary in *United States &c. Co. v. Riefler*, 239 U. S. 17, 60 L. Ed. 121, 38 Sup. Ct. 12; *Hartford Aetna Nat. Bank v. Anderson*, 92 Conn. 643, 103 Atl. 845.

¹⁵ See *Davis v. Wells Fargo & Co.*, 104 U. S. 159, 26 L. Ed. 686, where the

offered in exchange for a promise to perform some act, but as has been said the cases where the question of notice has arisen, and cases of guarantees generally, present the case of requested performances, not requested promises.

§ 69a. True reason for requiring notice of acceptance of guaranty.

If a bilateral contract were requested it would follow not only that notice of acceptance would be necessary to bind the guarantor, but also that after such notice, the person guaranteed would be bound to enter into the transaction to which the guarantee related. A more accurate explanation of the rule requiring notice is given in a Massachusetts case. "Ordinarily there is no occasion to notify the offeror of the acceptance of such an offer, for the doing of the act is a sufficient acceptance, and the promisor knows that he is bound when he sees that action has been taken on the faith of his offer. But if the act is of such a kind that knowledge of it will not quickly come to the promisor, the promisee is bound to give him notice of his acceptance within a reasonable time after doing that which constitutes the acceptance. In such a case it is implied in the offer that, to complete the contract, notice shall be given with due diligence, so that the promisor may

court treated the necessity of notice as depending on the nature and definition of a contract. "In some instances it has been treated as a rule, inhering in the very nature and definition of every contract, which requires the assent of a party to whom a proposal is made to be signified to the party making it, in order to constitute a binding promise," and see similar expressions in *Davis Sewing Machine Co. v. Richards*, 115 U. S. 524, 29 L. Ed. 480, 6 S. Ct. 173 (but see *United States &c. Co. v. Riefler*, 239 U. S. 17, 60 L. Ed. 121, 36 Sup. Ct. 12); *Barnes Cycle Co. v. Reed*, 84 Fed. 603 (but see s. c. on appeal, 91 Fed. 481, 33 C. C. A. 646); *Ruffner v. Love*, 33 Ill. App. 601; *Kinchloe v. Holmes*, 7 B. Mon. 5, 45 Am. Dec. 41; *Lachman v. Block*, 47

La. Ann. 505, 17 So. 153, 28 L. R. A. 255; *Howe v. Nickels*, 22 Me. 175; *Winnebago Mills v. Travis*, 56 Minn. 480, 58 N. W. 36; *Mitchell v. Railton*, 45 Mo. App. 273; *Kellogg v. Stockton*, 29 Pa. 460; *Deering v. Mortell*, 21 S. Dak. 159, 110 N. W. 86, 16 L. R. A. (N. S.) 352; *Wilkins v. Carter*, 84 Tex. 438, 19 S. W. 997. This misconception is at the bottom of the rule stated in Cal. Civ. Code, § 2795: "A mere offer to guarantee is not binding until notice of its acceptance is communicated by the guarantee to the guarantor, but an absolute guaranty is binding upon the guarantor without notice of its acceptance." The provision is copied in *Okl. Rev. L.* (1910), § 1031. See *Hays v. Smith*, (Okl.), 164 Pac. 470.

know that a contract has been made. But where the promise is in consideration of an act to be done, it becomes binding upon the doing of the act so far that the promise cannot be affected by a subsequent withdrawal of it, if within a reasonable time afterward he notifies the promisor."¹⁶ That the performance of the act requested by the guarantor completes the contract, and that notice if necessary at all is necessary only as a condition subsequent, is shown by the fact that if notice is not given within a reasonable time, the guarantor may waive his defense and incur liability by a subsequent promise to pay,¹⁷ or the necessity of notice may be waived in the offer.¹⁸ If an element necessary for the formation of a contract had been omitted, this result could not be reached. No subsequent gratuitous promise can vitalize an agreement which never became a contract.¹⁹ Jurisdictions which require notice of the acceptance of a guaranty generally hold that such notice must be given in case of a continuing guaranty within a reasonable time after the close of all the transactions under the guaranty.²⁰ If an acceptance analogous to that

¹⁶ *Bishop v. Eaton*, 161 Mass. 496, 499, 37 N. E. 665, 42 Am. St. Rep. 437. Cf. *Cumberland Glass Co. v. Wheaton*, 208 Mass. 425, 94 N. E. 803. See also *Singer Mfg. Co. v. Littler*, 56 Ia. 601, 9 N. W. 905.

So in *United States &c. Co. v. Riefler*, 239 U. S. 17, 24, Holmes, J., in speaking of a contract of indemnity under seal said: "If [the indemnitors] had made only a parol offer in the same terms, the company by becoming surety would have furnished the consideration that would have converted the offer into a contract, but notice is held necessary in *Davis Sewing Machine Co. v. Richards*, 115 U. S. 524, 29 L. Ed. 480, 6 Sup. Ct. 173."

¹⁷ *Gamage v. Hutchins*, 23 Me. 565; *Signourney v. Wetterell*, 6 Metc. 553; *Ashford v. Robinson*, 8 Ired. 114.

¹⁸ *Holmes v. Schwab*, 141 Ga. 44, 80 S. E. 313; *Swisher v. Deering*, 104 Ill. App. 572; *Valley Nat. Bank v. Cownie*, 164 Ia. 421, 145 N. W. 904;

Hughes v. Roberts, etc., Shoe Co., 24 Ky. L. Rep. 2003, 72 S. W. 799; *Crittenden v. Fiske*, 46 Mich. 70, 8 N. W. 714, 41 Am. Rep. 146; *International Text Book Co. v. Mabbott*, 159 Wis. 423, 150 N. W. 429.

¹⁹ Conditions subsequent to the existence of a contract may also exist in bilateral contracts, *e. g.*, the approval of a court when necessary to confirm a judicial sale, or of the Secretary of the Interior when necessary to confirm a contract with Indians. *Crosbie v. Brewer*, 158 Pac. 388.

²⁰ *Douglass v. Reynolds*, 7 Pet. 113, 8 L. Ed. 626; *Louisville Mfg. Co. v. Welch*, 10 How. 461, 13 L. Ed. 497; *Cremer v. Higginson*, 1 Mas. 323; *Wildes v. Savage*, 1 Story, 22, 23; *Craft v. Isham*, 13 Conn. 28; *Davis S. M. Co. v. Mills*, 55 Iowa, 543, 8 N. W. 356; *Singer Mfg. Co. v. Littler*, 56 Iowa, 601, 9 N. W. 905; *German Sav. Bank v. Drake Roofing Co.*, 112 Ia. 184, 192, 83 N. W. 960, 51 L. R. A.

in bilateral contracts were required, the proper time for it would be at the outset of the transactions under the guaranty, not at their close.

Again, an exception to the rule discharging the guarantor for lack of notice is made when it appears that the guarantor has not been injured by the delay in giving notice.²¹ If notice were in truth a requisite for the formation of the contract, the fact that the lack of notice worked no injury, would be immaterial.

§ 69b. Notice of allotment of shares.

It has been suggested²² that the principle under consideration is also applicable to cases where shares are allotted in a new company on application by mail. It has been held that the applicant is bound on notice of the allotment being mailed to him.²³ And the suggestion made is that the contract created is unilateral and is completed by the allotment of the shares; the subsequent notice of allotment being a notification that the act requested by the applicant, namely, the allotment of shares, has been complied with. If it is true that the allotment actually makes the applicant a shareholder, this reasoning is sound. If, however, the allotment is merely a vote that the applicant shall become a shareholder in the future the notice of allotment is in effect a promise that the applicant shall later become a shareholder. Apparently the latter is the true construction of the transaction. The allotment does not seem of itself to make the applicant a share-

758, 84 Am. St. Rep. 335; *Howe v. Nickels*, 22 Me. 175; *Babcock v. Bryant*, 12 Pick. 133; *Courtis v. Denijs*, 7 Met. 510; *Clark v. Remington*, 11 Met. 361; *Paige v. Parker*, 8 Gray, 211; *Whiting v. Stacey*, 15 Gray, 270 (cp. *Lascelles v. Clark*, 204 Mass. 362, 99 N. E. 875); *Montgomery v. Kellogg*, 43 Miss. 486; *Beebe v. Dudley*, 26 N. H. 249; *Bay v. Thompson*, 1 Pears. 551.

But see *contra*, *Cahuzac v. Samini*, 29 Ala. 288; *Lowe v. Beckwith*, 14 B. Mon. 184, 58 Am. Dec. 659.

²¹ *Louisville Manufacturing Co. v. Welch*, 10 How. 461, 13 L. Ed. 497; *German Sav. Bank v. Drake Roofing Co.*, 112 Ia. 184, 192, 83 N. W. 960; *Lachman v. Block*, 47 La. Ann. 505, 17 So. 153, 28 L. R. A. 255; *Farmers', etc., Bank v. Kercheval*, 2 Mich. 504, 513; *Beebe v. Dudley*, 26 N. H. 249, 59 Am. Dec. 341.

²² *Langdell*, Summary of Contracts, § 6.

²³ *Harris's Case*, L. R. 7 Ch. 587; *Household Fire Ins. Co. v. Grant*, L. R. 4 Exch. D. 216.

holder, at any rate under the English law; and in ²⁴ the English decisions the contract created is unquestionably treated as a bilateral contract.²⁵

§ 70. Acceptance in bilateral contracts requires communication.

As has been seen the acceptance of a bilateral contract is not only an expression of assent to the proposition but is a giving of the counter promise requested. To complete a contract, the offeror must always be given what he requests as the return for his promise and in an offer for a bilateral contract he requests either a promise in fact or an obligation in law.²⁶ In order to complete a bilateral contract, therefore, on the former supposition the offeree must make a promise to the offeror and a promise is something which from its very nature involves if not communication, at least attempted communication. If an obligation in law is requested, the same thing will generally be true, since contractual obligations in law are imposed as a rule only when promises in fact are made.²⁷ An exceptional case, however, may be supposed

²⁴ Lindley's Law of Companies (5th ed.), 13, 43, 760; Thring's Law of Companies, Chap. 2.

²⁵ In the opinions in the cases cited, *supra*, no distinction is drawn between allotment cases and ordinary contracts by correspondence. The decision of *Household Fire Ins. Co. v. Grant*, 4 Exch. D. 216, is universally regarded as the leading authority on the completion of ordinary contracts by correspondence which are of course bilateral contracts. Moreover, in *Re London & Northern Bank, Ltd.*, [1900] 1 Ch. 220, the court held effectual a revocation received between the allotment and the mailing of notice of allotment. This necessarily decides such a contract to be bilateral. The decision is criticised in 13 Harv. L. Rev. 519, but, for the reasons given in the text, seems sound.

²⁶ See *infra*, § 103.

²⁷ It is sufficient authority for this statement to refer to the cases of contracts by correspondence. *Infra*, § 75; see also *supra*, § 24. These decisions on contracts by correspondence, assume or decide that it is necessary at least that a properly addressed acceptance shall be started towards the offeror. The early case of *Hallock v. Commercial Ins. Co.*, 26 N. J. L. (2 Dutch,) 268, did indeed hold that any overt act by the offeree manifesting assent was sufficient whether it came to the offeror's knowledge and apparently whether it was intended to come to the offeror's knowledge or not, but this decision certainly goes too far.

In *Emerson v. Stevens Grocer Co.*, 95 Ark. 421, 130 S. W. 541, 105 Ark. 575, 151 S. W. 1003, one who had offered to buy goods sent the seller a check as part payment of the price. The court held that acceptance of the

where the offeror expresses himself as satisfied with some method of acceptance which would not necessarily involve even an attempt at communication. Where the offeror has thus manifested his satisfaction with a method which the acceptor thereupon adopts, it is probable that the law would impose upon both parties the obligations which they expected.²⁸

§ 71. Acceptance in unilateral contracts where the offeree is the promisor, requires communication.

Almost invariably when a unilateral contract is formed the offeror is the promisor, and the person who performs the completed act is the offeree. It is possible, however, where the act involved is the transfer of title to personal property, which may take place whenever the parties have agreed that

check upon the terms and in assent to the buyer's proposal would amount to an acceptance of the contract, binding the seller to deliver the goods as requested. Here it is to be observed that the seller's retention or cashing of the check is something which would necessarily come to the buyer's knowledge, through it is by no means certain that the court deemed this circumstance material. It is hard, however, to admit the correctness of the court's ruling that retention of the check would or would not be an acceptance (and therefore in effect a promise) according to the buyer's undisclosed intent when he retained it.

In *Mendell v. Willyoung*, 42 N. Y. Misc. 210, 85 N. Y. Supp. 647, and in *Post v. Frank*, 75 N. Y. Misc. 130, 132 N. Y. Supp. 807, the court held that an order for a series of advertisements became a complete bilateral contract after the publication of the advertisement was begun. In the earlier of these cases it appeared that the publication containing the advertisement was sent regularly to the defendant. This would supply the necessary communi-

cation. In the second case it did not appear that the publication had been sent to the defendant, but perhaps publication in a paper which may be easily obtained may be, if the parties expressly or compliedly assent thereto, a sufficient means of communication between them.

²⁸ In *Household Ins. Co. v. Grant*, 4 Ex. Div. 216, Bramwell, L. J., said: "If there is a difference where the acceptance is by a letter sent through the post which does not reach the offeror, it must be by virtue of some general rule or some particular agreement of the parties. As, for instance, there might be an agreement that the acceptance of the proposal may be by sending the article offered by the proposer to be bought, or hanging out a flag or sign to be seen by the offeror as he goes by, or leaving a letter at a certain place, or any other agreed mode; and in the same way there might be an agreement that dropping a letter in a post pillar box or other place of reception should suffice." See also *Brogden v. Metropolitan Ry. Co.*, 2 A. C. 666, 691.

it shall, for the offeror to be the actor and promisee, and for the offeree to be the promisor.²⁹ In this kind of unilateral contract since the offer requests a promise, it is necessary that the acceptance should be communicated or that something which the law regards an equivalent to communication shall be made. The offer is like that of a bilateral contract in respect to the thing which it requests to be given.

The situation supposed at the end of the preceding section (where a method of manifesting a promise is requested which does not involve communication) is more likely to occur in unilateral contracts of the kind under consideration than in a bilateral contract; thus, the offeror may send goods with a letter stating the price and requesting no manifestation of acceptance from the offeree except that he shall take the goods and use them. If he does, there can be no doubt that though his use of the goods involves no attempt at communication with the offeror, a debt arises. It may be objected that though there is a sale and a debt in such a case, there is no promise by the buyer and, therefore, properly speaking no contract; but it seems hard to believe that the law would not impose on the acceptor in such a case any obligation which the offeror requested and which the acceptor must be supposed to have intended to assume; and unless the acceptor can be held liable on a contract if what is requested by the offeror is a liability not enforceable as a debt, the offeror would be without remedy. Let it be supposed that bills of lading are sent with the statement that the offeree may take them if he is willing to accept bills of exchange to be drawn against them. It can hardly be supposed that a court would not hold the acceptor bound to honor the bills of exchange if he took the bills of lading. So it is generally held, that where a check is sent by one who owes an unliquidated or disputed claim on the condition that the check if accepted shall be full satisfaction, it operates as such if accepted.³⁰ This can only be on the theory that an accord and satisfaction, which is a contractual agreement has taken place.³¹

²⁹ See *supra*, § 25.

³⁰ See *infra*, § 1854.

³¹ See *Emerson v. Stevens Grocer*

Co., 95 Ark. 421, 130 S. W. 541, 105

Ark. 575, 151 S. W. 1003, stated *supra*,

n. 27.

§ 72. Acceptance must be unequivocal.

An acceptance must be positive and unambiguous. This requirement is often treated as identical with the requirement dealt with in the following sections that an acceptance must not change, add to or qualify the terms of the offer, and such changes or qualifications undoubtedly prevent an acceptance from being positive and unequivocal; but even though no change in the offer is suggested in the reply of the offeree, it nevertheless may not so clearly indicate assent to the offer as to create a contract. Thus a reply to an offer to lease premises in the following terms, was held not to make a binding contract:—"I have decided on taking No. 22 Belgrade Road, and have spoken to my agent Mr. C., who will arrange matters with you."³² So a telegram to a bidder for public work, "You are low bidder. Come on morning train."³³ So the following reply to an offer to sell coal "telegram received. You can consider the coal sold. Will be in Cleveland and arrange particulars next week."³⁴ Likewise a reply to an offer to sell land, "Have twice attempted the tender of the first payment of \$500 upon the agreement made between us on the 7th of December last. I will meet you, etc., when I shall be ready to make tender of the money and execute the proper agreements thereupon," is insufficient.³⁵ An acknowledgment of an order which stated that the order will receive best attention, or prompt attention, has also been held not an acceptance, since it implies no promise to comply with the terms of the order.³⁶ But if there has once been unequivocal acceptance the contract is complete and its binding

³² *Stanley v. Dowdeswell*, L. R. 10 C. P. 102.

³³ *Cedar Rapids Lumber Co. v. Fisher*, 129 Ia. 332, 105 N. W. 595, 4 L. R. A. (N. S.) 177.

³⁴ *Martin v. Northwestern Fuel Co.*, 22 Fed. 596.

³⁵ *Potts v. Whitehead*, 23 N. J. Eq. 512. See also *Appleby v. Johnson*, L. R. 9 C. P. 158; *Bowen v. Hart*, 101 Fed. 376, 41 C. C. A. 390; *Pike County v. Spencer*, 192 Fed. 11, 112 C. C. A. 433; *Havens v. American Fire Ins.*

Co., 11 Ind. App. 315, 39 N. E. 40; *Krum v. Chamberlain*, 57 Neb. 220, 77 N. W. 665; *Thurber v. Smith*, 25 R. I. 60, 54 Atl. 790.

³⁶ *Manier v. Appling*, 112 Ala. 663, 20 So. 978; *Courtney Shoe Co. v. Curd*, 42 Ky. 219, 134 S. W. 146, 38 L. R. A. (N. S.) 903, *VanKeuren v. Boomer & Boschert Press Co.*, 143 N. Y. App. Div. 785, 128 N. Y. Supp. 306; *National Cash Register Co. v. McCann*, 140 N. Y. Supp. 916, 80 N. Y. Misc. 165.

force cannot be affected by subsequent communications unless they amount to a mutual agreement to rescind.³⁷

§ 73. Acceptance must comply with the terms of the offer.

In order to make a bargain it is necessary that the acceptor shall give in return for the offeror's promise exactly the consideration which the offeror requests. If an act is requested, that very act and no other must be given. If a promise is requested that promise must be made absolutely and unqualifiedly. This does not mean necessarily that the precise words of the requested promise must be repeated, but by a positive and unqualified assent to the proposal the acceptor must in effect agree to make precisely the promise requested;³⁸ and if any provision is added to which the offeror did not assent, the consequence is not merely that this provision is not binding and that no contract is formed;³⁹ but that the offer is rejected.⁴⁰

The new condition is as fatal when its inconsistency with the offer appears by implication only as when it is explicitly stated. Thus when an offer is made by mail to sell stock, a reply in terms accepting the offer, and adding "ship with

³⁷ *Ozola v. Musolino*, 225 Mass. 512, 114 N. E. 733. This principle qualifies the statement sometimes made that the whole of a continuous correspondence must be considered. *Hussey v. Horne-Payne*, 4 A. C. 311; *Strobridge Co. v. Randall*, 73 Fed. 619, 19 C. C. A. 611.

³⁸ *Young's Market Co. v. Pioneer Produce Co.*, 192 Fed. 822, 113 C. C. A. 146; *Nieschburg v. Nothorn*, 101 Kan. 110, 165 Pac. 857; *W. C. Sterling & Son Co. v. Watson & Bennett Co.*, 193 Mich. 11, 159 N. W. 381; *State v. Robertson*, (Mo.), 191 S. W. 989; *Glenn v. S. Birch & Sons Const. Co.*, 52 Mont. 414, 158 Pac. 834; *Morrison v. Parks*, 164 N. C. 197, 80 S. E. 85, and see cases in this and the following sections.

³⁹ *Compania Bilbaine v. Spanish-American Co.*, 146 U. S. 483, 36 L. Ed. 1054, 13 S. Ct. Rep. 142. In this case the insertion in a charter party of un-

authorized clauses was held to invalidate the whole instrument. In *Porter v. Gossell*, 112 Ark. 380, 166 S. W. 533, the defendant offered to sell a car of oats at 42 cents, if the plaintiff would accept the city scale weights. A reply, requesting the shipment to be rushed, but demanding an affidavit attached to the scale weights, did not create a binding contract. See also *Hayes v. Possehl*, 92 Kan. 609, 141 Pac. 559.

⁴⁰ See *infra*, § 87.

Where the plaintiff sent the defendant a contract calling for 4,000 poles and the defendant signed it after adding the words "more or less," and on its return the plaintiff signed it after striking out the words 'or less,' the conduct of the parties was held to amount to no more than a series of offers, no one of which was assented to. *W. C. Sterling & Son Co. v. Watson & Bennett Co.*, 193 Mich. 11, 159 N. W. 381, 382.

draft attached" adds a new condition since by implication the place of delivery under the offer was the seller's residence, and the reply transfers it to the buyer's.⁴¹

§ 74. Illustrations in cases of offered rewards.

The principle stated in the preceding section finds frequent application in attempted acceptance of offers of reward. Thus where a reward was offered "for the apprehension of John H. Surratt," one who had made disclosures leading to Surratt's apprehension was held not entitled to the reward,⁴² the court holding that the offer requested the actual arrest. Doubtless it is possible to make an offer for the actual arrest of a criminal and such an offer can only be accepted by compliance with the request, and the Surratt case seems to have been of that sort, but in most cases of rewards offered for apprehension of a criminal, the more reasonable construction of the offer is that causing the arrest by giving the necessary information to officers of the law is the efficient cause and is a compliance with the offer.⁴³

Where a reward was offered for the "apprehension and conviction" of a criminal, it was held that no recovery could be had for the conviction unless the plaintiff had also apprehended the criminal.⁴⁴ Other illustrations of the exact per-

⁴¹ *Neer v. Lang*, 252 Fed. 575, 164 C. C. A. 491. See also *Sharp v. West*, 150 Fed. 458; *Lacey v. Thomas*, 164 Fed. 623; *Greenawalt v. Este*, 40 Kan. 418, 19 Pac. 803; *Cameron v. Wright*, 21 N. Y. App. D. 395, 47 N. Y. S. 571.

⁴² *Shuey v. United States*, 92 U. S. 73, 23 L. Ed. 697. See also *McClaghry v. King*, 147 Fed. 463, 79 C. C. A. 91, 7 L. R. A. (N. S.) 216; *Chambers v. Ogle*, 117 Ark. 242, 174 S. W. 532; *Juniata County v. McDonald*, 122 Pa. 115, 15 Atl. 696; *Williams v. West Chicago St. Ry. Co.*, 191 Ill. 610, 61 N. E. 456, 85 Am. St. Rep. 278.

⁴³ *Union Pac. R. Co. v. Belek*, 211 Fed. 699; *Elkins v. Board*, 91 Kan. 518, 120 Pac. 542, 138 Pac. 578, 46 L. R. A. (N. S.) 662; *Haskell v. Davidson*, 91 Me. 488, 40 Atl. 330, 42 L. R. A.

155, 64 Am. St. Rep. 254; *Rogers v. McCoach*, 120 N. Y. Supp. 686, 66 N. Y. Misc. 85; *Stair v. Heska Amone Congregation*, 128 Tenn. 190, 159 S. W. 840; *Hall v. State*, 102 Wash. 519, 173 Pac. 429; *Kinn v. First Nat. Bank*, 118 Wis. 537, 95 N. W. 969, 99 Am. St. Rep. 1012. In the Tennessee case it was held that though a police officer is precluded by public policy from receiving reward for an arrest, the fact that a reward was voluntarily paid an officer after notice that a private citizen claimed it does not enlarge the rights of such citizen, or entitle him thereto, where the officer, rather than he, was the efficient cause of the arrest.

⁴⁴ *Fitch v. Snedaker*, 38 N. Y. 248, 97 Am. Dec. 791. See also *Hogan v. Stophlet*, 179 Ill. 150, 53 N. E. 604,

formance required in order to entitle a plaintiff to a reward may be found in the cases.⁴⁵ But offers of reward should "be construed in the sense in which they are ordinarily understood and acted upon" and with reference to "the purposes for which they are intended."⁴⁶

An offer of reward contemplates ordinarily but a single performance. Therefore, if several persons perform the requested act, the first one only has entered into a contract, the offer immediately lapsing thereafter.⁴⁷ It is of course possible to make a general offer not to the first person who does a certain act, but to every person who may do it,⁴⁸ but where performance of the requested act by one person fulfils the apparent purpose of the offeror, the natural construction of the offer would confine it to the first person coming within its terms. Sometimes the service requested in an offer of reward is performed by several persons, no one of whom, alone, renders the whole service. If these persons are acting in concert there seems no doubt of their right to recover as joint promisees.⁴⁹ Where, however, there is no joint action in fact by the several persons rendering the service, it seems difficult on principle to make out a promise to them jointly. Nevertheless, a joint recovery has been held allowable even in such cases.⁵⁰ In one or two cases it has been held that where

44 L. R. A. 809; *Williams v. West Chicago St. R. Co.*, 191 Ill. 610, 61 N. E. 456, 85 Am. St. Rep. 278; *Furman v. Parke*, 21 N. J. L. 310; *Blain v. Pacific Ex. Co.*, 69 Tex. 74, 6 S. W. 679; *Kinn v. First Nat. Bank*, 118 Wis. 537, 95 N. W. 969, 99 Am. St. Rep. 1012.

⁴⁵ *Cornelson v. Insurance Co.*, 7 La. Ann. 345; *Bloomfield v. Maloney*, 176 Mich. 548, 142 N. W. 785; *Jones v. Phoenix Bank*, 8 N. Y. 228; *Clanton v. Young*, 11 Rich. L. 546; *cf. Mosley v. Stone*, 108 Ky. 492, 56 N. W. 965; *Mudd v. Woodside*, 136 Ky. 296, 124 S. W. 321; *Stair v. Heska Amone Congregation*, 128 Tenn. 190, 159 S. W. 840.

⁴⁶ *Marsh v. Wells Fargo & Co.*, 88 Kan. 538, 129 Pac. 168, 43 L. R. A.

(N. S.) 133; *Hall v. State*, 102 Wash. 519, 173 Pac. 429.

⁴⁷ *Lancaster v. Walsh*, 4 M. & W. 16; *United States v. Simons*, 7 Fed. 709; *Bloomfield v. Maloney*, 176 Mich. 548, 142 N. W. 785; *Fargo v. Arthur*, 43 How. Pr. 193.

⁴⁸ This seems to have been the true construction of the offer in *Carlill v. Carbolic Smoke Ball Co.*, [1892] 2 Q. B. 484, [1893] 1 Q. B. 256, where an offer of £100 was made to any person who should contract influenza while using one of the defendants' smoke balls. See also *supra*, § 32.

⁴⁹ *Williams v. Carwardine*, 5 C. & P. 566, 573; *Janvrin v. Exeter*, 48 N. H. 83, 2 Am. Rep. 185.

⁵⁰ *Bloomfield v. Maloney*, 176 Mich.

part of the service requested was rendered, a proportionate part of the reward offered could be recovered.⁵¹ But these decisions are opposed both to principle and the weight of authority. If an act is requested in return for a promise, that act, and the whole of that act must be performed or there is no contract.⁵² If full performance was prevented by the offeror, however, it seems that a quasi-contractual liability would arise to pay for any benefit received.⁵³ Where a reward is offered for the apprehension or conviction of a criminal, the criminal himself is not one of the public to whom the offer is addressed, and he cannot by surrendering himself become entitled to the reward.⁵⁴

§ 75. Illustrations in other cases than offers of reward.

The same principle may find application in any form of contract. Especially is it to be observed that where an offeror requests a promise in return for his offer, the incurring of a detriment by beginning to perform the act which the offeree was requested to promise to perform will not create a contract;⁵⁵

548, 142 N. W. 785; *Whiteher v. State*, 68 N. H. 605, 34 Atl. 745; *Fargo v. Arthur*, 43 How. Pr. 193; *Tobin v. McComb* (Tex. Civ. App.), 156 S. W. 237. But see *Stair v. Heska Amone Congregation*, 128 Tenn. 190, 159 S. W. 840.

⁵¹ *Hawk v. Marion County*, 48 Iowa, 472; *Symmes v. Frazier*, 6 Mass. 344, 4 Am. Dec. 142. In both these cases the reward was offered for the return of a sum of money and recovery of a proportionate part of the reward was allowed for the return of part of the money.

⁵² See cases cited *supra* in this section, and especially *Williams v. West Chicago St. R. Co.*, 191 Ill. 610, 61 N. E. 456, 85 Am. St. Rep. 278; *Blain v. Pacific Exp. Co.*, 69 Tex. 74, 6 S. W. 679.

⁵³ *Zwolaneck v. Baker Mfg. Co.*, 150 Wis. 517, 137 N. W. 769, 44 L. R. A. (N. S.) 1214. See further *supra*, § 60a.

⁵⁴ *Clinton County Commissioners*

v. Davis, 162 Ind. 60, 69 N. E. 680, 64 L. R. A. 780.

⁵⁵ *White v. Corlies*, 46 N. Y. 467. In this case the defendant wrote to the plaintiff: "Upon an agreement to finish the fitting up of offices, 57 Broadway in two weeks from date, you can begin at once." On receipt of this note the plaintiff purchased lumber and began work thereon. It was held that no contract was thereby created. What was requested was an agreement to finish the work, and starting performance was not a compliance with this offer. If the performance had been started in the presence of the offeror, it would probably have indicated such an agreement as the offer requested.

In *Chicago & Great Eastern Ry. Co. v. Dane*, 43 N. Y. 240, an offer was made to transport "not exceeding 6000 tons" . . . "during the months of April, May, June, July and August." It was held that this offer contemplated an acceptance defining the amount

unless, at least the beginning of performance was in the presence or knowledge of the offeror and might fairly be interpreted as implying in fact a promise. So, if the offeror requests the performance of an act as the consideration of his promise, no contract is created by a mere promise to perform the act. Thus, where an option is conditional upon the payment of a sum of money, a promise by the offeree to pay the money is not an acceptance of the option.⁵⁶

§ 76. If an offer prescribes the place, time, or manner of acceptance, its terms must be complied with.

Not only may the offeror dictate the consideration which he demands as the return for the promise in his offer, but he may also dictate the way in which acceptance shall be indicated.⁵⁷ As has been seen,⁵⁸ the offeror may limit the time within which an offer may be accepted. So he may dictate the place at which acceptance must be made;⁵⁹ likewise the manner

for which the offeree accepted and no contract was performed by merely writing "I assent to your agreement" or by the subsequent tender of particular lots of iron for transportation. In *Beckwith v. Cheever*, 21 N. H. 41, the owner of land, proposed to the plaintiff, that he might take timber from the land upon paying for it in a certain way. The plaintiff said he would accept the proposition if he could get his brother to assist him. The owner told him he need not give a decided answer then, but might do so thereafter. The plaintiff afterwards engaged his brother to assist him in cutting the timber, but never notified the owner that he had accepted his proposition. The court held that the offer had not become binding and that the plaintiff suffered no legal injury when the owner sold the timber to a third person.

⁵⁶ *Lockman v. Anderson*, 116 Iowa, 236, 89 N. W. 1072; *Winders v. Kenan*, 161 N. C. 628, 77 S. E. 687. See also *Rickard v. Taylor*, 122 Fed. 931, 59 C. C. A. 455.

⁵⁷ *Mott v. Jackson* (Ala.), 55 So. 528, and see cases in this section, *passim*.

⁵⁸ See *supra*, § 53.

⁵⁹ The leading case to this effect is *Eliason v. Henshaw*, 4 Wheat. 225. An offer requested an answer by return of wagon to Harper's Ferry. The acceptance was sent to Georgetown and received by the offeror at that place. The court said—"It was entirely unimportant whether it was sent by that or another wagon, or in any other manner, provided it was sent to Harper's Ferry, and was not delayed beyond the time which was ordinarily employed by wagons engaged in hauling flour from the defendant's mill to Harper's Ferry. Whatever uncertainty there might have been as to the time when the answer would be received, there was none as to the place to which it was to be sent; this was distinctly indicated by the mode pointed out for the conveyance of the answer. The place, therefore, to which the answer was to be sent constituted an essential part of the plaintiffs' offer. Their offer, it is true, was accepted by the terms of a

of acceptance may be a condition of the offer. Thus, if an offer requests an answer by telegram, an answer by mail will not create a contract.⁶⁰ Care must be taken, however, in construing offers to make sure whether the offer does impose an absolute condition (as to time, place, or manner) of acceptance, or merely suggests a method which will be satisfactory to the offeror; and in determining the construction of an offer in this respect, as in other respects, it is frequently necessary to look beyond the literal meaning of the language used. Thus, suppose an offer contains this language: "if you wish to accept this offer, send your office boy with your note of acceptance before 12 o'clock." Instead of sending his office boy, the offeree takes a note of acceptance himself to the offeror within the specified time. It can hardly be doubted that a contract has been formed. The statement in regard to the office boy in the offer is merely a suggestion as to a convenient method of getting the answer to the offeror. Probably any mode

letter addressed Georgetown, and received by the plaintiffs at that place; but an acceptance communicated at a place different from that pointed out by the plaintiffs, and forming a part of their proposal, imposed no obligation binding upon them, unless they had acquiesced in it, which they declined doing." It seems possible that the court somewhat over-emphasized the importance of an acceptance at Harper's Ferry. Doubtless the offeror could make this a positive condition of his offer, but it may be questioned if this was the true construction of the offer. In this connection may be considered the numerous authorities that hold that title will not pass to goods shipped in response to an order unless the directions of the buyer are exactly observed. See *Williston on Sales*, § 278. These decisions, however, do not decide that title may not pass when the goods actually arrive, but in *Sun Publishing Co. v. Minnesota Type Foundry*, 22 Or. 49, 29 Pac. 6, this question was presented. The plain-

tiff in ordering goods directed the defendant to mark them "Sun Publishing Co. Marshfield, Oregon, care of Coos Bay Coal & Navigation Co., San Francisco, Cal." Instead thereof, the defendant marked and shipped the goods to Flanagan & Bennett, bankers, at Marshfield, Oregon, together with an invoice of the goods so shipped, and bills of lading thereof, accompanied by a draft for the price. The court said: "Whether this departure from the plaintiff's instructions would of itself be sufficient to justify its refusal to take the goods, it seems is unnecessary for us to determine at this time; but some of the authorities to which our attention has been directed appear to hold as much. (*Bruce v. Pearson*, 3 Johns. 534; *Corning v. Colt*, 5 Wend. 253; *Eliason v. Henshaw*, 4 Wheat. 225.)" See also *Knox v. McMurray*, 159 Ia. 171, 140 N. W. 652. *Cf. infra*, § 87.

⁶⁰ *Horne v. Niver*, 168 Mass. 4, 46 N. E. 393.

of communication which reached the offeror before twelve o'clock would be sufficient. If the offer contained the sentence "address me at Harper's Ferry," doubtless an acceptance addressed elsewhere would be sent at the peril of the acceptor, but if the offeree, while the offer was still pending, met the offeror in Washington, or, knowing that he was there, sent a note of acceptance to him, which actually reached him while the offer was still open, it may be well argued that a contract has been formed. The exact place of acceptance can be made an absolute condition of the offer, but it would seem that a reasonable man would naturally understand the clause in the offer referring to Harper's Ferry as meaning no more than "this is the address for which I am responsible. This is where a letter will surely reach me." On this principle it has been held that where an offer stipulates for an answer by return mail, it is not essential that the acceptance shall actually be sent by return mail, but merely that it shall reach the offeror as soon as a letter sent by return mail,⁶¹ and where there are a number of mails a day, an acceptance mailed in time for an outgoing mail on the same day on which the offer was received, though not in time for the first return mail, would probably be sufficient.⁶² Even though the offer prescribes as a condition and not merely a suggestion a particular mode of acceptance, a different mode adopted by the acceptor will become effectual if the offeror thereafter expresses his assent to the other party⁶³ but it seems not otherwise. To allow a unilateral waiver of the method originally prescribed is open to objection.⁶⁴ The irregular acceptance is a counter-offer and as such must itself be accepted.

✓ § 77. Qualified or conditional acceptances are counter-offers and reject the original offer.

A conditional acceptance is in effect a statement that the offeree is willing to enter into a bargain differing in some respect from that proposed in the original offer. The condi-

⁶¹ *Tinn v. Hoffman*, 29 L. T. (N. S.) 271, per Brett, J.

⁶² *Palmer v. Phoenix Mut. Life Ins. Co.*, 84 N. Y. 63.

⁶³ *Shaenfield v. Hall Safe, etc., Co.* (Tex. Civ. App.), 157 S. W. 462.

⁶⁴ See *infra*, § 92.

tional acceptance is, therefore, itself a counter-offer and rejects the original offer, so that thereafter even an unqualified acceptance of that offer will not form a contract.⁶⁵

There are numerous decisions on the question whether a particular acceptance is conditional. A few of these may be given as illustrations. An acceptance "subject to the terms of a contract being arranged" between the parties' lawyers is conditional,⁶⁶ and no acceptance is good which contains the condition that subsequent arrangement is to be made concerning any of the terms of the bargain.⁶⁷ So a reply to an offer to sell real estate accepting the offer if the title is satisfactory to the buyer's attorney is not a valid acceptance if, as seems the true construction of the reply, the offeree thereby imposes as a condition of the bargain the favorable opinion of his own lawyer as distinguished from the standard established by the law.⁶⁸ A reply to an offer of the unexpired term of a lease that the offeree accepted subject to the lessor's assent creates no contract.⁶⁹ So an offer to sell land is not accepted by a reply which though in terms accepting the offer at the outset, imposes the condition that certain additional deeds be turned over;⁷⁰ or that a sum to be paid for an option should be credited on the price if the option was exercised.⁷¹ A reply imposing the requirement of a bond is conditional.⁷² So a reply to an offer to sell land, directing that the deed be sent to another State where payment will be made, since such a reply imposes the condition that the place of payment shall be other than that where it would have been on a true construction of the offer, and an alteration of the

⁶⁵ See *supra*, § 51.

⁶⁶ *Honeyman v. Marryatt*, 6 H. L. C. 112.

⁶⁷ *James v. Darby*, 100 Fed. Rep. 224, 40 C. C. A. 341; *Pacific Rolling Mill Co. v. Riverside & A. Ry. Co.*, 90 Cal. 627, 27 Pac. 525.

⁶⁸ See cases cited, *infra*, § 78, n. 80. That "satisfactory" to the offeree's lawyer should be construed as requiring his personal satisfaction as distinguished from what would satisfy a reasonable man, see *supra*, § 44 and *Corcoran v. White*, 117 Ill. 118, 7 N. E.

525, 57 Am. Rep. 858; but see *Vought v. Williams*, 120 N. Y. 253, 24 N. E. 195, 8 L. R. A. 591, 17 Am. St. Rep. 634; *Andrews v. Calori*, 38 Can. Supr. Ct. 588.

⁶⁹ *Putnam v. Grace*, 161 Mass. 237, 37 N. E. 166.

⁷⁰ *Egger v. Nesbitt*, 122 Mo. 677, 27 S. W. 385, 43 Am. St. Rep. 596.

⁷¹ *Laney v. Ricardo*, (Wis. 1919), 172 N. W. 141.

⁷² *Howard v. Industrial School*, 78 Me. 230, 3 Atl. 657.

place of payment is fatal to the existence of a contract.⁷³ A reply altering in any way the method of payment or performance,⁷⁴ or making new stipulations as to quality,⁷⁵ or the title of property for sale⁷⁶ will invalidate an acceptance. These illustrations might easily be multiplied.⁷⁷ Even the requirement of an acknowledgment has been held a fatal addition.⁷⁸

✱ § 78. Conditions in an acceptance which do not qualify in legal effect the offer, do not impair the acceptance.

Sometimes an acceptor from abundance of caution inserts a condition in his acceptance which merely expresses what

⁷³ *Gilbert v. Baxter*, 71 Iowa, 327, 32 N. W. 364; *Northwestern Iron Co. v. Meade*, 21 Wis. 474, 94 Am. Dec. 557. See also *Greenwalt v. Este*, 40 Kans. 418, 19 Pac. 803; *Robinson v. Weller*, 81 Ga. 704, 8 S. E. 447; *Sawyer v. Brossart*, 67 Iowa, 678, 25 N. W. 876, 56 Am. Rep. 371; *Rogers v. French*, 122 Iowa, 18, 96 N. W. 767; *Hall v. Jones*, 164 N. C. 199, 80 S. E. 228; *Cram v. Long*, 154 Wis. 13, 142 N. W. 267.

⁷⁴ *Arthur v. Gordon*, 37 Fed. 558; *Wilkins Mfg. Co. v. Lumber Co.*, 94 Mich. 158, 53 N. W. 1045; *DeJonge v. Hunt*, 103 Mich. 94, 61 N. W. 341; *United States Heater Co. v. Applebaum*, 126 Mich. 296, 85 N. W. 743.

⁷⁵ *Young's Market Co. v. Pioneer Produce Co.*, 192 Fed. 822; *Four Oil Co. v. United Oil Producers Co.*, 145 Cal. 623, 79 Pac. 366, 68 L. R. A. 226; *Brophy v. Idaho Produce Co.*, 31 Mont. 279, 78 Pac. 493; *Kirwan v. Byrne*, 9 N. Y. Misc. 76, 29 N. Y. Supp. 287; *Melchers v. Springs*, 33 S. C. 279, 11 S. E. 788.

⁷⁶ *Jones v. Daniel*, [1894] 2 Ch. 332; *Batie v. Allison*, 77 Iowa, 313, 42 N. W. 306.

⁷⁷ See *Travis v. Nederland L. Ins. Co.*, 104 Fed. 486, 43 C. C. A. 653; *Pike County v. Spencer*, 192 Fed. Rep. 11, 112 C. C. A. 433; *Phoenix Iron & Steel Co. v. Wilkoff Co.*, 253 Fed. 165,

165 C. C. A. 65, 1 A. L. R. 1497; *Cage v. Black*, 97 Ark. 613, 134 S. W. 942; *Strong & Trowbridge Co. v. Baars*, 60 Fla. 253, 54 So. 92; *Macley v. Harvey*, 90 Ill. 525; *Anglo-American Provision Co. v. Prentiss*, 157 Ill. 506, 513, 42 N. E. 157; *Davis v. Fidelity Fire Ins. Co.*, 208 Ill. 375, 383, 70 N. E. 359; *Wheaton Building, etc., Co. v. Boston*, 204 Mass. 218, 90 N. E. 598; *Bastian Bros. Co. v. Wemott-Howard Co.*, 113 Minn. 196, 129 N. W. 369; *Atwood v. Rose*, 32 Okl. 355, 122 Pac. 929.

⁷⁸ In *Poel v. Brunswick-Balke-Collender Co.*, 216 N. Y. 310, 110 N. E. 619, an acceptance which contained the addition that prompt acknowledgment must be made was held ineffectual. The court said (at p. 622): "In *Hough v. Brown*, 19 N. Y. 111, 114, it was held that a letter referring to a previous verbal proposition which stated the terms of the oral proposition according to the understanding of the writers and accepted them and added to the acceptance the words, 'You will acknowledge the acceptance of the above,' etc., was held not to constitute a contract, but merely a proposition for a contract. In his opinion in that case Judge Comstock, referring to the requirement that the acceptance should be acknowledged, said:

would be implied in fact or in law from the offer. As such a condition does not interfere with the expression of assent to all the terms of the offer, a binding contract is formed.⁷⁹ Thus an offer to sell land may be accepted subject to the condition that the title is good. For unless the offer expressly specify that the offeree must take his chance as to the validity of the title, the meaning of the offer is that a good title will be conveyed.⁸⁰ So where the defendant by letter offered to sell land, a reply, which requested the defendant to send the abstract and stated that the plaintiff would close the matter, was a valid acceptance.⁸¹ A further distinction has been suggested in regard to added terms in an acceptance. It has been held that if an acceptance in positive terms is made, the addition

"This language, in such a connection, can mean nothing else than that the defendant was expected to signify his assent to the terms thus set forth. That being done, the agreement would be complete, and it would also be in writing, so as to leave no room for future controversy. This, we are satisfied, is the true interpretation of the letter; and it follows that no contract was made consisting merely of the proposal at Buffalo, and the letter of the two firms referring to that proposal."

"In *Barrow Steamship Co. v. Mexican Central Railway Co.*, 134 N. Y. 15, 22, 31 N. E. 261, 263, 17 L. R. A. 359, the parties negotiated by letter for the transportation by the plaintiff of a party of immigrants from New York to Rome. In answer to a letter from the defendant which stated that there would probably be 250 or more in the party the plaintiff wrote, confirming the understanding between the parties that the defendant would ship not less than 250. The letter closed with the words, 'Please confirm this and oblige.' To this letter defendant replied that there was a probability that the party would exceed 250. The number furnished was 134, and in an action to recover for the breach of a contract to furnish 250 passengers it was held

that as 'no evidence of any definite understanding in respect to the number of pilgrims to constitute the party for transportation prior to that letter appears in the record, the statement in the letter must be treated as a proposition on the part of the plaintiff. And to give it the effect of a contract between the parties the acceptance or adoption of it by the defendant was essential.'" See also *Phoenix Iron & Steel Co. v. Wilkoff Co.*, 253 Fed. 165, 165 C. C. A. 65, 1 A. L. R. 1497.

⁷⁹ *Bennett v. Cummings*, 73 Kan. 647, 85 Pac. 755; *Cavender v. Waddingham*, 5 Mo. App. 457; *Grimsrud Shoe Co. v. Jackson*, 22 S. Dak. 114, 115 N. W. 656; *Curtis Land & Loan Co. v. Interior Land Co.*, 137 Wis. 341, 118 N. W. 853, 129 Am. St. 1068.

⁸⁰ *Hussey v. Horne-Payne*, 8 Ch. D. 670, 4 App. Cas. 311; *Morse v. Tilotson etc., Co.*, 253 Fed. 340, 165 C. C. A. 122; 1 A. L. R. 1485; *Ryder v. Johnson*, 153 Ala. 482, 45 So. 181; *cf. Fort Edward v. Fish*, 86 Hun, 548, 33 N. Y. S. 784, 156 N. Y. 363, 50 N. E. 973.

⁸¹ *Bushmeyer v. McGarry*, 112 Ark. 373, 166 S. W. 168; *cf. James v. Darby*, 100 Fed. 224, 40 C. C. A. 341; *Pacific Rolling Mill Co. v. Riverside &c. R. Co.*, 90 Cal. 627, 27 Pac. 525.

of a demand for some performance to which the acceptor would not be entitled under a proper construction of the agreement will not invalidate the acceptance and prevent the formation of a contract.⁸² It may be asked if one who is offered a contract of employment can reply "I accept your offer and demand that my work shall not exceed two hours a day;" and thereafter effectively assert that there is a binding contract. In other words, can an acceptance be valid if it is accompanied by a repudiation of one or more of the legal consequences of the supposed contract? It seems clear that if before a contract is finally concluded the parties become aware that they are insisting on different constructions of their duties thereunder no contract will arise.⁸³

§ 79. Added terms requested as a favor do not invalidate an acceptance.

Frequently an offeree while making a positive acceptance of the offer, adds as a request or suggestion that some addition or modification be made. So long as it is clear that the meaning of the acceptance is positively and unequivocally to accept the offer whether such request is granted or not, a contract is formed.⁸⁴ So an inquiry as to the meaning of an offer, or

⁸² *Horgan v. Russell*, 24 N. D. 490, 140 N. W. 99, 43 L. R. A. (N. S.) 1150. In this case the plaintiff to a written acceptance of an option added that an abstract and deed of the land was "hereby demanded." The court admitted that he had no right to an abstract but said: "Such demand pertained, not to the acceptance, but to performance after acceptance. In order for this demand to invalidate the acceptance, it must amount to a qualification or condition imposed as a part of the acceptance itself. In other words, it must amount in this case to a qualified acceptance to the effect that optionees 'do hereby signify their intention to take the land described therein, provided or upon condition that optioner, in addition to a deed, furnish an abstract of title to said

premises.' Such is not the construction to be placed upon the acceptance, nor was it the intent of the optionees to make the acceptance conditional upon the furnishing of an abstract. On the contrary the acceptance was specific, certain, and unconditional. The demand for an abstract was made in reference to what should happen during the thirty-day period after the option became, as it did, a contract of sale, and as to performance during said period of said executory contract."

⁸³ *Groschke v. Armour Fertilizer Works*, 245 Fed. 513, 158 C. C. A. 9.

⁸⁴ *Simpson v. Hughes*, 66 L. J. Ch. (N. S.) 143, 334; *Netherwood v. Raymer*, 253 Fed. 515; *Bushmeyer v. McGarry*, 112 Ark. 373, 166 S. W. 168; *Williams v. Moore*, 117 Ark. 535, 175 S. W. 1198; *Culton v. Gilchrist*, 92

request for an explanation will not invalidate a positive acceptance.⁸⁵

§ 80. An offer can be accepted only by the person or persons to whom it is made.

One of the necessary terms of any proposed contract is the person with whom the contract is to be made. Accordingly an offer made to one person cannot be accepted by another, even though the offeree purports to assign it.⁸⁶ Nor does it make any difference whether it was important for the offeror to contract with one person rather than another.⁸⁷ Whether this is true of an offer which has been made irrevocable by consideration, or a seal, and which is therefore a contract,⁸⁸ is hereafter considered.⁸⁹ Even a revocable offer, however, may be made not only to the public generally,⁹⁰ but it may be made to a specified person or his assigns, and in such a case

Iowa, 718, 61 N. W. 384; *Knox v. McMurray*, 159 Ia. 171, 140 N. W. 652, 657; *Brown v. Cairns*, 63 Kans. 693, 66 Pac. 1033; *Phillips v. Moor*, 71 Me. 78; *Stotesburg v. Massengale*, 16 Mo. App. 221; *American Woolen Co. v. Moskowits*, 159 N. Y. App. Div. 382, 144 N. Y. Supp. 532; *Turner v. McCormick*, 56 W. Va. 161, 49 S. E. 28, 67 L. R. A. 853; *Curtis Land & Co. v. Interior Land Co.*, 137 Wis. 341, 118 N. W. 853, 129 Am. St. Rep. 1068.

⁸⁵ *Simpson v. Hughes*, 66 L. J. Ch. (N. S.) 143, 334; *Neville v. Merchants', etc., Ins. Co.*, 17 Oh. 192.

⁸⁶ *Boulton v. Jones*, 2 H. & N. 564; *Boston Ice Co. v. Potter*, 123 Mass. 28 (25 Am. Rep. 9), the court said on page 30—"A party has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent. It may be of importance to him who performs the contract, as when he contracts with another to paint a picture, or write a book, or furnish articles of a particular kind, or when he relies upon the character or qualities of an individual,

or has, in this case, reasons why he does not wish to deal with a particular party. In all these cases, as he may contract with whom he pleases, the sufficiency of his reasons for so doing cannot be inquired into." The same principle is applied in *Wheeling Creek Gas, etc., Co. v. Elder*, 170 Fed. 215, 221; *Schoonover v. Osborne*, 108 Ia. 453, 79 N. W. 263; *Fifer v. Clearfield Coal Co.*, 103 Md. 1, 62 Atl. 1122; *Brighton Packing Co. v. Butchers' Association*, 211 Mass. 398, 97 N. E. 780; *Bushnell v. Chamberlain*, 44 Neb. 751, 62 N. W. 1114; *Kelly Asphalt Block Co. v. Barber Paving Co.*, 211 N. Y. 68, 105 N. E. 88, L. R. A. 1915 C. 256; *Friedlander v. New York, etc., Ins. Co.*, 38 N. Y. App. Div. 147, *Rease v. Kittle*, 56 W. Va. 269, 49 S. E. 150. See also *Werlin v. Equitable Surety Co.*, 227 Mass. 157, 116 N. E. 484.

⁸⁷ *School Sisters v. Kusnitt*, 125 Md. 323, 93 Atl. 928, and see cases cited in the preceding note.

⁸⁸ See *supra*, § 61.

⁸⁹ See *infra*, § 415.

⁹⁰ See *supra*, § 32.

an assignee of the offeree, being within the terms of the offer, may accept it.⁹¹ Moreover, if after an offer is made to one person only, performance is tendered by another, though the offeror may refuse the tendered performance,⁹² yet if he does receive performance knowing that it is not tendered by or on behalf of the offeree, he will be liable. The tender of the performance is, in effect, a counter-offer, and receipt of the performance an acceptance of the counter-offer.⁹³ Even if performance is received by the offeror under the supposition that it was rendered by the offeree, the offeror on learning the truth must surrender the performance if this is possible (or if the performance consisted of property which he has resold, he must pay over the proceeds of the resale) or he will in effect have accepted a counter offer.⁹⁴ If, however, before notice of the facts such a situation has arisen that neither the performance nor any equivalent received for it can be returned the offeror is certainly not liable on any theory of contract and probably not liable quasi-contractually;⁹⁵ for the conduct of the seller

⁹¹ *Wheeling Creek Gas, etc., Co., v. Elder*, 170 Fed. 215; *Watkins v. Robertson*, 105 Va. 269, 54 S. E. 33, 5 L. R. A. 1194, 115 Am. St. Rep. 880; *Tibbs v. Zirkle*, 55 W. Va. 59, 46 S. E. 701, 104 Am. St. Rep. 977. See *Rease v. Kittle*, 56 W. Va. 269, 279, 49 S. E. 150.

⁹² *Mitchell v. LaPage*, Holt, N. P. 253; *Barcus v. Dorries*, 64 N. Y. App. D. 109, 71 N. Y. Supp. 695, and cases in this section, *passim*. Cases should be carefully distinguished where the performance is furnished or tendered by a third person merely as agent for the offeree. Unless the performance is personal in character this is permissible. Thus where goods are ordered by A of B, who thereupon directs C to furnish them, and C does so, charging the cost to B, who in turn charges A, this is neither a rejection nor an assignment of the offer but a fulfillment of it. *Petroleum Products Distributing Co. v. Alton Tank Line*, 165 Ia. 398, 146 N. W. 52.

⁹³ *Cincinnati Gas Co. v. Western Siemens-Lungren Co.*, 152 U. S. 200, 202, 38 L. Ed. 411, 14 S. Ct. 523; *Barnes c. Shoemaker*, 112 Ind. 512, 14 N. E. 367; *Orcutt v. Nelson*, 1 Gray, 536; *Boston Ice Co. v. Potter*, 123 Mass. 28, 30, 25 Am. Rep. 9. But in *Deane v. Gray Bros. Paving Co.*, 109 Cal. 433, 42 Pac. 443, it was held that the mere fact that the defendant knew that a physician was treating a third person at the request of another, on the defendant's account, and was relying for compensation on the defendant, and that it made no objection, did not make it liable.

⁹⁴ *Burton Lumber Co. v. Wilder*, 108 Ala. 669, 18 So. 552; *Mudge v. Oliver*, 1 Allen, 74. See also *Randolph Iron Co. v. Elliott*, 34 N. J. L. 184.

⁹⁵ *Boulton v. Jones*, 2 H. & N. 564; *Barnes v. Shoemaker*, 112 Ind. 512, 14 N. E. 367; *Boston Ice Co. v. Potter*, 123 Mass. 28, 25 Am. Rep. 9; *Dempsey v. Billingshurst*, 7 So. Dak. 564, 64 N. W.

in failing to disclose his identity is wanting in the good faith which the law generally requires of one who seeks to base a claim on a benefit received without request.

§ 81. Acceptance in contracts by correspondence may be completed by mailing an acceptance.

Frequently contracts are made between parties at a distance and it is of vital importance to determine at what moment the contract is complete. If the mailing of an acceptance completes the contract, what happens thereafter, whether the death of either party, the receipt of a revocation or rejection, or a telegraphic recalling of the acceptance, though occurring before the receipt of the acceptance, will be of no avail. Whereas if a contract is not completed until the acceptance has been received, in all the situations supposed no contract will arise. It was early decided that the contract was complete upon the mailing of the acceptance.⁹⁶ The reason influencing the court was evidently that at the time of mailing acceptance there had been an overt manifestation of assent to the proposal. The court failed to consider that since the proposed contract was bilateral, as is almost invariably any contract made by mail, the so-called acceptance must also have become effective as a promise to the offeror in order to create a contract. The result thus early reached, however, has definitely established the law in England⁹⁷ and in the United States⁹⁸ and in

1124. See also *Concord Coal Co. v. Ferrin*, 71 N. H. 33, 36, 51 Atl. 283, 93 Am. St. 496.

⁹⁶ *Adams v. Lindsell*, 1 B. & Ald. 681.

⁹⁷ *Dunlop v. Higgins*, 1 H. L. C. 381; *Household Fire Ins. Co. v. Grant*, 4 Ex. D. 216; *Henthorn v. Fraser*, [1892] 2 Ch. 27. *In re London & Northern Bank*, [1900] 1 Ch. 220.

⁹⁸ *Taylor v. Merchants' F. Ins. Co.*, 9 How. 390, 13 L. Ed. 187; *Patrick v. Bowman*, 149 U. S. 411, 37 L. Ed. 790, 13 S. Ct. 811, 866; *Burton v. United States*, 202 U. S. 344, 50 L. Ed. 1057, 26 S. Ct. 688; *Winterport, etc., Co. v. The Jasper*, 1 Holmes, 99; *Re Dodge*, 9 Ben. 480; *Darlington Iron Co. v.*

Footo, 16 Fed. 646; *Schultz v. Caledonia Insurance Co.*, 77 Fed. 375; *Sea Insurance Co. v. Johnson*, 105 Fed. 286, 291, 44 C. C. A. 477; *Levisohn v. Waganer*, 76 Ala. 412; *Linn v. McLean*, 80 Ala. 360; *Kempner v. Cohn*, 47 Ark. 519, 1 S. W. 869, 58 Am. Rep. 775; *Porter v. Gossell*, 112 Ark. 380, 166 S. W. 533; *Mercer Elec. Mfg. Co. v. Connecticut Elec. Mfg. Co.*, 87 Conn. 691, 89 Atl. 909; *Levy v. Cohen*, 4 Ga. 1; *Bryant v. Boose*, 55 Ga. 438; *Haas v. Myers*, 111 Ill. 421, 53 Am. Rep. 634; *Chytraus v. Smith*, 141 Ill. 231, 257, 30 N. E. 450; *Kentucky Mutual Ins. Co. v. Jenks*, 5 Ind. 96; *Moore v. Piereson*, 6 Iowa, 279, 71 Am. Dec. 409;

Canada.⁹⁹ No distinction seems to have been taken in the cases between unilateral and bilateral contracts; yet a very clear distinction in theory exists. If an offer for a unilateral contract calls for the performance of an act by the offeree and that act can be performed by dispatching something through the mail, on well-recognized principles of the law of sales, title will pass and the act of the offeree will be complete as soon as the thing requested is sent. It has been settled since an early day that where goods are ordered from a distance, the delivery of them to a carrier, in accordance with the express or implied terms of the offer, transfers title to the buyer; that is, a unilateral contract is completed in which the performance

Ferrier v. Storer, 63 Iowa, 484, 19 N. W. 288, 50 Am. Rep. 752; *Siebold v. Davis*, 67 Iowa, 560, 25 N. W. 778; *Hunt v. Higman*, 70 Iowa, 406, 30 N. W. 769; *Gipps Brewing Co. v. De-France*, 91 Iowa, 108, 112, 58 N. W. 1087, 28 L. R. A. 386, 51 Am. St. Rep. 329; *Chiles v. Nelson*, 7 Dana, 281; *Shaw v. Ingram-Day Lumber Co.*, 152 Ky. 329, 153 S. W. 431, L. R. A., 1915, D. 145; *Bailey v. Hope Ins., Co.* 56 Me. 474; *Emerson Co. v. Proctor*, 97 Me. 360, 54 N. E. 849; *Wheat v. Cross*, 31 Md. 99; *Peck v. Freese*, 101 Mich. 321, 59 N. W. 600; *Lungrass v. German Ins. Co.*, 48 Mo. 201, 8 Am. Rep. 100; *Egger v. Nesbitt*, 122 Mo. 667, 674, 27 S. W. 385, 43 Am. Rep. 596; *Horton v. New York Life Ins. Co.*, 151 Mo. 604, 52 S. W. 356; *Lancaster v. Elliot*, 42 Mo. App. 503; *Abbott v. Shepard*, 48 N. H. 14; *Davis v. Aetna Mutual Fire Ins. Co.*, 67 N. H. 218, 34 Atl. 464; *Hallock v. Commercial Ins. Co.*, 26 N. J. L. 268; *Commercial Ins. Co. v. Hallock*, 27 N. J. L. 645, 72 Am. Dec. 379; *Northampton, etc., Ins. Co. v. Tuttle*, 40 N. J. L. 476; *Mactier v. Frith*, 6 Wend. 103, 21 Am. Dec. 262; *Vassar v. Camp*, 11 N. Y. 441; *Trevor v. Wood*, 36 N. Y. 307, 93 Am. Dec. 511; *Watson v. Russell*, 149 N. Y. 388, 391, 44 N. E. 161; *Wester v. Casein Co.*, 206 N. Y. 506, 100

N. E. 488; *Hacheny v. Leary*, 12 Ore. 40, 7 Pac. 329; *Williams v. Burdick*, 63 Ore. 41, 125 Pac. 844; *Hamilton v. Lycoming M. I. Co.*, 5 Pa. St. 339; *McClintock v. South Penn. Oil Co.*, 146 Pa. 144, 161, 23 Atl. 211, 25 Am. St. Rep. 785; *Otis v. Payne*, 86 Tenn. 663, 8 S. W. 848; *Blake v. Hamburg-Bremen F. I. Co.*, 67 Tex. 160, 2 S. W. 368, 60 Am. Rep. 15; *Scottish American Mortgage Co. v. Davis*, 96 Tex. 504, 74 S. W. 17, 97 Am. St. Rep. 932; *Kenedy Mercantile Co. v. Western Union Tel. Co.* (Tex. Civ. App.), 167 S. W. 1094; *Haarstick v. Fox*, 9 Utah, 110, 33 Pac. 251; *Durkee v. Vermont Central R. R. Co.*, 29 Vt. 127; *Hartford Ins. Co. v. Lasher Stocking Co.*, 66 Vt. 439, 29 Atl. 629, 44 Am. St. Rep. 859; *Malloy v. Drumheller*, 68 Wash. 106, 122 Pac. 1005; *Washburn v. Fletcher*, 42 Wis. 152. The only contrary decision not overruled seems to be *McCulloch v. Eagle Ins. Co.*, 1 Pick. 278. Whether this case would now be followed in Massachusetts may be doubted. See *Brauer v. Shaw*, 168 Mass. 198, 46 N. E. 617, 60 Am. St. Rep. 387; *Commonwealth Mutual Fire Ins. Co. v. Knabe & Co.*, 171 Mass. 265, 50 N. E. 516.

⁹⁹ *McGiverin v. James*, 33 Up. Can. Q. B. 203.

by the offeree is the transfer of title at the moment of shipment, and the promise of the offeror to pay the price becomes a binding obligation at that time.¹ If goods are ordered to be sent by mail there can be no doubt that the same principle applies and that a unilateral contract is complete when the goods are mailed. If instead of goods the offeree is requested to send money, the result also is the same. As soon as the money is sent it becomes the property of the offeror,² and he is bound to perform his promise for which the money was the consideration. So if the offer requested the sending of a formal document by mail, title to the document would pass as soon as mailed.³

In an offer to make a bilateral simple contract, however, the offeror requests a promise and not an act, and our law does not regard the mere delivery of an unsealed informal writing, such as a letter, as of itself creating an obligation.⁴ Accordingly in bilateral contracts made by correspondence, the question is, when has the offeree made the promise requested in the offer? It may be forcibly argued that making a promise is something which necessarily requires communication, and that sending a letter which never arrives is no more making a promise to the person addressed than talking into a telephone when there is no connection with the person addressed;⁵ and the rule that a bilateral contract is completed by mailing acceptance has been ably criticised, and contention made that

¹ Williston on Sales, § 278.

² *Buell v. Chapin*, 99 Mass. 594, 97 Am. Dec. 58; *Currier v. Continental Life Ins. Co.*, 53 N. H. 538; *Palmer v. Phoenix Mut. L. Ins. Co.*, 84 N. Y. 63; *Edgerton v. Hodge*, 41 Vt. 676; cp. *Campbell v. Knights of Pythias*, 168 Mass. 397, 47 N. E. 109. But the mere request to "remit" a large sum though it authorizes the use of the post, does not authorize mailing the amount in negotiable treasury notes, and if the money is lost in the mail, it is the sender's loss. *Mitchell-Henry v. Norwich &c. Ins. Co.* [1918], 1 K. B. 124.

³ Thus in *Tayloe v. Merchants' Fire Ins. Co.*, 9 How. 390, 13 L. Ed.

187; *Pennsylvania Lumbermans' Mut. F. Ins. Co. v. Meyer*, 126 Fed. 352, 61 C. C. A. 254; *Canterbury v. Bank of Sparta*, 91 Wis. 53, 64 N. W. 311, 30 L. R. A. 845, 51 Am. St. Rep. 870. the offer requested that a check or draft be sent and ownership of the document was held to pass as soon as it was mailed. See also *Sichel v. Borch*, 2 H. & C. 954, 956; *Mitchell v. Byrne*, 6 Rich. L. 171; *Kirkman v. Bank of America*, 2 Coldw. 397. Cp. *Ex parte Cote*, L. R. 9 Ch. 27.

⁴ See *supra*, § 12.

⁵ But see 2 Col. L. Rev. 5, by Dean Ashley.

actual communication should be required.⁶ But it is certainly in accordance with all analogies in the formation of contracts that some outward indication of assent and of promises should be regarded by the law as essential rather than the actual communication which is necessary for mental assent. If the law is open to criticism for taking the moment of mailing a letter as important, it is because that outward act is not so certain an outward indication that a promise has been made as a receipt of the letter by the offeror would be, and the law should select such an outward act as normally and ordinarily connotes the actual making of a promise by communication.

§ 82. Acceptance in contracts by telegraph or telephone may be complete by dispatching a message.

By analogy to the law governing contracts by mail, it is held that a contract by telegraph may be completed by delivering a telegraphic dispatch of acceptance for transmission at the receiving office of the telegraph company.⁷ The same analogy will probably prevail in the case of contracts by telephone.⁸ The analogy between the telegraph and mail is by

⁶ Langdell, Summary of Contracts, §§ 14-16. Dean Langdell's assertion that the promise contained in the acceptance is itself an offer before a contract is complete, seems untenable.

⁷ *Minnesota Oil Co. v. Collier Lead Co.*, 4 Dill. 431; *Garrettson v. North Atchison Bank*, 47 Fed. 867; *Andrews v. Schreiber*, 93 Fed. 367; *Weld v. Victory Co.*, 205 Fed. 770; *Bank of Yolo v. Sperry Flour Co.*, 141 Cal. 314, 74 Pac. 855, 65 L. R. A. 90; *Haas v. Myers*, 111 Ill. 421, 427, 53 Am. Rep. 634; *Cobb v. Foree*, 38 Ill. App. 255; *Western Union Tel. Co. v. Allen*, 30 Kans. 229, 119 Pac. 981; *Postal Telegraph Cable Co. v. Louisville Oil Co.*, 140 Ky. 506, 131 S. W. 277; *Tyng v. Converse*, 180 Mich. 195, 146 N. W. 629; *Trevor v. Wood*, 36 N. Y. 307, 93 Am. Dec. 511; *Wester v. Casein Co.*, 206 N. Y. 506, 100 N. E. 488, 490;

Williams v. Burdick, 63 Ore. 41, 125 Pac. 844; *Perry v. Mt. Hope Iron Co.*, 15 R. I. 380, 5 Atl. 632; *Kenedy Mercantile Co. v. Western Union Tel. Co.* (Tex. Civ. App.), 167 S. W. 1094. *Contra* is *Beaubien Produce Co. v. Robertson*, Rap. Jud. Quebec, 18 C. S. 429.

⁸ *Bank of Yolo v. Sperry Flour Co.*, 141 Cal. 314, 74 Pac. 855, 65 L. R. A. 90; *Tung v. Converse*, 180 Mich. 195, 146 N. W. 629; *Planters' Oil Co. v. Whitesboro Cotton Oil Co.* (Tex. Civ. App.), 146 S. W. 225; *Cuero Cotton Oil Mfg. Co. v. Feeders' Supply Co.* (Tex. Civ. App.), 203 S. W. 79. The point decided by these cases related to the place of a contract rather than to its existence, but the decision that the place where the acceptor speaks is the place of the contract necessarily involves the conclusion that it is the

no means perfect, and the telephone presents still greater differences from the mail. In the United States, neither the telegraph nor the telephone has been operated by the government, except during war. In neither case is anything tangible sent by the offeree and received by the offeror. In the use of the telegraph the risks of error are also vastly greater than in the case of mail. Nevertheless if the assumption is sound that the offeror has impliedly assented to the starting of a telegram on its way, as the only necessary manifestation of acceptance, the result would be unquestionably right. The difficulty is because of the probability that such an assumption is based on a legal fiction. So far as the telegraph is concerned, however, the law is doubtless settled; but a contract by telephone presents quite as great an analogy to a contract made where the parties are orally addressing one another in each other's presence. It has not been suggested in the latter case that the offeror takes the risk of hearing an acceptance addressed to him. The contrary has been held.⁹ If then it is essential that the offeror shall hear what is said to him, or at least be guilty of some fault in not hearing, the time and place of the formation of the contract is not when and where the offeror speaks, but when and where the offeror hears, or ought to hear.¹⁰

speaking of the acceptor, not the hearing of the offeror which completes the contract. See *infra*, § 97. The following editorial comment is made in 75 Central L. J. 71, on the earlier Texas decision cited above:—

"The rule as to letters and telegrams is, we think, this way, and the court's conclusion is very probably correct. There seems, however, something more of assumption of fact than logic in arriving at this conclusion. Thus it is said the offer was received and accepted at the same place. Just as forcibly, however, it could be said the offer was made and accepted and the agreement consummated at the other place, and perhaps with more reason. If the

voice of the offeror had not reached or been properly heard by the offeror of the contract, would the agreement have been consummated? The acceptor knew the offeror was listening to hear and, in accepting, it was incumbent on him to make him hear. But he was to hear at the place of offer. Would not what the offeror heard be the contract, if it differed from what the other said?"

⁹ See *infra*, § 95.

¹⁰ The New Swiss Federal Code of Obligations provides (Art. 4): Contracts concluded by telephone are regarded as made between parties present, if they or their agents have been personally in communication.

§ 83. The use of the mail or telegraph must have been authorized in order that a contract should be completed by sending an acceptance.

The reason given in modern cases for the doctrine that a contract may be completed by mailing a letter of acceptance, or by dispatching a telegraphic acceptance, is that the use of the post-office or telegraph company has been authorized or indicated by the offeror as the means of communication, and that the acceptor is complying with a request made to him or authority given to him by the offeror in sending his acceptance in that way. If the offeror himself sends his offer by mail, this of itself implies authority to answer by the same channel of communication.¹¹ Similarly, if an offer is sent by telegraph, authority to reply in the same way will be implied.¹² If an offer is made orally, but is left open for subsequent acceptance, and the parties reside at a distance so that no subsequent personal meeting is apparently contemplated, an acceptance by mail would be authorized;¹³ and similar principles would govern the use of the telegraph,¹⁴ where the offerer has not himself made use of the medium of communication adopted by the offeree. The question whether that medium was authorized is one of fact; depending upon what would reasonably be expected by one in the position of the contracting parties, in view of prevailing business customs.

¹¹ See cases *supra*, § 80.

¹² *Williams v. Burdick*, 63 Ore. 41, 125 Pac. 844; *Perry v. Mt. Hope Iron Co.*, 15 R. I. 380, 5 Atl. 632, 2 Am. St. Rep. 902; and see other cases cited in the preceding section.

¹³ *Henthorn v. Fraser*, [1892] 2 Ch. 27; *cf. Scottish Am. Mtge. Co. v. Davis*, 96 Tex. 504, 74 S. W. 17, 97 Am. St. Rep. 932.

¹⁴ In *Perry v. Mt. Hope Iron Co.*, 15 R. I. 380, 5 Atl. 632, 2 Am. St. Rep. 902, an offer made in Boston in conversation was to "stand until the next day." The plaintiff telegraphed an acceptance from Providence. It was held

that the contract was completed in Rhode Island. "If there be any question that the telegraph is a natural and ordinary mode of transmitting such an acceptance, that is a question of fact for the jury; but we are of opinion that if it be shown that the acceptance duly reached the defendant, the question of the mode, no mode having been specified is immaterial." See also *Wilcox v. Cline*, 70 Mich. 517, 38 N. W. 555; *Tyng v. Converse*, 180 Mich. 195, 146 N. W. 629; *South Branch Cheese Co. v. American Butter & Cheese Co.*, 191 Mich. 507, 158 N. W. 158.

§ 84. An acceptance must be properly stamped and addressed.

It is obvious that authority to send an answer by mail must be limited to an acceptance properly addressed.¹⁶ And as the postal laws of the United States require entire or partial prepayment of postage, a letter of acceptance mailed without a stamp will not create a contract.¹⁶ But as letters with the minimum requirement of stamps upon them are sent forward, though their weight is such as to require additional postage, it is not so clear that an acceptance thus stamped is not effective when mailed.¹⁷ That prepayment of a telegraphic acceptance is essential does not seem probable, since no added risk of delay or of failure to reach its destination is involved. The question may also be suggested whether a contract could be completed by mailing a letter of acceptance at a time when mails were stopped by disturbance of nature, by riots, or by war; and, similarly, whether dispatching a telegraphic acceptance would be sufficient if telegraphic communication had been interrupted by breaking of the wires. Certainly if the acceptor knew of the circumstances, no contract ought to be held to have been formed.¹⁸ If the acceptor had no reason to know of the interruption, it would seem that since the offeror has authorized the means of communication adopted, he must take the risks which that method of communication involves.

§ 85. When an acceptance is mailed.

An acceptance is mailed within the meaning of the rule under consideration, when it is put within the control of postal authorities authorized to receive it. Merely delivering an acceptance to a messenger with directions to mail it, amounts to nothing until the messenger actually deposits it in the mail.¹⁹

¹⁶ *Potts v. Whitehead*, 20 N. J. Eq. (5 C. E. Green) 55. A letter directed to the offeror at a place to which he only occasionally resorted, was held not to create a contract when mailed.

¹⁷ *Britton v. Phillips*, 24 How. Pr. 111; *Blake v. Hamburg-Bremen F. I. Co.*, 67 Tex. 160, 2 S. W. 368.

¹⁸ In *Schultz v. Caledonia Insurance Co.*, 77 Fed. 375, it was held without

discussion that such an acceptance was effective when mailed, though the deficiency in postage delayed delivery of the letter.

¹⁹ In *Bal v. Van Staden*, 20 So. African L. J. 407, it was held that mailing a letter of acceptance did not complete a contract when communication by mail was interrupted by war.

²⁰ *Maclay v. Harvey*, 90 Ill. 525, 32 Am. Rep. 35.

In England where postmen are not required by law to receive letters for mailing, the delivery of a letter to a postman with the request that he post it, is wholly ineffectual until the letter is actually posted.²⁰ In the United States the postal regulations require the carriers on their rounds to receive all prepaid letters that may be handed them for mailing. Therefore, handing an acceptance properly addressed and stamped to a postman would complete a contract.²¹ Depositing a letter in a street mail box is still more clearly a mailing of it within the requirements of the law.²²

§ 86. It is not important that the acceptor has the power to withdraw his acceptance from the mail.

An inference is possible from an English case²³ that the doctrine that an acceptance is complete when it is mailed, is based on the assumption that thereafter the letter is no longer within the sender's control, and that where, as in France, the sender may reclaim his letter, the contract should not be regarded as complete until the acceptance is received. This doctrine can hardly be accepted in the United States, however, where, by the postal regulations,²⁴ the sender of a letter may regain it by complying with certain specified formalities,²⁵ and yet as has been

²⁰ *Re London & Northern Bank*, [1900] 1 Ch. 220.

²¹ In *Pearce v. Langfit*, 101 Pa. 507, 511, 47 Am. Rep. 737, the court said: "It certainly can make no difference whether the letter is handed directly to the carrier, or is first deposited in a receiving box and taken from thence by the same carrier. . . . The postal regulations of the United States require that carriers while on their rounds shall receive all letters prepaid that may be handed them for mailing."

²² "It is clear that when the plaintiff in pursuance of defendant's request deposited the duplicate of the contract signed by her, with her address, in the United States street mailing box, the agreement by that act became complete." *Watson v. Russell*, 149 N. Y. 388, 391, 44 N. E.

161. See also *Re London & Northern Bank*, [1900] 1 Ch. 220; *Wood v. Callaghan*, 61 Mich. 402, 411, 28 N. W. 162; *Greenwich Bank v. DeGroot*, 7 Hun, 210.

²³ *Ex parte Cote*, L. R. 9 Ch. 27. The decision, however, involved the question whether the ownership in bills of exchange passed when they were mailed not whether a bilateral contract was completed. See *supra*, § 80.

²⁴ §§ 531, 533.

²⁵ See *Crown Point Iron Co. v. Aetna Ins. Co.*, 127 N. Y. 608, 609, 28 N. E. 653, 14 L. R. A. 147. In *McDonald v. Chemical Natl. Bank*, 174 U. S. 610, 620, 43 L. Ed. 1106, the court said, however,—“Nor can it be conceded that except on some extraordinary occasion and on evidence satisfactory to the post-office authorities,

seen a contract is completed by an authorized mailing of an acceptance.²⁶ Moreover, after an acceptance by telegraph, there can be little doubt that the company would, if requested by the sender of the dispatch immediately after he had delivered it for transmission, return it. In England the telegraph lines are in the control of the government, and are operated by the post-office department. Attention does not seem to have been called in the American cases to the difference in this respect of the telegraph from the post office as a medium of transmission. It may be observed that in the law of property title may pass by an authorized appropriation on the part of the seller though the property still remains entirely within his control,²⁷ and though it would not be universally admitted that there may be delivery of a formal document remaining wholly within the maker's hands,²⁸ it does not seem that a mere possibility that the maker may regain possession would prevent a delivery to the post-office from operating as a delivery of the instrument to the person addressed.²⁹ Though the analogy is by no means perfect between a transfer of property or of a formal instrument on mailing and the formation of a bilateral contract by the mailing of a letter of acceptance, no reason is apparent why the possibility of withdrawal by the sender should be of any more importance in the latter case than in the former.

§ 87. An acceptance inadequate when mailed may become valid when received.

If an acceptance is actually received by the offeror which complies with the terms of the offer, while the offer is still

a letter once mailed can be withdrawn by the party who mailed it. When letters are placed in a post-office, they are within the legal custody of the officers of the government, and it is the duty of postmasters to deliver them to the parties to whom they are addressed. *United States v. Pond*, 2 Curtis, C. C. 265; *Buell v. Chapin*, 99 Mass. 594, 97 Am. Dec. 58; *Morgan v. Richardson*, 13 Allen, 410; *Tayloe v. Merchants' Fire Ins. Co.*, 13 L. Ed. 187, 9 How. 390."

²⁶ See *supra*, § 80.

²⁷ Williston on Sales, §§ 274 *et seq.*

²⁸ See *infra*, § 211.

²⁹ In *Canterbury v. Bank of Sparta*, 91 Wis. 53, 64 N. W. 311, 30 L. R. A. 845, 51 Am. St. Rep. 870, a check was dispatched by mail in accordance with an offer. It was held that the title to the check passed at once on the mailing, and that when it was subsequently withdrawn from the mail by the sender, he converted the check, and was liable for its amount. See further, *supra*, § 80.

open, a contract will be formed. Accordingly if for any reason an acceptance when mailed or dispatched by telegraph does not complete the contract, as, for instance, because the use of the mail or telegraph was not authorized, or because the acceptance was not properly addressed, a contract will, nevertheless, be formed if the acceptance is received while the offer still remains open.³⁰ An inquiry suggests itself which does not seem to have been considered by the courts; how far the duration of the offer may be affected by permitting an acceptance, ineffective when sent, to become valid when received. If an offer is sent by mail from San Francisco to Boston, expressly or impliedly requesting an answer by the same channel, it may be supposed that an answer by mail must be sent within a day or two to create a contract, and if so sent will form a contract when it is mailed. As the mailing constitutes the acceptance, this seems to involve the conclusion that a reasonable time within which acceptance must be made is a day or two. Let it be supposed that the offeree instead of taking this course waits three or four days longer than would be permissible if he had used the mails, and then sends a telegraphic acceptance which reaches the offeror as soon as a letter promptly mailed would have reached him. It seems certainly arguable that when the telegram was sent no offer was open; yet if this result is accepted, the general statements sometimes made must be qualified. It must follow that where a letter of acceptance is called for, and one is sent which is misdirected but which, nevertheless, arrives as soon as if it had been correctly addressed, no contract is created unless the letter of acceptance arrives within a time which would have been reasonable not for receiving, but for dispatching a properly addressed letter. The only apparent escape from the difficulty (which is a consequence of the prevailing rule that mailing an acceptance may create a contract) is to say that a reasonable time for the acceptance of an offer is not an absolute

³⁰ See as to telegrams—*Webb v. Sharman*, 34 U. C. Q. B. 410; *Perry v. Mt. Hope Iron Co.*, 15 R. I. 380, 5 Atl. 632, 2 Am. St. Rep. 902; *Lucas v. Western Union Tel. Co.*, 131 Ia. 669, 109 N. W. 191. As to mail—*Linn v.*

McLean, 80 Ala. 360, 365; *Summers v. Hibbard*, 153 Ill. 102, 38 N. E. 899, 46 Am. St. Rep. 872; *Potts v. Whitehead*, 20 N. J. Eq. 55 (5 C. E. Green); *Haines v. Dearborn*, 100 Ia. 474, 49 Atl. 319.

quantity even for that offer but may vary with the means adopted for accepting. Thus a reasonable time for dispatching a letter of acceptance would be shorter than the time permitted if the acceptor accepted in person or put the acceptance directly in the offeror's hands. Though this reasoning is somewhat forced, it is not impossible, and the fact that such an expression as "return mail," when inserted in an offer as a requirement has been construed as meaning within such a time as return mail would reach the offeror,³¹ seems to indicate a disposition on the part of the courts to give effect to the probable attitude of mind of the offeror, which ordinarily regards the time when receipt of the acceptance is expected, not the time when it shall be started. One may suppose, however, conditions in an offer concerning the time of acceptance from which escape would be difficult. If an offer by mail said "this offer will be open three days" or "this offer must be accepted within three days" presumably an acceptance mailed within that time would be sufficient; but it seems a difficult construction to interpret the offer as meaning that acceptance may be made at any time within which a letter mailed in three days would normally take to reach the offeror. Unless such a construction could be given the offer, a misdirected acceptance mailed within three days would be ineffectual if it arrived after the lapse of three days, although it arrived as soon as it would if it had been properly directed.

When it is proved that a letter properly addressed and stamped was put in the mail there is a presumption that it reached its destination in due course of post.³² A similar presumption has been applied to telegrams.³³

³¹ See § 76.

³² *Warren v. Warren*, 1 Cr. M. & R. 250; *Bussard v. Levering*, 6 Wheat, 102, 5 L. Ed. 215; *Rosenthal v. Walker*, 111 U. S. 185, 195, 28 L. Ed. 395; *Kimberly v. Arms*, 129 U. S. 512, 529, 32 L. Ed. 764, 9 Sup. Ct. 355; *Young v. Clapp*, 147 Ill. 176, 190, 32 N. E. 187, 35 N. E. 372; *Goodwin v. Provident, etc., Ass'n*, 97 Ia. 226, 66 N. W. 157, 32 L. R. A. 473, 59 Am. St. Rep. 411; *Collins v. Swan Lumber Co.*, 158

Ky. 231, 164 S. W. 813; *Chase v. Surry*, 88 Me. 468, 34 Atl. 270; *McDowell v. Aetna Insurance Co.*, 164 Mass. 444, 41 N. E. 665; *Farmers' Handy Wagon Co. v. Newcomb*, 192 Mich. 634, 159 N. W. 152; *Dade v. Aetna Ins. Co.*, 54 Minn. 336, 56 N. W. 48; *Hand v. Howell*, 61 N. J. L. 142, 38 Atl. 748; *Jansen v. McCorkell*, 154 Pa. 323, 26 Atl. 366.

³³ *Eppinger v. Scott*, 112 Cal. 369, 42 Pac. 301, 44 Pac. 723, 53 Am. St.

§ 88. The offeror may impose as a condition of his offer that the acceptance be received.

It necessarily follows from the power of the offeror to dictate the conditions of the contract, and the way that it may be accepted, that he may require the letter or telegram of acceptance actually to be received before a contract shall be formed.³⁴ And it would seem a wise precaution for an offeror in making an offer by letter always to stipulate for actual receipt of the acceptance. This requirement need not be in express words, it is enough if the offer imposes a condition which cannot be satisfied until the acceptance is received. Thus, the words "If I do not hear from you by the 18th or 20th, I shall conclude, no," were held to impose a condition that the answer should be received by the 18th or 20th before a contract could be formed.³⁵ So an offer by mail conditional "upon the return" of certain notes was held revocable at any time prior to their actual receipt.³⁶

§ 89. When a letter of acceptance or of revocation is received within the meaning of the law.

If actual communication were necessary for the formation of a contract, or actual communication of the revocation of an offer necessary for its withdrawal, it would be immaterial that a letter of acceptance or revocation came into the possession of the person addressed; it would be necessary for the letter to be read. But the law in regard to this matter, as in regard to other matters in the formation of contracts, takes as its requirement an outward situation which would ordinarily connote the existence of the state of mind which would

Rep. 220; *Com. v. Jeffries*, 7 Allen, 548, 83 Am. Dec. 712; *Oregon S. S. Co. v. Otis*, 100 N. Y. 446, 3 N. E. 485, 53 Am. Rep. 221; *Perry v. German-American Bank*, 53 Neb. 89, 73 N. W. 538.

³⁴ *Household Fire Ins. Co. v. Grant*, 4 Ex. D. 216, 223, 238; *Pennsylvania Lumbermans' Mut. F. I. Co. v. Meyer*, 126 Fed. 352, 354, 61 C. C. A. 254, *Mercer Elec. Mfg. Co. v. Connecticut Elec. Mfg. Co.*, 87 Conn. 691, 89 Atl.

909; *Haas v. Myers*, 111 Ill. 421, 423, 53 Am. Rep. 634; *Postal Telegraph Cable Co. v. Louisville Oil Co.*, 140 Ky. 506, 131 S. W. 277; *Lewis v. Browning*, 130 Mass. 173; *McCone v. Eccles*, (Nev. 1919), 181 Pac. 134; *Vassar v. Camp*, 11 N. Y. 441; *Ackerman v. Maddux*, 26 N. Dak. 50, 143 N. W. 147.

³⁵ *Lewis v. Browning*, 130 Mass. 173.

³⁶ *McCone v. Eccles*, (Nev. 1919), 181 Pac. 134.

be necessary were mutual assent a matter of actual as distinguished from apparent assent. Accordingly, if a letter is in the possession of the person addressed, or of one authorized to receive it for him, or in a place which he has designated for the purpose, the letter has reached its destination and is as effectual though unread as if it were read.³⁷

§ 90. Implication of assent and counter-promise.

Assent may be indicated by acts as well as by words, and an expression which primarily indicates merely assent to receive a performance promised by the offeror may also justify an inference on the part of the offeror that the offeree undertakes to render counter-performance.³⁸ This double

³⁷ In *Howard v. Daly*, 61 N. Y. 362, 19 Am. Rep. 285, an offer was sent by the defendant to the plaintiff for a theatrical engagement in the form of a contract executed by the defendant with a duplicate which he requested the plaintiff, if she accepted, to sign and return. The plaintiff promptly signed the duplicate and deposited it in the defendant's letter box at his theatre, which was sometimes used for such purposes. It was held that a contract was completed although the duplicate never reached the defendant. In *Holmes v. Myles*, 141 Ala. 401, 37 So. 588, an acceptance of an option left at the house of the party giving the option was held effectual though he had gone to the woods and received no actual notice within the stipulated time. In *Sherwin v. Natl. Cash Register Co.*, 5 Col. App. 162, 38 Pac. 392, an offer and revocation were received by the offeree in the same mail. The court held the revocation effectual though there was no evidence which letter was in fact read first. This holding necessarily involves the conclusion that the possession of the revocation made it effectual. Similarly in the Scotch case of *Dunmore v. Alexander*, 9 Shaw & D. 190 (Scots. Cas.) Langdell's Cas. Cont. (2d ed.) 121, letters of ac-

ceptance and rejection were simultaneously received and it was held that they must be treated as one communication.

³⁸ *Pittsburgh Plate Glass Co. v. H. Neuer Glass Co.*, 253 Fed. 161, 165 C. C. A. 61. In *Grossman v. Schenker*, 206 N. Y. 466, 469, 100 N. E. 39, the court said:

"A contract includes not only what the parties said but also what is necessarily to be implied from what they said. *Milliken v. Western Union Tel. Co.*, 110 N. Y. 403, 408, 18 N. E. 251, 1 L. R. A. 281. Thus the words 'cash on delivery' with no other promise to pay 'imply a promise and create an obligation' to make payment upon delivery. *Justice v. Lang*, 42 N. Y. 493, 1 Am. Rep. 576. So the word 'sold' in a written agreement implies not only a contract to sell but also a contract to buy; *Butler v. Thomson*, 92 U. S. 412, 414, 23 L. Ed. 684, and a contract to buy with no express promise to sell implies the latter obligation. *Hudson Canal Co. v. Penn. Coal Co.*, 75 U. S. [8 Wall.] 276, 289, 19 L. Ed. 349. 'What is implied in an express contract is as much a part of it as what is expressed.' *Bishop on Contracts* [2d ed.], § 241; for 'the law is a silent factor in every contract.' *Long v.*

effect of an acceptance, as not only an expression of assent but also a counter-promise has already been noted.³⁹ Where the offer clearly states the undertaking which the offeror requests as consideration for his offer there can be no doubt that any expression of assent by the offeree has this double effect. Where the offer is not thus clear, it is a question of construction what the natural meaning of the words and acts of the parties may mean. Taking title to goods with knowledge that they are offered at a certain price indicates a promise to pay that price.⁴⁰ So that where goods which have not been ordered are sent and the buyer takes the goods, he impliedly agrees to pay for them.⁴¹ Not infrequently an agreement in terms states merely that one party will buy or that he will sell certain goods without stating any correlative obligation by the other party. If the parties were purporting to make a contract it will generally be a correct implication of fact to assume the existence of the correlative promise.⁴²

Straus, 107 Ind. 94, 95, 6 N. E. 123, 7 N. E. 763.

A mutual agreement implies an offer and acceptance, or a promise for a promise in some form, and if, as alleged, it was 'mutually agreed . . . that the defendants would pay to the plaintiff the sum of \$500, for such superintendence,' necessarily there was not only an express promise by the defendant to pay, but also an implied promise by the plaintiff to superintend. *Allen v. Patterson*, 7 N. Y. 476, 479, 57 Am. Dec. 542; *Marie v. Garrison*, 83 N. Y. 14, 23; *Hadden v. Dimick*, 31 How. Pr. 196, 226; *Stilwell v. Ocean Steamship Co.*, 5 N. Y. App. Div. 212, 214; *Jones & Co v. Binford*, 74 Me. 439; *Foulks v. Falls*, 91 Ind. 315, 320." See also *Baltimore Breweries Co. v. Callahan*, 82 Md. 106, 33 Atl. 460; *C. M. Cecil Co. v. C. D. Wood Electric Co.*, 103 N. Y. Misc. 687, 170 N. Y. Supp. 962.

³⁹ See *supra*, § 65; and *infra*, § 1293.

⁴⁰ *Dexter v. Filmore*, (Vt. 1918), 102 Atl. 1048.

⁴¹ See *infra*, § 91.

⁴² *Cold Blast Transportation Co. v. Kansas City &c. Co.*, 114 Fed. 77, 52 C. C. A. 25, 57 L. R. A. 696; *Lima Locomotive &c. Co. v. National Steel Castings Co.*, 155 Fed. 77, 83 C. C. A. 593, 11 L. R. A. (N. S.) 713; *Sterling Coal Co. v. Silver Springs*, 162 Fed. 848, 89 C. C. A. 520; *Jenkins v. Anaheim Sugar Co.*, 247 Fed. 958, 961, 160 C. C. A. 658; *Pittsburgh Plate Glass Co. v. H. Neuer Glass Co.*, 253 Fed. 161, 165 C. C. A. 61. In *Ziehm v. Frank Steil Brewing Co.*, 181 Md. 582, 102 Atl. 1005, 1007, the court said (citing *Minnesota Lumber Co. v. Whitebreast Coal Co.*, 160 Ill. 85, 43 N. E. 774, 31 L. R. A. 529; *Wells v. Alexandre*, 130 N. Y. 642, 29 N. E. 142, 15 L. R. A. 218):

"The general rule . . . is to the effect that an accepted offer to furnish or deliver such articles of personal property as shall be needed, required, or consumed by the established business of the acceptor during a limited time is binding and may be enforced, because it contains an implied agreement of the acceptor to

More specifically, a seller who takes a written order or agreement to buy, thereby not only assents to receive the buyer's promise, but also himself impliedly agrees to sell.⁴³ The receipt of such an order by a commercial traveler, however, carries with it no such implication. Unless his authority to make contracts, not simply to take orders is shown, no contract arises until acceptance of the order is sent to the buyer by the principal.⁴⁴ The same question may arise in agreements with employees. The only express promise may be to employ or to serve. Whether the promise is gratuitous or is supported by an implied counter-promise is a question of fact in each case.⁴⁵ Where a contract of employment for a definite time is made and the employee's services are continued after the expiration of the time, without objection, the inference is that the parties have assented to another contract for a term of the same length with the same salary and conditions of service;⁴⁶ following the analogy of a

purchase all articles that shall be required in conducting his business during the time named from the party who makes the offer."

⁴³ *American Automobile Co. v. Perkins*, 83 Conn. 520, 77 Atl. 954; *Cameron Coal Co. v. Universal Metal Co.*, 28 Okla. 615, 110 Pac. 720. See also *Bauman v. McManus*, 75 Kans. 106, 89 Pac. 15, 10 L. R. A. (N. S.) 1138. In *Davidge v. Velie*, 95 N. Y. Misc. 511, 160 N. Y. Supp. 820, 821, speaking of an order the court said: "The written instrument here is nothing more than an offer by the defendants to purchase fertilizer, fixing price, quality, quantity, time, and place of delivery. No acceptance binding the plaintiff can be found within the four corners of the paper. It may be that soliciting the order and manual acceptance of the paper would warrant the inference of its acceptance, but that must be shown by evidence outside the paper."

⁴⁴ *Gould v. Cates Chair Co.*, 147 Ala. 629, 41 So. 675; *Toledo Computing Scale Co. v. Stephens*, 96 Ark. 606, 132 S. W. 926; *Outcault Advertising Co. v. Young Hardware Co.*, 110 Ark. 123,

161 S. W. 142; *Bauman v. McManus*, 75 Kan. 106, 89 Pac. 15, 10 L. R. A. (N. S.) 1138; *John Matthews Apparatus Co. v. Renz*, 22 Ky. L. Rep. 1528, 61 S. W. 9; *Burbank v. McDuffee*, 65 Me. 135, 137; *Howe Scale Co. v. Wolfshaut*, (Supr. Ct. App. Term), 170 N. Y. S. 943; *McKindly v. Dunham*, 55 Wis. 515, 13 N. W. 485, 42 Am. Rep. 740; cf. *Clark v. Murphy*, 164 Mass. 490, 491, 41 N. E. 674; *Brennan v. Dansby*, (Tex. Civ. App.) 95 S. W. 700. Often the order or so-called contract expressly provides that it shall not be binding on the principal until accepted by him, *Hargrove v. Crawford*, 159 Ia. 522, 141 N. W. 423, or impliedly so provides, e. g., in *Cary v. Appo*, (App. Term.) 84 N. Y. S. 569, the order stated: "You are at liberty to consult as to my reputation &c.," clearly indicating that the seller unless satisfied was not to be bound.

⁴⁵ *Grayling Lumber Co. v. Hemingway*, 124 Ark. 354, 187 S. W. 327. See also *Baltimore Breweries Co. v. Callahan*, 82 Md. 106, 33 Atl. 460, and cases *infra*, note 46.

⁴⁶ *Williams v. Byrne*, 7 A. & E. 177;

similar rule in regard to leases.⁴⁷ One who receives an appointment as sole agent agrees by his assent to the appointment not only that the principal shall have no other agent, but also that he himself will use reasonable diligence in endeavoring to forward the business of the agency.⁴⁸ Where a franchise is offered to a corporation on condition that it assume certain obligations, acceptance of the franchise is an acceptance of an offer and binds the corporation to observe the stated terms.⁴⁹

Hermann v. Littlefield, 109 Calif. 430, 42 Pac. 443; *State Board v. Meyers*, 20 Colo. App. 139, 77 Pac. 372; *Hart v. Bradbury*, 201 Ill. 82; *Travelers' Ins. Co. v. Parker*, 92 Md. 22, 47 Atl. 1042; *Dunton v. Derby Desk Co.*, 186 Mass. 35, 71 N. E. 91; *Maynard v. Royal Worcester Corset Co.*, 200 Mass. 1, 85 N. E. 877; *Allen v. Chicago Pneumatic Tool Co.*, 205 Mass. 569, 91 N. E. 887; *Sines v. Wayne County*, 58 Mich. 503, 25 N. W. 485; *Wright v. Elk Rapids Iron Co.*, 129 Mich. 543, 89 N. W. 335; *Home Fire Ins. Co. v. Barber*, 67 Neb. 644, 93 N. W. 1024, 60 L. R. A. 927, 108 Am. St. 716; *Fitch v. Martin*, 74 Neb. 538, 104 N. W. 1072; *Capron v. Stout*, 11 Nev. 304; *Douglas v. Merchants Ins. Co.*, 118 N. Y. 484, 23 N. E. 806, 7 L. R. A. 822; *Adams v. Fitzpatrick*, 125 N. Y. 124, 26 N. E. 143; *Mason v. New York Produce Exch.*, 127 N. Y. App. D. 282, 111 N. Y. S. 163; *Kelly v. Carthage Wheel Co.*, 62 Ohio St. 598, 57 N. E. 984; *Wallace v. Floyd*, 29 Pa. 184, 72 Am. Dec. 620; *Houston Ice &c. Co. v. Nicolini* (Tex. Civ. App.), 96 S. W. 84; *Dickinson v. Norwegian Plow Co.*, 101 Wis. 157, 76 N. W. 1108; *Appleton Waterworks Co. v. Appleton*, 132 Wis. 563, 113 N. W. 44; *Halter v. Goody*, 4 Sask. L. R. 161; *Bullock v. Wimmera*, 5 Vict. L. R. (L.) 362; *Short v. Laery*, 11 N. Zealand L. R. 17. The inference may be rebutted by evidence of any kind which indicates an expression by words or acts of a different intention. *Rex v. Macclesfield*, 3

T. R. 76; *O'Connor v. Briggs*, 182 Mass. 387, 65 N. E. 836; *Summers v. Phoenix Ins. Co.*, 50 N. Y. Misc. 181, 98 N. Y. S. 226; *Schott v. La Compagnie Générale*, 52 N. Y. Misc. 236, 102 N. Y. S. 901. As to the effect of the Statute of Frauds, see *infra*, § 503.

⁴⁷ *Doe v. Bell*, 5 T. R. 471; *Earle v. Kelly*, 21 Calif. App. 480, 132 Pac. 282; *Clinton Wire Cloth Co. v. Gardner*, 99 Ill. 151; *Cramer v. Baugher*, 130 Md. 212, 100 Atl. 507; *Faxon v. Jones*, 176 Mass. 138, 57 N. E. 360; *Ackley v. Westervelt*, 86 N. Y. 448; *Phipps Est. v. Tong Phong*, 214 N. Y. 308, 108 N. E. 410; *Baltimore &c. R. Co. v. West*, 57 Ohio St. 161, 49 N. E. 344; *Adams v. Dunn*, 64 Pa. Super. 303; *Grice v. Todd*, 120 Va. 481, 91 S. E. 609; and see 24 Cyc. 1011. For cases where the inference was rebutted, see *Cowell v. Snyder*, 171 Calif. 291, 152 Pac. 920; and 24 Cyc. 1014.

⁴⁸ *American Distributing Co. v. Hayes Wheel Co.*, 250 Fed. 109, 115; *Kaufman v. Farley Mfg. Co.*, 78 Ia. 679; *Mueller v. Bethesda Mineral Spring Co.*, 88 Mich. 390, 50 N. W. 319; *Commercial Wood & Cement Co. v. Northampton Portland Cement Co.*, 115 N. Y. App. D. 388, 100 N. Y. Supp. 960; *Taylor v. Bannerman*, 120 Wis. 189, 97 N. W. 918. Cf. *Stensgaard v. Smith*, 43 Minn. 11, 44 N. W. 669. As to any implication that the principal will continue to do business, see *infra*, § 1293.

⁴⁹ *Public Service Commission v.*

The acceptance by a creditor of a note payable in the future implies a promise to forbear suit until that day,⁵⁰ and whenever an offeree manifests by action taken, within the knowledge of the offeror, an assent to a proposed contract, the action will operate as an assent on the offeree's part to make the promise requested by the offeror.⁵¹

§ 90a. Acceptance of a document implies assent to its terms.

For the same reason, namely, that his action naturally indicates assent, where an offeree signs a document though in ignorance of its contents, he is bound by its terms.⁵² Nor is signature necessary.

The acceptance of a paper which purports to be a contract sufficiently indicates an assent to its terms whatever they may be, and it is immaterial that they are, in fact, unknown.⁵³ This principle finds illustrations in several kinds of cases. Thus the grantee under a deed poll who accepts the deed is bound, as a promisor⁵⁴ to fulfill all undertakings expressed in the deed as made by him.⁵⁵ And any writing signed by one

Westchester St. Ry. Co., 206 N. Y. 209, 99 N. E. 536.

⁵⁰ *Baker v. Walker*, 14 Exch. 468; *Cherokee County v. Meroney*, 173 N. C. 653, 92 S. E. 616.

⁵¹ *Springer v. Cooper*, 11 Ill. App. 267; *Rogers v. Becker-Brainard Machine Co.*, 211 Mass. 559, 98 N. E. 592; *Atlantic Pebble Co. v. Lehigh Valley R.*, 89 N. J. L. 336, 98 Atl. 410. In *Scully v. Roche*, 76 N. Y. Misc. 458, 135 N. Y. Supp. 633, a tenant who held over his term after being notified that increased rent would be required, was held bound to pay it. See also *Emerson v. Stevens Grocer Co.*, 95 Ark. 421, 130 S. W. 541, 105 Ark. 575, 151 S. W. 1003, and *supra*, § 22a.

⁵² *Supra*, § 35.

⁵³ *Watkins v. Rymill*, 10 Q. B. D. 178, 188; *Raffel v. Clark*, 87 Conn. 567, 89 Atl. 184, stated *infra*, n. 55, and *Haskins v. Young*, 89 Conn. 66, 92 Atl. 877.

⁵⁴ It is not important here to go into

the disputed question whether the grantee can properly be called a covenantor and be sued in covenant, or whether his liability is on a simple contract for breach of which assumpsit is the proper remedy. As to this see *infra*, § 214.

⁵⁵ *Felker v. Rice*, 110 Ark. 70, 161 S. W. 162; *Atlanta, etc., Ry. Co. v. McKinney*, 124 Ga. 929, 53 S. E. 701, 6 L. R. A. (N. S.) 436, 110 Am. St. Rep. 215; *Sanitary District v. Chicago &c. Trust Co.*, 278 Ill. 529, 116 N. E. 161; *Brockmeyer v. Sanitary District*, 118 Ill. App. 49; *Sexauer v. Wilson*, 136 Ia. 357, 113 N. W. 941, 14 L. R. A. (N. S.) 185; *Midland Ry. Co. v. Fisher*, 125 Ind. 19, 24 N. E. 756, 8 L. R. A. 604, 21 Am. St. Rep. 189; *Parish v. Whitney*, 3 Gray, 516; *Nugent v. Riley*, 1 Metc. 117, 35 Am. Dec. 355; *Hickey v. Lake Shore &c. R.*, 51 Ohio St. 40, 36 N. E. 672, 23 L. R. A. 396, 46 Am. St. 545. But in *Raffel v. Clark*, 87 Conn. 567, 571, 89 Atl. 184, the

party and orally assented to by the other binds both, except so far as the Statute of Frauds provides the contrary.⁵⁶ Indeed any written contract though signed by one party only, binds the other if he accepts the writing.⁵⁷ On the same principle "a defectively executed instrument, either a lease or a deed, when made by the owner, may be enforced against him as a contract to make a lease or deed for the reason that it is his contract."⁵⁸

§ 90b. Acceptance of telegraph blank, bill of lading, ticket or warehouse receipt.

So one who writes a telegraphic message on a blank, offered court said: "No doubt the production of a recorded deed containing an assumption clause is sufficient to establish the personal liability of the grantee, in the absence of any other testimony. But when the agreement to assume the mortgage debt is denied, and there is no finding of an antecedent agreement to that effect, and the delivery and acceptance of the deed is under such circumstances as do not charge the grantee with actual knowledge of the existence of the assumption clause, and it is not found that he had such knowledge, the mere production of the deed containing such a clause is not enough to fix a personal liability for the debt upon the grantee. The principle that a party must be presumed to know the contents and meaning of a written instrument which he takes as evidence of title, does not extend so far as to conclusively impose on the grantee of mortgaged lands a collateral personal liability for the mortgage debt, founded upon a clause inserted in the deed without his knowledge and expressing an agreement which he has not made. 1 Jones on Mortgages (6th ed.), § 738; Swisher v. Palmer, 106 Ill. App. 432; Kilmer v. Smith, 77 N. Y. 226, 33 Am. Rep. 613; Blass v. Terry, 156 N. Y. 122, 50 N. E. 953; Demaris v. Rodgers, 110 Minn. 49, 124 N. W. 457." The Connecticut

court in fact here was summarily reforming a contract. See *infra*, § 1599. The grantee's acceptance of the deed can, it seems, mean nothing other than assent. See *supra*, § 35, though his assent might be revocable for fraud or mistake.

⁵⁶ *Sentney v. Hutchinson, etc., R. Co.*, 90 Kans. 610, 135 Pac. 678; *Leonard v. Howard*, 67 Or. 203, 135 Pac. 549; *Bronson v. Coffin*, 108 Mass. 175, 186, 11 Am. Rep. 335; *Martin v. Drinan*, 128 Mass. 515; *Atlantic Dock Co. v. Leavitt*, 54 N. Y. 35, 13 Am. Rep. 556; *Earle v. New Brunswick*, 38 N. J. L. 47; *Hagerty v. Lee*, 54 N. J. L. 580, 25 Atl. 319, 20 L. R. A. 631; *Maynard v. Moore*, 76 N. C. 158; *Hickey v. Lake Shore, etc., Ry. Co.*, 51 Oh. St. 40, 36 N. E. 672, 23 L. R. A. 396, 46 Am. St. Rep. 545; *West Virginia, etc., Ry. Co. v. McIntire*, 44 W. Va. 210, 28 S. E. 696; *Chloupek v. Perotka*, 89 Wis. 551, 62 N. W. 537, 46 Am. St. Rep. 858.

⁵⁷ *Short v. Kieffer*, 142 Ill. 258, 31 N. E. 427; *Sellers v. Greer*, 172 Ill. 549, 50 N. E. 246, 40 L. R. A. 589; *McPherson v. Fargo*, 10 S. Dak. 611, 74 N. W. 1057, 66 Am. St. Rep. 723.

⁵⁸ *Lithograph Bldg. Co. v. Watt*, 96 Oh. St. 74, 117 N. E. 25, 28, and see *infra*, § 579, note 12, cases holding an undelivered deed is a sufficient memorandum under the Statute of Frauds.

by the Company, which contains printed terms and conditions is bound by them in so far as they are not violations of public policy.⁵⁹ The same principle is applicable to writings delivered as contracts by common carriers. Therefore, a shipper who takes a bill of lading or express receipt without objection should be bound by the terms of the contract of shipment legibly stated in the bill, and such is the law of England,⁶⁰ and of most of the United States where the question has arisen.⁶¹ This view has found expression in the Uniform

⁵⁹ *Postal Telegraph Cable Co. v. Nichols*, 159 Fed. 643, 89 C. C. A. 585, 16 L. R. A. (N. S.) 870; *Western Union Tel. Co. v. Prevatt*, 149 Ala. 617, 43 So. 106; *Western Union Tel. Co. v. Waxelbaum*, 113 Ga. 1017, 39 S. E. 443, 56 L. R. A. 741; *Grinnell v. Western Union Tel. Co.*, 113 Mass. 299, 18 Am. Rep. 485; *Clement v. Western Union Tel. Co.*, 137 Mass. 463; *Jacob v. Western Union Tel. Co.*, 135 Mich. 600, 98 N. W. 402; *Cole v. Western Union Tel. Co.*, 33 Minn. 227, 22 N. W. 385; *Kiley v. Western Union Tel. Co.*, 109 N. Y. 231, 16 N. E. 75; *Western Union Tel. Co. v. Edsall*, 63 Tex. 668. In Illinois, however, the sender is not bound by the conditions unless he knew or assented to them; and mere use of the blank is not sufficient proof of this. *Western Union Tel. Co. v. Lycan*, 60 Ill. App. 124; *Tyler v. Western Union Tel. Co.*, 60 Ill. 421, 14 Am. Rep. 38.

⁶⁰ *Parker v. Southeastern Ry. Co.*, 2 C. P. D. 416, at page 418, counsel for the shipper said, *arguendo*: "There is no contract if one party means one thing and the other party means something else. There is no *consensus ad idem*." Bramwell, J., replied, however, "Not so, one of the parties may so conduct himself as to lead the other to believe that there was a contract." And at page 422, Mellish, J., said, in his opinion, "Now the reason why the person receiving the bill of lading would be bound, seems to be that in the

great majority of cases persons shipping goods do know that the bill contains a contract of carriage; and the ship-owner, or master delivering the bill of lading, is entitled to assume that the person shipping the goods has that knowledge." See also *Acton v. Castle Mail Packets Co.*, 73 L. T. Rep. 158.

⁶¹ *Cau v. Texas & Pacific R. Co.*, 194 U. S. 427, 431, 24 Sup. Ct. Rep. 663, 48 L. Ed. 1053; *Louisville, etc., R. Co. v. Meyer*, 78 Ala. 597, 601; *Atlantic, etc., R. Co. v. Dexter*, 50 Fla. 180, 39 So. 634; *Central Railroad & B. Co. v. Hasselkus*, 91 Ga. 382, 17 S. E. 838, 44 Am. St. Rep. 37; *McElveen v. Southern Ry. Co.*, 109 Ga. 249, 34 S. E. 281, 77 Am. St. Rep. 371; *Adams Express Co. v. Carnahan*, 29 Ind. App. 606, 63 N. E. 245, 64 N. E. 647; *Mulligan v. Illinois Central Ry. Co.*, 36 Ia. 181, 14 Am. Rep. 514; *Louisville, etc., R. Co. v. Brownlee*, 14 Bush, 590; *Grace v. Adams*, 100 Mass. 505, 97 Am. Dec. 117, 1 Am. Rep. 131; *Hoadley v. Northern Transportation Co.*, 115 Mass. 304, 15 Am. Rep. 106; *Graves v. Adams Express Co.*, 176 Mass. 280, 57 N. E. 462; *McKinney v. Boston &c. R. Co.*, 217 Mass. 274, 104 N. E. 446; *McMillan v. Michigan Southern R. Co.*, 16 Mich. 79, 93 Am. Dec. 208. (See also *Hengstler v. Flint, etc., R. Co.*, 125 Mich. 530, 84 N. W. 1067; *Slooman v. National Express Co.*, 134 Mich. 16, 95 N. W. 999); *Christenson v. American Express Co.*, 15 Minn. 270, 2 Am. Rep. 122; *Snider v. Adams Express Co.*,

Bills of Lading Act.⁶² The courts of a few States, however, have expressed a contrary opinion. In Illinois especially it has been held to be a question of fact, to be decided by the jury, whether the shipper in fact assented to the terms of the bill of lading.⁶³

63 Mo. 376; *O'Bryan v. Kinney*, 74 Mo. 125; *Merrill v. American Express Co.*, 62 N. H. 514, 515; *Belger v. Dinsmore*, 51 N. Y. 166, 10 Am. Rep. 575; *Kirkland v. Dinsmore*, 62 N. Y. 171, 20 Am. Rep. 475; *Germania Fire Ins. Co. v. Memphis, etc., R. Co.*, 72 N. Y. 90, 29 Am. Rep. 113; *Hill v. Syracuse, etc., R. Co.*, 73 N. Y. 351, 29 Am. Rep. 163; *Hoffman v. Metropolitan Express Co.*, 111 N. Y. App. Div. 407, 97 N. Y. Supp. 838; *Boyle v. Bush Terminal R. Co.*, 136 N. Y. Supp. 355; *Whitehead v. Wilmington, etc., R. Co.*, 87 N. C. 255; *Cincinnati, etc., R. Co. v. Pontius*, 19 Oh. St. 221, 2 Am. Rep. 391; *Farnham v. Camden, etc., R. Co.*, 55 Pa. 53; *Newburger v. Howard*, 6 Phil. 174. (See also *Crary v. Lehigh Valley R. Co.*, 203 Pa. 525, 53 Atl. 363, 59 L. R. A. 815, 93 Am. St. Rep. 778); *Merchants' Dispatch Transportation Co. v. Bloch*, 86 Tenn. 392, 6 S. W. 881, 6 Am. St. Rep. 847; *Ryan v. Missouri, etc., Ry. Co.*, 65 Tex. 13, 57 Am. Rep. 589. (But see *St. Louis, etc., R. Co. v. McIntyre*, 36 Tex. Civ. App. 399, 82 S. W. 346; *Galveston &c. R. Co. v. Sparks* (Tex. Civ. App.), 162 S. W. 943); *Davis v. Railroad*, 66 Vt. 290; *Schaller v. Chicago & N. W. Ry. Co.*, 97 Wis. 31, 71 S. W. 1042; *Ullman v. Chicago & N. W. R. Co.*, 112 Wis. 150, 88 N. W. 41, 56 L. R. A. 246, 88 Am. St. Rep. 949; *Ross v. Northrup*, 156 Wis. 327, 144 N. W. 1124.

⁶² Sec. 10. See *infra*, § 1134.

⁶³ *Baker v. Michigan Southern, etc., R. Co.*, 42 Ill. 73; *Illinois Central R. Co. v. Frankenberg*, 54 Ill. 88, 5 Am. Rep. 92; *American Merchants' Express Co. v. Schier*, 55 Ill. 140. In *Chicago & Northwestern R. v. Simon*,

160 Ill. 648, 653, 43 N. E. 596, the court said: "where a contract limiting the liability of the carrier is contained in a bill of lading which, in its entirety, constitutes both a receipt and a contract, the *onus* is on the carrier to show the restrictions of the common liability were assented to by the consignor. (*Field v. Chicago and Rock Island Railroad Co.*, 71 Ill. 458; *Boscowitz v. Adams Express Co.*, 93 *id.* 523.) And whether there is such assent is a question of fact. The mere receiving the bill of lading, without notice of the restrictions therein contained, does not amount to an assent thereto. (*United States Express Co. v. Haines*, 67 Ill. 137; *Anchor Line v. Dater*, 68 *id.* 369; *American Merchants' Union Express Co. v. Schier*, 55 *id.* 140; *Merchants' Dispatch Transportation Co. v. Joesting*, 89 *id.* 152; *Erie and Western Transportation Co. v. Dater*, 91 *id.* 195.)" This passage was quoted with approval and followed in *Chicago & Northwestern Ry. Co. v. Calumet Stock Farm*, 194 Ill. 9, 13, 61 N. E. 1095, 88 Am. St. Rep. 68. The same rule was applied in *Plaff v. Pacific Express Co.*, 251 Ill. 243, 95 N. E. 1089; *Pereira v. Central Pac. R. Co.*, 66 Cal. 92, 4 Pac. 988; *Curtis v. United Transfer Co.*, 167 Cal. 112, 138 Pac. 726; *Hill v. Adams Express Co.*, 82 N. J. L. 373, 81 Atl. 859; *Wichern v. United States Express Co.*, 83 N. J. L. 241, 83 Atl. 776. In Georgia though for most purposes assent to the terms of the bill of lading is shown by the acceptance of the document without objection, in order to establish a limitation of liability further proof of assent is

Under the Interstate Commerce Acts the Supreme Court of the United States has decided that the Federal government has declared its purpose to exercise supervision over all interstate contracts of carriers and that, therefore, the Supreme Court will decide on writ of error to a State court not only the legality of a carrier's contract but also whether a contract has been made in fact. Under this ruling the court has held acceptance of a bill of lading or receipt sufficient to create a contract, if the formation of such a contract is permitted by law, that is if its terms have been filed in the schedules of the carrier with the Interstate Commerce Commission.⁶⁴ It seems clear, therefore, that jurisdictions which previously have held the contrary must revise their rulings, so far as interstate contracts of carriage are concerned.⁶⁵ A contract to pay freight may be created in the same way, not only on the part of the shipper who first receives the bill of lading, but, if the document so provides, on the part of the consignee who later receives it, and gets the goods under it.⁶⁶

necessary. The Georgia Code provides that a carrier may limit its liability by "express contract." The question, therefore, where a limitation of liability is concerned, is what amounts to an express contract within the terms of the code; and in *Central of Georgia R. Co. v. City Mills Co.*, 128 Ga. 841, 845, 58 S. E. 197, the court say: "The mere acceptance of a bill of lading, or a ticket which contains a limitation upon liability will not amount to an express contract." The court, however, held that when the shipper made out for the carrier's signature a receipt which read—"as per conditions of company's bill of lading" a charge was erroneous which left to the jury the question whether the plaintiff assented to a particular condition in the bill of lading. The question should have been—did he assent to adopt the conditions in the bill of lading, whatever they might be.

⁶⁴ *Adams Express Co. v. Croninger*, 226 U. S. 491, 33 Sup. Ct. 148, 57 L.

Ed. 314; *Wells Fargo & Co. v. Neiman-Marcus Co.*, 227 U. S. 469, 33 Sup. Ct. 267, 57 L. Ed. 600. See also *Boston & Maine R. Co. v. Hooker*, 233 U. S. 97, 34 Sup. Ct. Rep. 526, 58 L. Ed. 868, L. R. A. 1915 B. 450; and *infra*, §§ 1073, 1107, 1116.

⁶⁵ *Spada v. Pennsylvania R. Co.*, 86 N. J. L. 187, 92 Atl. 379, overruling *Hill v. Adams Express Co.*, 82 N. J. L. 373, 81 Atl. 859.

⁶⁶ In *New York, New Haven & H. R. v. Sampson*, 222 Mass. 311, 313, the court said:—

"One of the terms of both the bills of lading was: 'Owner or consignee shall pay freight at the rate herein stated, and all other charges accruing on said property, before delivery.' The defendant, as purchaser and holder of the bills of lading, indorsed by the consignee, became the owner of the hay represented thereby; *Forbes v. Boston & Lowell R. R.*, 133 Mass. 154; and his acceptance and receipt of the hay would warrant, if it did not re-

The acceptance of goods consigned to him may also indicate assent by the consignee to pay the freight charges, though he does not see the bill of lading, if he is otherwise informed that the goods are offered to him only on the terms that he assume payment of the freight.⁶⁷ Whether the same principle is applicable to a ticket, depends only upon the question whether the ticket is a mere check showing the points between which the passenger is entitled to be carried, and does not purport to be a contract stating the rights of the parties. If such is the true nature of the ticket, the passenger would not be required at his peril to read any stipulations upon it. Much might depend upon the appearance of the ticket and the nature of the trip contemplated.⁶⁸

So the acceptance of a railroad pass involves assent to conditions printed upon it, so far as they are not opposed to public policy, irrespective of the acceptor's knowledge of them.⁶⁹ And the taking of a warehouse receipt by a bailor binds him as an acceptor of the terms therein legibly stated.⁷⁰

quire, a finding that he accepted the stipulations contained in the bills of lading and impliedly agreed to pay the freight. *Cox v. Central Vermont R. R.*, 170 Mass. 129, 49 N. E. 97; *New York, N. H. & H. R. R. v. York & Whitney Co.*, 215 Mass. 36, 102 N. E. 366, and cases cited." See also *New York Central & C. R. R. v. York & Whitney Co.*, (Mass. 1919) 119 N. E. 855.

⁶⁷ *New York Central & C. R. v. York & Whitney Co.*, (Mass. 1919) 119 N. E. 855; *Pennsylvania R. v. Titus*, 216 N. Y. 17, 109 N. E. 857, L. R. A. 1916, E. 1127, Ann. Cas. 1917, C. 862; *cf. Georgia R. v. Southern Ferro Concrete Co.*, 193 Ala. 108, 68 So. 981, Ann. Cas. 1916, E. 376; *Central R. v. MacCartney*, 68 N. J. L. 165, 173, 52 Atl. 575.

⁶⁸ In *Fonseca v. Cunard Steamship Co.*, 153 Mass. 553, 27 N. E. 665, 12 L. R. A. 340, the court held a passenger bound by the terms of a steamship "contract ticket" which was covered with print and writing for the

greater part of two large quarto pages. The same principle was applied to the case of a passenger unable to read in *O'Regan v. Cunard Steamship Co.*, 160 Mass. 356, 35 N. E. 1070, 39 Am. St. Rep. 484; and to one who could not understand the English language in *Secoulsky v. Oceanic Steam Nav. Co.*, 223 Mass. 465, 112 N. E. 151. See further *Hood v. Anchor Line*, [1918] A. C. 837; 4 Elliott on Railroads, § 1661.

In the decisions on the subject besides the distinction taken in the text between a mere check or token, and a contract, there is also observable in some cases the same reasoning aluded to *supra*, in connection with the Illinois decisions on Bills of Lading and telegraph blanks; namely, that some evidence of assent other than the acceptance of the document is necessary.

⁶⁹ *Quimby v. Boston & Maine R. R.*, 150 Mass. 365, 23 N. E. 205, 5 L. R. A. 846.

⁷⁰ *Taussig v. Bode*, 134 Cal. 260,

§ 90c. Qualification of principles of the preceding section.

Many courts qualify the principle just stated by the further principle that if the terms of a document are not fairly legible, the acceptance of it does not involve assent to its terms unless they were actually known.⁷¹ This qualification is applicable where the terms are printed in too fine type,⁷² or are printed on the back of the document without anything in the form of the document or any reference on the face to call the acceptor's attention to the fact that there are provisions on the back,⁷³ or where the light is too dim to permit reading,⁷⁴ or where the receiver of the document is known to be unable to read.⁷⁵

All these cases may be compared with decisions which hold that an illiterate person is bound by the terms of a document which he signs, even though in fact ignorant of them, unless he requires the document to be read to him.⁷⁶ If acceptance of a document is the equivalent of assent, the same rule should apparently be applied to any case where the one receiving the document was aware or should have been aware that there were terms and conditions upon it, whether these were legible or not. It may be that the character of the documents here in question and the rapidity of action expected in the cases which have arisen involving them may justify a distinction. A railroad agent would probably not accede to a request by a shipper to read aloud the terms of a bill of lading.

66 Pac. 259, 54 L. R. A. 774, 86 Am. St. Rep. 250. In *Watkins v. Rymill*, 10 Q. B. D. 178, the plaintiff deposited a carriage with the defendant and received a receipt in which were the words "subject to the conditions as exhibited upon the premises." The plaintiff did not read the receipt, simply taking it and putting it in his pocket. It was held that the condition on the premises were part of the contract, and that it was error to leave to the jury the question whether the plaintiff had had reasonable notice of the conditions.

⁷¹ *Richardson v. Rowntree*, [1894] A. C. 217; *New York, etc., R. Co. v.*

Sayles, 87 Fed. 444, 58 U. S. App. 18, 32 C. C. A. 485.

⁷² *Snider v. Adams Express Co.*, 63 Mo. 376, 383; *Blossom v. Dodd*, 43 N. Y. 264, 3 Am. Rep. 701; *Verner v. Sweitzer*, 32 Pa. 208.

⁷³ *Henderson v. Stevenson*, L. R. 2 H. L. Sc. 470; *Railroad Co. v. Manufacturing Co.*, 16 Wall. 318, 21 L. Ed. 297; *Newell v. Smith*, 49 Vt. 255.

⁷⁴ *Blossom v. Dodd*, 43 N. Y. 264, 3 Am. Rep. 701; *Madan v. Sherard*, 73 N. Y. 329, 29 Am. Rep. 153.

⁷⁵ *McKinney v. Boston & Maine R.*, 217 Mass. 274, 104 N. E. 446.

⁷⁶ *Supra*, § 35.

It is necessary that an agreement have consideration in order to form a contract; consequently it is not true that in every case acceptance of a paper purporting to contain an agreement will form a contract. Thus, if goods have been shipped, their acceptance by the carrier creates in the absence of express agreement at the time an implied obligation involving certain liability by the carrier. The delivery by the carrier to the shipper subsequently and not as part of the transaction of shipment, of a bill of lading or receipt containing terms which if binding would diminish the carrier's liability without giving the shipper any equivalent for such diminution, will not be binding.⁷⁷ Even if assented to, there is no consideration for the shipper's agreement. So "upon a bailment of goods for work and labor upon them, the contract between the parties arises immediately upon the delivery of the goods to the bailee; and upon the completion of the work for which the bailment was made, it is the duty of the bailee to return the goods to the owner. He cannot prescribe the conditions under which he will perform that duty. Notice by the bailee, with the return of the goods, or with his bill for the work done, qualifying his liability for defective workmanship, are terms of his own dictation. His refusal to restore the goods to the owner except upon those terms would be wrongful. And although the owner should accept his goods with knowledge of the terms proposed, no contract would arise therefrom. The transaction would lack the consideration necessary to support a contract."⁷⁸

§ 90d. Printed notices on letter heads, catalogues or tags.

The principle of acceptance by conduct may be involved not only when all the terms of a contract are contained in

⁷⁷ Louisville, etc., R. Co. v. Meyer, 78 Ala. 597; Gott v. Dinsmore, 111 Mass. 45; Bostwick v. Baltimore & O. R. Co., 45 N. Y. 712; Guillaume v. General Transportation Co., 100 N. Y. 491, 3 N. E. 489.

⁷⁸ Dale v. See, 51 J. N. L. 378, 382, 18 Atl. 306, 5 L. R. A. 583. In this case the plaintiff sent goods to the defendant to be dyed. On the defend-

ant's bill for the work there was printed the notice "all claims for deficiency or damage must be made within three days from date, otherwise not allowed." It was held, though brought to the knowledge of the manufacturer, that it did not bind him. See also Edgar v. Breck, 172 Mass. 581, 52 N. E. 1083.

a writing, but also when it is sought to import into a contract a statement printed on a letter heading or tag upon goods, or in some other paper delivered to the acceptor. The sole question seems to be whether the facts present a case where the person receiving the paper should as a reasonable man understand that it contained terms of the contract which he must read at his peril, and regard as part of the proposed agreement. The precise facts of each case are important in reaching a conclusion.⁷⁹

⁷⁹ In *Anaconda Copper Mining Co. v. Houston*, 107 Ill. App. 183, a printed stipulation above the date line, but below several written words in a letter, offering terms of sale, was held part of the contract assented to.

In *Lambeth Rope Co. v. Brigham*, 170 Mass. 518, 49 N. E. 1022, the words "terms thirty days" printed on a bill sent to the buyer, and to which the buyer made no objection, was held to constitute an effective agreement. It will be noticed in this case that the provision was for the acceptor's benefit, since otherwise he would have been liable for the price immediately.

In *Robinson v. Merchants' Despatch Company*, 45 Ia. 470, a shipping receipt contained the printed statement at the top "through without transfer." The goods were transferred and destroyed by fire in transit. The carrier was held liable in spite of a written clause exempting it from liability for loss by fire. See also to the same effect—*Stewart v. Merchants' Express Co.*, 47 Ia. 229, 29 Am. Rep. 476. In *Yorston v. Brown*, 178 Mass. 103, 59 N. E. 654, an order addressed to publishers for a steel engraving was interpreted in the light of printed matter at the top of the order. In *Haddaway v. Post*, 35 Mo. App. 278, underneath the signature to a contract there was printed a reference to terms on the back of the paper. It was held that these terms formed part of the contract. In *Bell v. Mills*, 78 N. Y. App.

Div. 42, 80 N. Y. Supp. 34, a seedsman's catalogue contained a disclaimer of warranty and in each bag of seeds there was also a disclaimer. On the first trial it was held that the disclaimer was to be included in the seller's offer; on retrial, however, evidence was allowed that the purchaser had not read the disclaimer, which was in fine print. In *Ross v. Northrup*, 156 Wis. 327, 144 N. W. 1124, shipping tags on packages of seeds contained a statement printed in red ink in conspicuous type that no warranty express or implied was given. The disclaimer was held effectual. On the other hand in the following cases a printed statement was held ineffectual. In *Summers v. Hibbard Co.*, 153 Ill. 102, 38 N. E. 899, 46 Am. St. Rep. 872, there was printed at the top of a letter-head "All sales subject to strikes and accidents." It was held that these words were not incorporated in an offer of sale written thereunder. A similar decision is *Augusta Factory v. Mente*, 132 Ga. 503, 64 S. E. 553. See also *Garfield, etc., Coal Co. v. Pennsylvania Coal, etc., Co.*, 199 Mass. 22, 84 N. E. 1020. In *Edgar v. Breck*, 172 Mass. 581, 52 N. E. 1083, there was a printed statement on a bill for certain bulbs, to the effect that the seller did not warrant. It was held that whether or not the acceptance of such a bill afforded evidence of an agreement to rescind an original executory contract containing a war-

§ 90e. Notices on merchandise.

Attempts have been made by manufacturers to apply this principle to sales of merchandise so as to bind any purchaser by some sort of contract. As between the original parties to a sale this seems possible. Thus, if the terms of an agreement with the seller are plainly stamped on a machine, a contract between the buyer and the seller to observe those terms may arise, when the buyer accepts delivery of the machine.⁸⁰ But whether a statement so printed upon a machine

ranty, it was at least not conclusive of rescission.

In *Ramaley v. Leland*, 6 Rob. (N. Y.) 358, a printed notice on the top of each page of a hotel register disclaiming liability for valuables not deposited in the office safe, did not bind the guests who signed the book, unless their attention was called to it. In *Tichnor v. Hart*, 52 Minn. 407, 54 N. W. 369, a printed prospectus was held not incorporated in a contract to subscribe to a book to which the prospectus related unless the prospectus was handed to the subscriber or he knew of its contents. In *B. F. Sturtevant Company v. Fireproof Film Co.*, 216 N. Y. 199, 110 N. E. 440, an offer for a contract contained the following statement printed at the bottom of the stationery: "All agreements are contingent upon strikes, fire, accidents or delays beyond our control. All prices are subject to change without notice, and all contracts and orders taken are subject to the approval of the executive office at Hyde Park, Mass." It was contended that an acceptance of the offer did not create a contract because no confirmation had been given by the executive office at Hyde Park. The point was raised for the first time in the appellate court and that court, observing that the print was fine, that the first typewritten numeral indicating the page number of the letter was typewritten over the printed matter; and that the language of the typewrit-

ten offer was clear, and did not refer to the print, said that if an issue had been raised upon the trial whether the print formed part of the proposal that issue would have presented a question of fact for the jury; but that it could not be said as matter of law that an offer expressed in clear terms was qualified by matter printed in small type at the top or bottom of office stationery. Cf. *Poel v. Brunswick-Balke-Collender Co.*, 216 N. Y. 310, 110 N. E. 619.

⁸⁰ *Henry v. A. B. Dick Co.*, 224 U. S. 1, 14, 56 L. Ed. 645, 32 Sup. Ct. Rep. 364. In this case a patented machine was sold and there was attached thereto the following printed statement:

"This machine is sold by the A. B. Dick Co. with the license restriction that it may be used only with the stencil paper, ink and other supplies made by A. B. Dick Company, Chicago, U. S. A." The court said (at page 14) "that the license agreement constitutes a contract not to use the machine in a prohibited manner, is plain." To the same effect, see *Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co.*, 77 Fed. 288, 291, 25 C. C. A. 267, 35 L. R. A. 728. In these cases it was primarily held that the defendants were guilty of an infringement of patent. Cp. *Bauer v. O'Donnell*, 229 U. S. 1, 57 L. Ed. 1041, 33 Sup. Ct. Rep. 616, and see *Boston Store v. American Graphophone Co.*,

or book can create a contract between any subsequent purchaser of the article and the original seller, seems very doubtful.⁸¹ There would seem, however, no difficulty in the seller's making a general offer to all the world in this way, to be accepted by taking ownership in the property, provided consideration could be found for the promise of the purchaser, and also such communication to the promisee as is necessary for a contract.⁸² If the ultimate purchase is not from the offeror, but from one who has acquired from him absolute and unqualified ownership, it would seem impossible to treat the purchase of the property as consideration for a promise of the purchaser to the original seller, unless at least the facts warranted the assumption that the immediate seller demanded as part of the consideration of the sale a promise to the original seller,—an improbable case.⁸³ Further, lack of communication to the original seller would prohibit any implication of a promise to him. It may, however be urged that there is fairly to be inferred a promise from the ultimate buyer to the person from whom he bought that the buyer would comply with the terms stamped or printed upon the goods; that the promise was for the benefit of the original seller and enforceable by him. If the ultimate seller is, and is known by the buyer to be under a duty to the original seller to make such a bargain for his benefit, the inference that such a contract was proposed when the goods were offered for sale might be a fair one;

246 U. S. 8, 62 L. Ed. 551, 38 Sup. Ct. 257.

⁸¹ In *Bobbs-Merrill v. Straus*, 210 U. S. 339, 28 Sup. Ct. 722, 52 L. Ed. 1086, the following notice was printed at the beginning of a book: "The price of this book at retail is one dollar net. No dealer is licensed to sell it at a less price, and a sale at a less price will be treated as an infringement of the copyright." The plaintiff brought suit for infringement of copyright against the defendant, a sub-vendee. The question of whether a contract could be made out was not discussed, the court saying (page 350): "There is no claim in this case of contract limitation,

nor license agreement controlling the subsequent sales of the book." It is to be noticed that the words printed in the book do not purport to be words of agreement but simply limitation of authority. In *McGruther v. Pitcher*, [1904] 2 Ch. 306, the question was squarely raised and the Court of Appeal held that the sub-purchaser did not by purchasing, bind himself not to resell except on the printed conditions. The legality of such contracts if made is not here under discussion, As to this, see *infra*, § 1649.

⁸² See *supra*, §§ 24, 70, 71.

⁸³ As to a contract of this sort, see *infra*, § 114.

but if the ultimate buyer has no reason to suppose that his seller has any interest in the words stamped or printed by the original seller, there seems little reason to infer that an offer is either made or accepted.

§ 91. When silence and inaction may amount to assent.

Generally speaking an offeree has a right to make no reply to offers, and his silence and inaction cannot be construed as an assent to the offer.⁸⁴

But the relations between the parties may have been such as to have justified the offeror in expecting a reply.⁸⁵ Or the offeree may have come under a duty either to return money or property in his possession belonging to the

⁸⁴ *Barton v. London & N. W. Ry. Co.*, 24 Q. B. D. 77; *Baltimore & L. Ry. Co. v. Steel Rail Supply Co.*, 123 Fed. 655, 59 C. C. A. 419; *Titcomb v. United States*, 14 Ct. Cl. 263; *Hobbs v. Massasoit Whip Co.*, 158 Mass. 194, 33 N. E. 495; *Grice v. Noble*, 59 Mich. 515, 523, 26 N. W. 688; *Prescott v. Jones*, 69 N. H. 305, 41 Atl. 352; *Drucker v. Oppenheimer*, 165 N. Y. S. 284; *Carnahan Mfg. Co. v. Beebe-Bowles Co.*, 80 Ore. 124, 156 Pac. 584; *Royal Insurance Co. v. Beatty*, 119 Pa. 6, 12 Atl. 607, 4 Am. St. Rep. 622; *Berg Co. v. Thomas & Son Co.*, 256 Pa. 584, 100 Atl. 951; *Rutledge v. Greenwood*, 2 Dessaus, 389, 401; *Rayson v. Berkeley Co.*, 26 S. C. 610, 2 S. E. 119.

In *Prescott v. Jones*, *supra*, the court said: "It is well settled that 'a party cannot, by the wording of his offer, turn the absence of communication of acceptance into an acceptance, and compel the recipient of his offer to refuse it at the peril of being held to have accepted it.' *Clark*, Cont. 31, 32. 'A person is under no obligation to do or say anything concerning a proposition which he does not choose to accept. There must be actual acceptance or there is no contract.' *More v. Insurance Co.*, 130 N. Y. 537, 547, 29 N.

E. 757. And to constitute acceptance, 'there must be words, written or spoken, or some other overt act.' *Bish. Cont.*, s. 329, and authorities cited." See also *Wiedemann v. Walpole*, [1891] 2 Q. B. 534.

⁸⁵ In *Hobbs v. Massasoit Whip Co.*, 158 Mass. 194, 33 N. E. 495, goods had been sent four or five times before the occasion in question and had been accepted and paid for by the buyer. The testimony warranted the conclusion that there was a standing offer to the seller for all goods of a certain description which the seller should ship. The court held that a duty was imposed on the buyer to act in regard to goods sent by the seller, and that the buyer's silence coupled with the retention of the goods for more than a reasonable time might be found by the jury to warrant the seller in assuming that they were accepted. In *Drucker v. Oppenheimer*, 165 N. Y. S. 284, the defendants, after previous negotiations with the plaintiffs sent them duplicate signed written drafts of a contract. The plaintiffs altered certain dates, kept one copy and returned the other with their signature to the defendants, who put it in their safe and made no reply. The court held that the retention of the paper without objection

offeror,⁸⁶ or to accept an offer for its purchase. In such a case, silence and failure to return the property will amount to an assent to buy it. The most frequent illustration of this is in contracts or offers to sell on approval. The approval of the buyer is in terms made a condition precedent to the transfer of the title. But, if the buyer retains the goods beyond a reasonable time, this of itself operates as an assent to take title.⁸⁷ Similarly when property is sent to another though not ordered but under such circumstances that the latter knows that payment is expected, the silent acceptance of the property is in effect an assent to the offer of sale implied by the sending of the property.⁸⁸ A common illustration of this principle is where newspapers or periodicals are sent to one who has not subscribed to them, or whose subscription has ceased.⁸⁹ But it is necessary for the plaintiff to prove that

could not amount to an acceptance. But this seems open to question.

⁸⁶ *Preferred Accident Ins. Co. v. Stone*, 61 Kans. 48, 58 Pac. 986.

⁸⁷ *Moss v. Sweet*, 16 Q. B. 493; *Re Downing Paper Co.*, 147 Fed. 858; *Mowbray v. Cady*, 40 Iowa, 604, 606; *Turner v. Machine Co.*, 97 Mich. 166, 56 N. W. 356; *Columbia Rolling Mill Co. v. Beckett Foundry Co.*, 55 N. J. L. 391, 26 Atl. 888; *Butler v. School District*, 149 Pa. St. 351, 24 Atl. 308; *Washington v. Johnson*, 7 Humph. 468. See also *Hickman v. Schimp*, 109 Pa. St. 16; *Keeler v. Jacobs*, 87 Wis. 545, 58 N. W. 1107; cp. *Hunt v. Wyman*, 100 Mass. 198, 200; *Wartman v. Breed*, 117 Mass. 18; *Springfield Engine Stop Co. v. Sharp*, 184 Mass. 286, 68 N. E. 224; *Kahn v. Klabunde*, 50 Wis. 235, 6 N. W. 888. Retention after an inconclusive expression of disapproval for the remainder of the period originally given for trial will not, however, operate as an acceptance of the property. *Ellis v. Mortimer*, 1 B. & P. N. R. 257. In *Wheeler v. Klaholt*, 178 Mass. 141, 50 N. E. 756, the principle seems to have been pressed too far. There, goods were sent on the supposition that a bargain had been made but the

parties disagreed and if any contract had been made it was subsequently repudiated by them both. Thereafter the plaintiffs, the sellers, requested the defendants to send cash draft by return mail or return the goods at once. Nothing more was heard by the plaintiffs until more than a month later when they were notified by the railroad company that the goods had been returned. The court held that the jury were warranted in finding that the neglect of the duty to return, implied an acceptance of the alternative offer to sell. It is difficult to find, however, any duty to return. Doubtless the defendants were bound to surrender the goods on request, but if it be assumed as a fact that the goods had been sent without an agreement on the part of the defendant either to keep or return them, it seems hard to discover any ground for imposing a duty for prompt return upon the defendant.

⁸⁸ *Harris v. Lumber Co.*, 97 Ga. 465, 25 N. E. 519; *Garst v. Harris*, 177 Mass. 72, 58 N. E. 174; *Watters v. Glendenning*, 87 Wis. 250, 58 N. W. 404. See also *Pignataro v. Gilroy*, [1919] 1 K. B. 459.

⁸⁹ In the following cases, one who

the periodical was actually received by the defendant.⁹⁰ For the same reason there may often be a duty to speak in order to escape the inference of a promise to pay for beneficial services which are rendered to another with this consent, whether the consent is implied from a request or merely from his acquiescence. The ordinary implication is that the services are to be paid for at their fair value.⁹¹ This inference is not usually drawn, however, where services are rendered another by a near relative, especially if he is living as a member of the same family.⁹² Even though there is no blood relation between the

thus received papers or periodicals was held to be liable. *Weatherby v. Banham*, 5 C. & P. 228; *Austin v. Burge*, 156 Mo. App. 286, 137 S. W. 618; *Fogg v. Portsmouth Athenæum*, 44 N. H. 115, 82 Am. Dec. 191; *Goodland v. LeClair*, 78 Wis. 176, 47 N. W. 268. See also *Legal News Pub. Co. v. George C. Knispel Cigar Co.*, (Minn. 1919), 172 N. W. 317.

⁹⁰ *Shoemaker v. Roberts*, 103 Iowa, 681, 72 N. W. 776. Proof of proper mailing is, however, evidence that it was received. *Legal News Pub. Co. v. George C. Knispel Cigar Co.*, (Minn. 1919), 172 N. W. 317.

⁹¹ *Hughes v. Dundee Mortgage, etc., Co.*, 21 Fed. 169; *Hood v. League*, 102 Ala. 228, 14 So. 572; *Tyson v. Thompson*, 195 Ala. 230, 70 So. 649; *Lewis v. Meginnis*, 30 Fla. 419, 12 So. 19; *Hunt v. Osborn*, 40 Ind. App. 646, 82 N. E. 933; *Weston v. Davis*, 24 Me. 374; *Wadleigh v. Katahdin Pulp & Paper Co.*, 116 Me. 107, 100 Atl. 150; *Emery v. Cobbey*, 27 Neb. 621, 43 N. W. 410; *Hill v. Carr*, (N. H. 1917), 101 Atl. 525; *Kiser v. Holladay*, 29 Or. 338, 45 Pac. 759; *Ingram v. Basye*, 67 Or. 257, 135 Pac. 883; *Moyer's Appeal*, 112 Pa. St. 290, 3 Atl. 811; *Jones v. Campbell*, (Vt. 1917), 102 Atl. 102; *Miller v. Tracy*, 86 Wis. 330, 56 N. W. 866; *Wojahn v. Nat. Union Bank*, 144 Wis. 646, 129 N. W. 1068.

⁹² *Lessley v. Pond*, (Ala. 1917), 75 So. 298; *Hogg v. Laster*, 56 Ark. 382,

19 S. W. 975; *Crane v. Derrick*, 157 Cal. 667, 109 Pac. 31; *Walker v. Taylor*, 28 Colo. 233, 64 Pac. 192; *Hudson v. Hudson*, 90 Ga. 581, 16 S. E. 349; *Howard v. Randolph*, 134 Ga. 691, 68 S. E. 586, 29 L. R. A. (N. S.) 294; *Freeman v. Freeman*, 65 Ill. 106; *Collar v. Patterson*, 137 Ill. 403, 27 N. E. 604; *Neish v. Gannon*, 198 Ill. 219, 64 N. E. 1000; *People v. Porter*, 287 Ill. 401, 123 N. E. 59; *Hill v. Hill*, 121 Ind. 255, 23 N. E. 87; *McGarvy v. Roods*, 73 Iowa, 363, 35 N. W. 488; *Wyley v. Bull*, 41 Kans. 206, 20 Pac. 855; *Farley v. Stacy*, 177 Ky. 109, 197 S. W. 636; *Armstrong's Adm. v. Shannon*, 177 Ky. 547, 197 S. W. 950; *Marples v. Morse*, 180 Mass. 508, 62 N. E. 966; *Harris v. Smith*, 79 Mich. 54, 44 N. W. 169, 6 L. R. A. 702; *Lillard v. Wilson*, 178 Mo. 145, 77 S. W. 74; *Bell v. Rice*, 50 Neb. 547, 70 N. W. 25; *Page v. Page*, 73 N. H. 305, 61 Atl. 356; *Disbrow v. Durand*, 54 N. J. L. 343, 24 Atl. 545, 33 Am. St. Rep. 678; *Williams v. Hutchinson*, 3 N. Y. 312, 53 Am. Dec. 301; *Stallings v. Ellis*, 136 N. C. 69, 48 S. E. 548; *Ingram v. Basye*, 67 Oreg. 257, 135 Pac. 883; *Houck's Executors v. Houck*, 99 Pa. St. 552; *Dash v. Inabinet*, 53 S. C. 382, 31 S. E. 297; *Gorrell v. Taylor*, 107 Tenn. 568, 64 S. W. 888; *Andrus v. Foster*, 17 Vt. 556; *Jackson's Admr. v. Jackson*, 96 Va. 165, 31 S. E. 78; *Hodge v. Hodge*, 47 Wash. 196, 91 Pac. 764, 11 L. R. A. (N. S.) 873;

parties, if the services are rendered by one who has been adopted as a member of the household, there will also ordinarily be no inference of a promise to pay.⁹³ It should be observed, moreover, that the rendition of services is an ambiguous act. It may be for other reasons than membership in a common family, the intention of the person rendering them to do so gratuitously and, if so, no recovery can be had.⁹⁴ It is better to deal with each case as one of fact, the question being whether an inference of a promise is fairly warranted by the facts; but it is at least clear as matter of law that silence and total inaction of the defendant may operate as assent to the formation of a contract. Generally taking the benefit of the services will involve some action on his part indicating assent, but a situation is perfectly possible where though he has knowledge of them, he neither speaks nor acts.

§ 91a. Silent inaction with intent to accept.

Even where there is no duty to speak, a line of argument, which has not been formally stated in the cases, may be advanced to indicate that mere silence though unaccompanied by

Cann v. Cann, 40 W. Va. 138, 20 S. E. 910; *Bostwick v. Bostwick*, 71 Wis. 273, 37 N. W. 405.

⁹³ *Hogg v. Lester*, 56 Ark. 382, 19 S. W. 975; *Stock v. Stoltz*, 137 Ill. 349, 27 N. E. 604; *Walker v. Taylor*, 28 Colo. 233, 64 Pac. 192; *Reeves' Estate v. Moore*, 4 Ind. App. 492, 31 N. E. 44; *McClure v. Lenz*, 40 Ind. App. 56, 80 N. E. 988; *Smith v. Johnson*, 45 Iowa, 308; *Wyley v. Bull*, 41 Kan. 206, 20 Pac. 855; *Livingston v. Hammond*, 162 Mass. 375, 38 N. E. 968; *Kirchgassner v. Rodick*, 170 Mass. 543, 49 N. E. 1015 (cf. *Wirth v. Kuehn*, 191 Mass. 51, 77 N. E. 641); *Andrus v. Foster*, 17 Vt. 556; *Jones v. Campbell* (Vt. 1917), 102 Atl. 102; *Martin v. Martin's Estate*, 108 Wis. 284, 84 N. W. 439, 81 Am. St. Rep. 896. The cases are fully collected in notes to 11 L. R. A. (N. S.) 873, and 133 Am. St. Rep. 248.

⁹⁴ *Hughes v. Dundee Mortgage, etc., Co.*, 21 Fed. 169; *Osier v. Hobbs*, 33 Ark. 215; *Levy v. Gillis*, 1 Pennewill, 119, 39 Atl. 785; *Dunlap v. Allen*, 90 Ill. 108; *Evans v. Henry*, 66 Ill. App. 144; *St. Joseph's Orphan Society v. Wolpert*, 80 Ky. 86; *Simon v. Tipton*, 21 Ky. Law, 167, 50 S. W. 1106; *Ayland v. Rice*, 23 La. Ann. 75; *Sanderson v. Brown*, 57 Me. 308; *Brown v. Tuttle*, 80 Me. 162, 13 Atl. 583; *Sheperd v. Young, Admr.*, 8 Gray, 152, 69 Am. Dec. 242; *Cicotte v. Church of St. Anne*, 60 Mich. 552, 27 N. W. 682; *Kerr v. Cusenbary*, 60 Mo. App. 558 (but see *Hay v. Walker*, 65 Mo. 17); *Potter v. Carpenter*, 76 N. Y. 157; *Pickslay v. Starr*, 76 Hun, 10, 27 N. Y. Supp. 616; *Swires v. Parsons*, 5 Watts & Serg. 357; *Gross v. Cadwell*, 4 Wash. 670, 30 Pac. 1052. See *Kaufman Advertising Agency v. Snellenburgh*, 43 N. Y. Misc. 317, 88 N. Y. Supp. 199.

any act, may amount to an acceptance if the offeror requested that mode of indicating assent, and assent was intended by the offeree. When an offer is made to one who remains silent, the silence may be due to a variety of causes. It is clear that, whatever may have been the offeree's state of mind, no contract can be made unless the offer stated that the offeror would assume assent in case the offeree made no reply. But if the offer does so state, the offeree's silence is ambiguous, and may doubtless be shown not to have meant assent.⁹⁵ Certainly the offeree has the right to keep silent if he chooses without thereby becoming charged with a contract. But it is at least possible that he did mean assent, and if in fact this was his meaning, there is good reason for urging that a contract has been formed. It may be replied that mere non-feasance ought not to be sufficient to amount to an acceptance, but clearly non-feasance may be enough to constitute both acceptance and consideration for a unilateral contract. An offer of forbearance is a common illustration of this.⁹⁶ And the forbearance requested may be forbearance to speak as well as forbearance to do any other act. Where forbearance is requested as consideration for a unilateral contract, it would always be open to proof that the forbearance was given not as an acceptance but from other motives. The situation seems essentially similar where the offer contemplates a bilateral contract, provided the offeree's silence, under the circumstances, might indicate assent to a reasonable man. Such silence would not establish a contract unless the silent offeree meant his silence to indicate assent. But if the two facts concurred that the offeror authorized silence as a means of indicating assent and the offeree so intended it, every requirement for the formation of contracts seems satisfied. It is even possible that if the situation for any reason is such that a reasonable person would construe silence as necessarily indicating assent, one who keeps silent, knowing that his silence will be misinterpreted, should not be allowed to deny the natural interpretation of his conduct, though he has not given rise to the circumstances which make it a natural interpretation.⁹⁷ His inherent right to do nothing

⁹⁵ See §§ 94, 95.

⁹⁶ See *infra*, § 135.

⁹⁷ See for an instance of this sort, *infra*, § 278. Cf. cases *infra*, § 93.

without thereby subjecting himself to liability should give way when it is apparent to him that by a word he can prevent a damaging misconception, even if he is not otherwise a responsible cause of that misconception.⁹⁸

§ 92. Waiver of defect in acceptance.

It has sometimes been suggested that a defect in an acceptance might be "waived" by the offeror.⁹⁹ If what is meant by this is merely that the offeror may accept a counter-offer by the offeree, which, by reason of delay, or the addition or change of terms failed of being an acceptance of the original offer, no fault can be found; but if, as seems to be the case, the meaning is that the offeror may at his option assert either that there has not been a valid acceptance and hence a contract because of some defect, or that there has been a contract made because he is willing to disregard the defect in the acceptance, and that this option on the part of the offeror may be exercised without communication with the offeree, a vital principle of the law of contracts is violated. Nothing is more fundamental than that in bilateral contracts both parties must be bound, or neither; and that in unilateral contracts, the performance requested must be simultaneous with the creation of any obligation on the part of the promisor. To allow a waiver of a defect of an acceptance is virtually to say

⁹⁸ In *Cavanaugh v. D. W. Ranlet Co.*, 229 Mass. 366, 118 N. E. 650, following previous negotiations a memorandum of sale was sent to the buyer which, after stating the terms of the bargain, contained these added words,—"This is a contract and will be considered mutually binding unless we are advised of its nonacceptance by wire." The court said of this memorandum "it did not purport to confirm a previous contract; it is of itself an offer to sell, which upon acceptance by the offerees, would become a binding sale. . . . It could not be ruled as matter of law that if the 'confirmation' were treated as an offer, it became a binding agreement from the

failure of the plaintiffs to reply. The jury, under all the circumstances, were to say whether the plaintiffs' silence amounted to an assent." The Swiss Code of Obligations provides (Art. 6): "When the offeror ought not reasonably, whether from the particular nature of the transaction or from circumstances, to expect an express acceptance, the contract is deemed concluded if the offer has not been refused within a reasonable time." See also *Van Arsdale Brokerage Co. v. Robertson*, 36 Okl. 123, 128 Pac. 107.

⁹⁹ *Wheeler v. Klaholt*, 178 Mass. 141, 59 N. E. 756. See also *Shaenfield v. Hall Safe & Co. Co.* (Tex. Civ. App.), 157 S. W. 462.

that the acceptance is binding on the acceptor, or may be treated as binding by the offeror (which amounts to the same thing) from the time when it is made though the offeror himself is still perfectly free to assert that the acceptance was defective, and though no estoppel forbids the acceptor from showing the true facts. In truth, a defective acceptance can only amount to a counter-offer, and the only way a contract can be formed is by acceptance of the counter-offer in the same way as if it were an original offer.

§ 93. Late acceptance.

The principles stated in the last section find application where an acceptance is delayed beyond the time allowed by the offeror, or beyond a reasonable time allowed by law, if no time was fixed in the offer. It has been held¹ that if an acceptance is delayed slightly beyond a reasonable time, and the offeror, when he receives the acceptance does not promptly state that he refuses to be bound because of the delay, a contract exists. On the other hand, the Supreme Court of Iowa has said: "We have to inquire whether an acceptance after the time limited, or, in the absence of an express limitation, after the lapse of a reasonable time, imposes upon the person making the offer any obligation. The theory of the Court below seems to have been that it does. But in our opinion it does not. The offer, unless sooner withdrawn, stands during the time limited; or, if there is no express limitation, during a reasonable time. Until the end of that time the offer is regarded as being constantly repeated. After that there is no offer, and, properly considered, nothing to withdraw. The time having expired, there is nothing which the acceptor can do to revive the offer, or produce an extension of time."²

¹ Phillips v. Moor, 71 Me. 78.

² Ferrier v. Storer, 63 Ia. 484, 487, 19 N. W. 288, 50 Am. Rep. 752. To the same effect is Maclay v. Harvey, 90 Ill. 525, 32 Am. Rep. 35.

A French writer who has dealt with the problem says:

[The offeror when he has received an acceptance which is too late]

"would act prudently and fairly if he informed his correspondent that he had given up the transaction and was no longer disposed to bind himself by the agreement in regard to which he had at first taken the initiative. Otherwise, indeed, his silence might be considered as importing tacit assent to the proposition *ex novo* contained in the

Certainly where the offer fixes a time within which it must be accepted this reasoning is unanswerable, since the offeree must know that his acceptance is not within the terms of the offer. Where, however, the offer contains no such limitation, the limit of a reasonable time imposed by law is one that no one can fix beforehand with precision. Therefore it has been forcibly said that if the acceptor "makes known his acceptance of it [the offer] to the party making it, within any period which he could fairly have supposed to be reasonable, good faith requires the maker if he intends to retract on account of the delay, to make known that intention promptly."³ More exactly stated from an analytical standpoint the last clause should read "if he does not wish his silence to be construed as an acceptance of the counter-offer contained in the late acceptance."⁴

§ 94. Effect of misunderstanding of offer and acceptance.

It follows from the principle that expressed mutual assent rather than actual mental assent is the essential element in the formation of contracts,⁵ that (a mistaken idea of one or both parties in regard to the meaning of an offer or acceptance will not prevent the formation of a contract.) Such a mistake may, under certain circumstances be ground for relief from the enforcement of the contract.⁶ But this relief is in its origin equitable, and is in its nature a defence to the enforcement of the contract of which advantage may or may not be taken, rather than a defect in the formation of the contract.⁷ It follows that the test of the true construction of an offer or acceptance is not what the party making it thought it meant or intended it to mean, (but what a reasonable person in the position of the parties would have thought it meant.)

late acceptance. . . . These considerations have such force that they have led to some legislation imposing on every one who has made an offer by correspondence the duty to inform his correspondent that the acceptance has arrived too late. German Commercial Code, Art. 319; Swiss Federal Code of Obligations, Art. 5;" Valéry, Contrats par Correspondance, § 203.

³ Phillips v. Moor, 71 Me. 78.

⁴ The situation is of the sort discussed at the end of § 91a.

⁵ See *supra*, § 20; *infra*, §§ 1535-1537.

⁶ See *infra*, §§ 1535 *et seq.*

⁷ Woburn Nat. Bank v. Woods, 77 N. H. 172, 89 Atl. 491.

⁸ Baines v. Woodfall, 6 C. B. (N. S.) 657; Smith v. Hughes, L. R. 6 Q. B. 597; Ireland v. Livingstone, L. R. 5

The sound view has been well expressed by L. Hand, J.:⁹ "A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties. A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent. If, however, it were proved by twenty bishops that either party, when he used the words, intended something else than the usual meaning which the law imposes upon them, he would still be held, unless there were some mutual mistake, or something else of the sort. Of course, if it appear by other words or acts of the parties, that they attribute a peculiar meaning to such words as they use in the contract, that meaning will prevail, but only by virtue of the other words, and not because of their unexpressed intent."¹⁰ Therefore, if either party instead of communicating with the other party directly makes use of an intermediary who makes a mistake in the words transmitted, they nevertheless are binding on the party employing the intermediary.

H. L. 395; *Preston v. Luck*, 27 Ch. D. 497; *Van Praagh v. Everidge*, [1902] 2 Ch. 266; *Falck v. Williams*, [1900] A. C. 176; *Scully v. United States*, 197 Fed. 327; *Bijur Motor Lighting Co. v. Eclipse Mach. Co.*, 243 Fed. 600, 156 C. C. A. 298; *Thompson v. Ray*, 46 Ala. 224; *Silva v. Silva*, 32 Cal. App. 115, 162 Pac. 142; *Newsome v. Brazell*, 118 Ga. 547, 45 S. E. 397; *Wood v. Duval*, 100 Ia. 724, 69 N. W. 1061; *Lull v. Anamosa Nat. Bank*, 110 Ia. 537, 81 N. W. 784; *Wood v. Allen*, 111 Ia. 97, 82 N. W. 451; *Miller v. Lord*, 11 Pick. 11; *Stoddard v. Ham*, 129 Mass. 383, 37 Am. Rep. 369; *Mansfield v. Hodgdon*, 147 Mass. 304, 17 N. E. 544; *Tallant v. Stedman*, 176 Mass. 460, 466, 57 N. E. 683; *Home F. Ins. Co. v. Bredehoft*, 49 Neb. 152, 68 N. W. 400; *Woburn Nat. Bank v. Woods*, 77 N. H. 172, 89 Atl. 491; *American Lithographic Co. v. Commercial Casualty Co.*, 81 N. J. L. 271, 80 Atl. 25; *Carnegie Steel Co. v. Connelly*, 89 N. J. L. 1, 97 Atl. 774; *Phil-*

lip v. Gallant, 62 N. Y. 256; *Leonard v. Howard*, 67 Oreg. 203, 135 Pac. 549; *Neufville v. Stuart*, 1 Hill Eq. (S. C.) 159; *J. A. Coates & Sons v. Buck*, 93 Wis. 128, 67 N. W. 23. But see *Green v. Bateman*, 2 Woodb. & M. 359; *Lamar Elevator Co. v. Craddock*, 5 Col. App. 203, 37 Pac. 950; *Hartford &c. R. R. Co. v. Jackson*, 24 Conn. 514, 63 Am. Dec. 177; *Rowland v. New York &c. R. R. Co.*, 61 Conn. 103, 23 Atl. 755, 29 Am. St. Rep. 175; *Brant v. Gallup*, 5 Ill. App. 262; *Clay v. Rickets*, 66 Ia. 362, 23 N. W. 755; *Hogue v. Mackey*, 44 Kan. 277, 24 Pac. 477; *Frazer v. Small*, 59 Hun. 619, 13 N. Y. Supp. 468; *Tucker v. Preston*, 60 Vt. 473, 11 Atl. 726.

⁹ *Hotchkiss v. Natl. City Bank*, 200 Fed. 287, 293 (aff'd 231 U. S. 50, 58 L. Ed. 115, 34 S. Ct. 20). See also the elaborate opinion of Rogers, J. in *Star-Chronicle Pub. Co. v. New York Evening Post*, 256 Fed. 435 (C. C. A.)

¹⁰ See further, *infra*, §§ 606, 607, 610.

Thus, "when two parties who speak different languages and cannot understand each other, voluntarily agree upon a third person to translate for them, they make the interpreter their agent, so that each has a right to rely on the communication made to him by the other party through his representative."¹¹ So if one party using a telephone asks the operator to repeat the message to a third person, the offeror is bound by the words of the operator though they do not correctly follow instructions.¹² So where a telegraphic offer is sent and the telegraph company transmits the message inaccurately, the offeror is treated as having made the offer in the form in which it was received by the offeree.¹³ If, however, the receiver of the telegram ought to have known that there must have been a mistake in the wording of the telegram, from his knowledge of the market, or for other reasons, he cannot by accepting, bind the offeror.¹⁴ And

¹¹ *Bonelli v. Burton*, 61 Ore. 429, 123 Pac. 37, citing *Sullivan v. Kuykendall*, 82 Ky. 483, 489, 56 Am. Rep. 901, and *Miller v. Lathrop*, 50 Minn. 91, 93, 52 N. W. 274, and adding further: "An interpreter selected by adverse parties, who speak different languages and cannot understand each other, being the agent of both, his representations, made in their presence and hearing, in communicating to one what purport to be the expressions of the other, related in the regular course and prior to the termination of the business, are chargeable to each; and the other is entitled to rely on such representations."

¹² *Sullivan v. Kuykendall*, 82 Ky. 483, 489, 56 Am. Rep. 901.

¹³ *Western Union Telegraph Co. v. Shotter*, 71 Ga. 760; *Western Union Telegraph Co. v. Flint River Lumber Co.*, 114 Ga. 576, 40 S. E. 815, 88 Am. St. Rep. 36; *Ayer v. Western Union Telegraph Co.*, 79 Me. 493, 1 Am. St. Rep. 353; *Wilson v. M. & N. W. R. Co.*, 31 Minn. 481, 18 N. W. 291; *Haubelt v. Rea & Page Mill Co.*, 77 Mo. App. 672; *J. L. Price Brokerage Co. v. Chicago &c. R.*, (Mo. App. 1917), 199

S. W. 732; *Howley v. Whipple*, 48 N. H. 487. See also *Hasbrouck v. Telegraph Co.*, 107 Ia. 160, 77 N. W. 1034, 70 Am. St. 181. But see the contrary decisions of *Henkel v. Pape*, L. R. 6 Ex. 7; *Verdin v. Robertson*, 10 Ct. Sess. Cas. (3d series), 35; *Western Union Telegraph Co. v. Anniston Cordage Co.*, 6 Ala. App. 351, 59 So. 757; *Jackson Lumber Co. v. Western Union Tel. Co.*, 7 Ala. App. 644, 62 So. 266; *Postal Tel. Co. v. Schaefer*, 110 Ky. 907, 62 S. W. 1119; *Shingleur v. Western Union Tel. Co.*, 72 Miss. 1030, 18 So. 425, 30 L. R. A. 444, 48 Am. St. Rep. 604; *Pepper v. Telegraph Co.*, 87 Tenn. 554, 11 S. W. 783, 4 L. R. A. 660, 10 Am. St. Rep. 699. See also *Penobscot Fish Co. v. Western Union Tel. Co.*, 91 Conn. 35, 98 Atl. 341. The question has been disputed on the continent of Europe also. See *Lyon-Cæn et Renault, Traité de Droit Commercial*, Vol. III, § 23.

¹⁴ *Germmain Fruit Co. v. Western Union Tel. Co.*, 137 Cal. 598, 70 Pac. 658, 59 L. R. A. 575. The telegram as received, offered Riverside oranges at \$1.60 a box. The market price was \$2.60. See also *Central of Georgia*

the same principle is applicable in any case where the offeree must know that the terms of the offer are unintended or misunderstood by the offeror. No contract based on the offer can be enforced by the acceptor.¹⁵ And if under these circumstances a buyer keeps property which was the subject of the transaction he is liable for its fair value, or if he discovers the seller's intended price before using the goods, for that price.¹⁶ The liability of one who signs a written promise in ignorance of the contents of the writing depends upon the same principles.¹⁷

§ 95. When mistake will prevent the formation of a contract.

Though it is true that a party to a contract is bound by his express language, and cannot contradict the meaning of his words by denying that he intended this meaning, he is not bound by the interpretation which may be placed on ambiguous language unless he was himself blameworthy in permitting the ambiguity. Where a phrase of a contract, therefore, has no obvious meaning, or is reasonably capable of different interpretations, and is in fact differently understood, there is no contract.¹⁸ This does not violate the principles stated in the preceding section. If the language used

Ry. Co. v. Gortatowsky, 123 Ga. 366, 51 S. E. 469. But see J. L. Price Brokerage Co. v. Chicago &c. R., (Mo. App. 1917), 190 S. W. 732.

¹⁵ Smith v. Hughes, L. R. 6 Q. B. 597; Tamplin v. James, 15 Ch. Div. 215; Cunningham Mfg. Co. v. Rotograph Co., 30 App. Dist. Col. 524, 15 L. R. A. (N. S.) 368; Essex v. Day, 52 Conn. 483; Bromagin v. Bloomington, 234 Ill. 114, 84 N. E. 700; C. H. Young Co. v. Springer, 113 Minn. 382, 129 N. W. 773; Tyra v. Cheney, 129 Minn. 428, 152 N. W. 835; Buckberg v. Washburn-Crosby Co., 115 Mo. App. 701, 92 S. W. 733; Borden v. Richmond &c. R. Co., 113 N. C. 570, 18 S. E. 392, 37 Am. St. Rep. 632; Butler v. Moses, 43 Ohio St. 166, 1 N. E. 318; Bartelder Seed Co. v. Bennett (Tex. Civ. App.), 161 S. W. 399; Ever-

son v. International Granite Co., 65 Vt. 658, 27 Atl. 320; Harran v. Foley, 62 Wis. 584, 22 N. W. 837. See also Hartford &c. R. Co. v. Jackson, 24 Conn. 514, 63 Am. Dec. 177; Shelton v. Ellis, 70 Ga. 297.

¹⁶ Cunningham Mfg. Co. v. Rotograph Co., 30 App. D. C. 524, 15 L. R. A. (N. S.) 368; Mummenhoff v. Randall, 19 Ind. App. 44, 49 N. E. 40; Fullerton v. Dalton, 58 Barb. 237; Estey Organ Co. v. Lehman, 132 Wis. 144, 111 N. W. 1097, 11 L. R. A. (N. S.) 254, 122 Am. St. Rep. 951.

¹⁷ See *supra*, § 35.

¹⁸ Winnemucca Water &c. Co. v. Model Gas Engine Works, 179 Ind. 542, 101 N. E. 1007; Wheaton Building & Lumber Co. v. Boston, 204 Mass. 218, 90 N. E. 598.

may fairly mean either of two things, each party is at liberty to attach his own meaning, at least unless he was in some way responsible for the other party's mistake. Such an error in language may relate to the object to which the apparent agreement relates,¹⁹ to the person with whom it was made,²⁰ or

¹⁹ In *Raffles v. Wichelhaus*, 2 H. & C. 906, the parties had contracted for a cargo by the ship "Peerless" from Bombay. There were two ships from Bombay of that name, and the parties understood each a different ship. It was held there was no contract. Somewhat similar is *Kyle v. Kavanagh*, 103 Mass. 356, 4 Am. Rep. 560, where the parties entered into apparent agreement for the sale of a lot on "Prospect Street, Waltham." There were two streets of that name in Waltham, and the jury were instructed in effect that if the parties had in mind lots on different streets of that name there was no contract.

²⁰ In *Brighton Packing Co. v. Butchers', etc., Assoc.*, 211 Mass. 398, 97 N. E. 780, a bill of equity for the specific performance of the provisions of a lease in writing, the court thus explained the nature of the transaction (at p. 402): "It was not an agreement made by the defendant with a person then present, but under some mistake as to the identity or character of that person, in which case it might have been merely voidable and good until avoided, like the bargain first considered in *Edmunds v. Merchants' Despatch Co.*, 135 Mass. 283. Here the defendant's agreement was expressed to be with the South Dakota company, but there were before the defendant two companies, that of South Dakota and that of Maine, both acting through Batchelder but only the first one being known to the defendant. There was no agreement with the South Dakota company, because that company intended to make none, and did not execute the paper in which the purported

agreement was embodied; none with the Maine company, because there was no intention to contract with it; it was not mentioned as a party to the agreement, and could no more gain the rights of a party by a surreptitious and really fraudulent execution thereof than, for example, the present plaintiff could have entitled itself to the estate created by the original lease if, without the knowledge and consent of the defendant, it had executed that lease as then drawn, while leading the defendant to suppose that the execution was really by the South Dakota company, the lessee therein named. No agreement can result from such a transaction so carried out. *Rodliff v. Dallinger*, 141 Mass. 1, 4 N. E. 805, 55 Am. Rep. 439; *Consumers' Ice Co. v. Webster & Co.*, 53 N. Y. Supp. 56, 32 N. Y. App. Div. 592; *Boulton v. Jones*, 2 H. & N. 564; *Hardman v. Booth*, 1 H. & C. 803; *Hollins v. Flower*, L. R. 7 H. L. 757; *Cundy v. Lindsay*, 3 App. Cas. 459; 2 Q. B. D. 96, reversing s. c. 1 Q. B. D. 348; *Baillie's Case*, [1898] 1 Ch. 110; *Gordon v. Street*, [1899] 2 Q. B. 641. This case differs essentially from those cases in which there was a real contract, though entered into by mistake or even produced by fraud. *Stoddard v. Ham*, 129 Mass. 383, 37 Am. Rep. 369; *Hunter v. Giddings*, 97 Mass. 41, 93 Am. Dec. 54; *Rayner v. Grote*, 15 M. & W. 359; *Schmaltz v. Avery*, 16 Q. B. 655.

But it has been argued that the substitution of one company for the other made no real difference; that the defendant had no reason to prefer one to the other; that it would as readily and as willingly have contracted with the

to any of its terms.²¹ It may be urged forcibly that if the offeror uses language which is ambiguous on its face, he should be bound by whatever reasonable construction the acceptor may put upon his words. Certainly this should be true if the offeror knew or, as a reasonable person should have known, of the ambiguity; and the offeree did not know of it. But the acceptor's knowledge of the surrounding circumstances may be such that he equally should have observed the ambiguity, and therefore cannot object to the offeror attaching to the words his own meaning. The decisions have not thus far developed this field of thought and have seemed to allow

Maine company as with that of South Dakota. Perhaps it would have been so, though perhaps it might have made a difference if the agreement had turned out unfortunately for the other side and the defendant had sought to enforce it. But the real point is that the defendant, though willing and ready to contract with the one company, its lessee, yet made no agreement with either; and we cannot enforce against the defendant an agreement which it never made."

In *Fifer v. Clearfield Coal Co.*, 103 Md. 1, 62 Atl. 1122, a man who carried on business under the name of the Cambria Coal Company made an agreement in that name with the defendant, who thought that he was dealing with a corporation having a capital stock, when in reality there was no such corporation, and who repudiated the agreement upon learning this fact. The agreement was held void on account of the defendant's mistake as to the identity of the person with whom the agreement was made. See also *Jones v. Chicago &c. R. Co.*, 102 Neb. 853, 170 N. W. 170, and criticism in 32 Harv. L. Rev. 736.

²¹ In *Falck v. Williams* [1900], A. C. 176, a cipher telegram without punctuation was sent in acceptance of previous offers. The meaning of the telegram depended upon whether one

word in it was to be construed with the preceding words or with the subsequent ones. As the court held there was no reason pointing one way or the other, and as the parties differed in their interpretation, it was held that there was no contract. In *Peerless Glass Co. v. Pacific Crockery Co.*, 121 Cal. 641, 54 Pac. 101, a railroad agent replied to an inquiry "freight allowance to Converse 74 cts." the speaker understood he was giving the freight rate, the inquirer that it was a discount. The court held it could not say that these words justified one interpretation more than the other, and therefore held there was no contract. In *Cage v. Black*, 97 Ark. 613, 134 S. W. 942, an offer of 200 sacks of rice named the price of \$5.75 f. o. b. The offer was accepted in terms, but subsequent correspondence showed that the seller meant \$5.75 a bbl. which was the ordinary unit in selling rice, but it had not long been so, and the buyer was not familiar with this usage, and supposed a sack was meant, which contained more than a barrel. There was held to be no contract; but later, the buyer discovering the mistake, and nevertheless thereafter taking the rice, was held bound to pay \$5.75 a barrel. See also *Snoderly v. Bower*, 30 Ida. 484, 166 Pac. 265; *Strong v. Lane*, 66 Minn. 94, 68 N. W. 765.

either party to assert his own interpretation so long as it was reasonable.²² Interesting cases may be supposed of a failure to hear the words which an offeror spoke. The same principles should be applied, but as it will not generally be possible to show that a failure to hear or to understand correctly was unjustifiable, such a failure will on every view prevent the formation of a contract.²³ It is undoubtedly often said broadly that if the parties do not understand the same thing there is no contract.²⁴ But in view of what has been said, it is clear that so broad a statement cannot be justified. It is even conceivable that a contract shall be formed which is in accordance with the intention of neither party. If a written contract

²² In *Falck v. Williams* [1900], A. C. 176 (stated in the preceding note), the court said:—"The fault lay with the appellant's agent. If he had spent a few more shillings on his message, if he had even arranged the words he used more carefully, . . . there would have been no difficulty." Nevertheless, the court held not only that the appellant as plaintiff being unable to make out that the construction which he put upon the message was the true one, must fail; adding, "If the respondent had been maintaining his construction as plaintiff he would equally have failed." It would seem that if the appellant was at fault the respondent should have been able to enforce rights based on his reasonable though mistaken construction of the ambiguous telegram. In *Scriven v. Hindley*, [1913] 3 K. B. 564, an auctioneer knocked down certain goods. The bidder supposed he was buying hemp, while the auctioneer intended to sell tow. Samples of the hemp and tow were on view in an adjoining room, and numbers of the lots were marked opposite the respective samples. The court held that there was no bargain. In commenting on the decision, the editor of the *Law Quarterly Review* said (Vol. 30, p. 20): "The source of the mistake was the quite unusual association of hemp and

tow under the same shipping mark, the bales and samples being distinguished only by numbers; whence the buyer naturally supposed that all the samples marked like those he actually inspected were samples of hemp. He knew there was tow for sale, but did not ask to see samples of it, as he did not want to buy tow. When the facts were ascertained, the only real dispute was whether the buyer ought not to have made a more careful examination. As to this, A. T. Lawrence, J., held that there could be no duty laid on him of examining goods he did not wish to buy. Thus, if there could be any talk of negligence, it would seem to be rather on the seller's side." Cf. *Sheldon v. Capron*, 3 R. I. 171.

²³ *Rupley v. Daggett*, 74 Ill. 351. The offeror offered to sell a mare for \$165. The offeree understood him to say \$65 and replied "Did I understand you \$65?" The offeror in turn misunderstanding and supposing his offer was accurately repeated said "yes." It was held that an acceptance created no contract.

²⁴ *Clyde Steamship Co. v. West India Steamship Co.*, 169 Fed. 275, 94 C. C. A. 551; *Meux v. Hogue*, 91 Cal. 442, 27 Pac. 744; *Harvey v. Duffey*, 99 Cal. 401, 33 Pac. 897. See *infra*, §§ 1535-1537.

is entered into, the meaning and effect of the contract depends on the construction given the written language by the court, and the court will give that language its natural and appropriate meaning; and, if it is unambiguous, will not even admit evidence of what the parties may have thought the meaning to be.²⁵

§ 95a. A writing signed without negligence in ignorance of its nature is void.

Though expression of assent and not actual assent creates a contract, a writing purporting to be a contract and not ambiguous in its language may be wholly void. If without negligence on his part, a signer attached his signature to a paper assuming it to be a paper of a different character, the paper is void. Such a mistake without negligence will not often occur in the absence of some such fraud, as substituting by sleight-of-hand, for a paper which has been agreed upon, a different one. Nevertheless the situation is possible without actual fraud, and if it occurs whether induced by fraud,²⁶ or without it, no contract is formed.²⁷

²⁵ See *Preston v. Luck*, 27 Ch. D. 497; *Silva v. Silva*, 32 Cal. App. 115, 162 Pac. 142, and *infra*, §§ 606, 607, 610. In *Joliet Bottling Co. v. Joliet Brewing Co.*, 254 Ill. 215, 98 N. E. 263, the court said:

"Where a contract is ambiguous and has been interpreted by the parties to it, courts will regard the interpretation placed upon the contract by the parties themselves. This rule can have no application to a construction of the contract before us in this case, because it is not ambiguous; and the intention of the parties to it is not to be determined by evidence, but by the language employed in the contract itself." See *infra*, §§ 606, 607.

²⁶ See *infra*, § 1488.

²⁷ See *Thoroughgood's Case*, 2 Coke, 9a (considered in L. R. 4 C. P. 711); *Davis v. Snider*, 70 Ala. 315; *Bank v. Webb*, 108 Ala. 132, 19 So. 14; *Yoch v. Insurance Co.*, 111 Cal. 503, 44 Pac.

189, 34 L. R. A. 857; *Meyer v. Haas*, 126 Cal. 560, 58 Pac. 1042; *Green v. Maloney*, 7 Houst. 22; *Brooks v. Matthews*, 78 Ga. 739, 3 S. E. 627; *Rockford, etc., R. R. Co. v. Shunick*, 65 Ill. 223; *Eldorado Jewelry Co. v. Darnell*, 135 Ia. 555, 113 N. W. 344, 124 Am. St. Rep. 309; *O'Donnell v. Clinton*, 145 Mass. 461, 14 N. E. 747; *Adolph v. Minneapolis & Pac. Ry. Co.*, 58 Minn. 178, 59 N. W. 959; *Wright v. McPike*, 70 Mo. 175; *Alexander v. Brogley*, 62 N. J. L. 584, 41 Atl. 691, 63 N. J. L. 307, 43 Atl. 888; *Jackson v. Hayner*, 12 Johns. 469; *Green v. North Buffalo Township*, 56 Pa. St. 110; *Schuylkill County v. Copley*, 67 Pa. St. 386, 5 Am. Rep. 441; *Wanner v. Landis*, 137 Pa. St. 61, 20 Atl. 950; *Coates v. Early*, 46 S. C. 220, 24 S. E. 305; *Cameron v. Estabrooks*, 73 Vt. 73, 50 Atl. 638; *Gross v. Drager*, 66 Wis. 150, 28 N. W. 141; *Warder Co. v. Whitish*, 77 Wis. 141, 1 W. 540;

It is as if the offeror in his sleep said words expressive of an offer, which were accepted. Though neither will to create a legal obligation, nor accurate understanding of the meaning of an offer and acceptance is essential to the creation of a contract, intent to do the act which amounts to an offer or acceptance or at least negligently allowing the appearance of such an intent is essential.

§ 96. Time of formation of contract.

The suggestion has been made that the acceptance of an offer relates back to the time when the offer was made. The original basis for this suggestion seems to be found in cases decided prior to the recognition of continuing offers.²⁸ But in a few later decisions also it has been said or assumed that there was a relation of the acceptance to the offer.²⁹ There is no need, however, to invoke a fictitious relation. Undoubtedly the offer and the acceptance must exist at the same moment in order to form a contract. But this result is reached by the continuance of the offer to the time of the acceptance, not by a relation back of the acceptance to the time when the offer was first made. As has been pointed out³⁰ if the doctrine of relation were applied, even as between the parties themselves, the consequence would be that an offer might be accepted in spite of the death or insanity of the

Bank of Ireland v. McManamy, [1916] 2 Ir. K. B. 161. A few decisions seem inconsistent with the foregoing. *Hawkins v. Hawkins*, 50 Cal. 558 (compare *Meyer v. Haas*, 126 Cal. 560, 58 Pac. 1042); *Chicago, etc., Ry. Co. v. Belliwith*, 83 Fed. Rep. 437 (compare *Great Northern Ry. Co. v. Kasischke*, 104 Fed. Rep. 440, 449); *Binford v. Bruso*, 22 Ind. App. 512, 54 N. E. 146. See further a full note in 32 Am. L. Reg. (N. S.) 946.

²⁸ In *Kennedy v. Lee*, 3 Mer. 441, 454, Lord Eldon said of a contract by correspondence—"The acceptance must be taken as simultaneous with the offer," and see further, *supra*, § 50.

²⁹ This seems to be assumed in *Potter v. Sanders*, 6 Hare, 1, and in *Dickinson v. Dodds*, 2 Ch. D. 463. In the latter case Bacon, V. C., declared that this was the law and therefore gave the plaintiff priority over one who had acquired title to the land in question after the offer was made, but prior to its acceptance by the plaintiff; and though the decision was reversed, it was on another ground. In *Garrett v. Trabue*, 82 Ala. 227, 3 So. 149; *Smith v. Bingham*, 156 Cal. 359, 104 Pac. 689, 28 L. R. A. (N. S.) 522; *Willets v. Sun Mutual Ins. Co.*, 45 N. Y. 45, 47, 6 Am. Rep. 31; *Grossman v. Schenker*, 206 N. Y. 466, 100 N. E. 39.

³⁰ Langdell, Summary of Cont., § 7.

offeror occurring after the making of the offer but before the acceptance,³¹ and it would even be true that no offer could be effectually revoked, as an acceptance whenever made would by relation precede the revocation. Where the interests of third persons are involved, it is well settled that the fiction of relation will never be adopted.³² Therefore if A makes an offer to sell property to B, and subsequently makes an offer to sell the same to C, and both B and C accept the offer, the one who accepts first, thereby completing a contract, is entitled to the land; not the one to whom the offer was first made, which would be the case if the doctrine of relation were applied.³³ And as between the parties themselves there is no need here to invoke a fiction, and many reasons against it. The decisions cited in the following section as to place of contract, in effect also decide the time of the contract; because if the acceptance related to the time when the offer was made, the place of contract would necessarily be that where the offer was made, since only there was an offer in existence at the time to which the relation is had.

§ 97. Place of contract.

If the acceptance is made immediately after the offer when the parties are together, no question can arise as to the place of the contract. The place where the parties are is the only possible place of contract. But if the acceptance is not made simultaneously with the offer, and is made in a different place, the universal principle disposing of this and any similar question is that the place of the contract is the place where the last act necessary to the completion of the contract was done,—³⁴ that is where the contract first becomes a legal obligation. If an offer contemplates a unilateral contract and calls for the performance of an act, the place where that act is done is the place of the contract.³⁵ Thus if goods are shipped in conformity with an offer, the place of the contract is the place

³¹ See *supra*, § 62.

³² *Felthouse v. Bindley*, 11 C. B. (N. S.) 869.

³³ *Potter v. Sanders*, 6 Hare, 1.

³⁴ *Emerson Co. v. Proctor*, 97 Me.

360, 54 Atl. 849; *Ohl v. Standard Steel Section, Inc.*, 179 N. Y. App. D. 637, 167 N. Y. S. 184.

³⁵ *Milliken v. Pratt*, 125 Mass. 374, 28 Am. Rep. 241.

of shipment, since the act requested is the transfer of title to the goods by shipment.³⁶ If, however, the seller shipped goods but not in conformity with the contract, or if title to the goods was not to pass until they reached their destination, the place of the contract would be the destination of the goods, where they were received and accepted, since in the former case the shipment was a counter-offer and no contract would be formed till it was accepted by the buyer's assent to take the goods, and in the latter case the terms of the original offer would not be fully complied with until the goods reached their destination.³⁷ Similarly if an offer calls for the sending of a note,³⁸ or an insurance policy,³⁹ or a check,⁴⁰ or money,⁴¹

³⁶ *Mobile, etc., R. R. Co. v. Copeland*, 63 Ala. 219, 35 Am. Rep. 13; *Atlantic Phosphate Co. v. Ely*, 82 Ga. 438, 9 S. E. 170; *State v. Colby*, 92 Ia. 463, 61 N. W. 187; *Claffin v. Mayer*, 41 La. Ann. 1048, 7 So. 139; *Boothby v. Plaisted*, 51 N. H. 436, 12 Am. Rep. 140; *Mack v. Lee*, 13 R. I. 293.

³⁷ In *State v. O'Neil*, 58 Vt. 140, 2 Atl. 586, 56 Am. Rep. 557, intoxicating liquors were ordered by a Vermont buyer from New York. They were shipped to Vermont by express C. O. D. and delivered and paid for in Vermont. It was held that the shipment C. O. D. retained title in the seller and that, therefore, as no sale was made until delivery in Vermont, the liquor law of that State had been violated. See also *Crabb v. State*, 88 Ga. 584, 15 S. E. 455; *State v. American Express Co.*, 118 Iowa, 447, 92 N. W. 66; *State v. Goss*, 59 Vt. 266, 9 Atl. 829, 59 Am. Rep. 706.

On the other hand, on similar facts the Maine court held that shipment C. O. D. did not prevent a transfer of title and that therefore the sale was made in the State from which the goods were shipped. *State v. Intoxicating Liquors*, 98 Me. 464, 57 Atl. 798. See also to the same effect *Pilgreen v. State*, 71 Ala. 368; *Hunter v. State*, 55 Ark. 357, 359; *State v. Cairns*, 64 Kans.

782, 68 Pac. 621, 58 L. R. A. 55; *State v. Mullin*, 78 Ohio St. 358, 85 N. E. 556, 18 L. R. A. (N. S.) 609, 125 Am. St. Rep. 710; *Commonwealth v. Fleming*, 130 Pa. 138, 18 Atl. 622, 5 L. R. A. 470, 17 Am. St. Rep. 763; *Golightly v. State*, 49 Tex. Cr. App. 44, 90 S. W. 26, 2 L. R. A. (N. S.) 383; *State v. Flanagan*, 38 W. Va. 53, 17 S. E. 792, 22 L. R. A. 430, 45 Am. St. Rep. 836.

³⁸ *Wm. Glennly Glass Co. v. Taylor*, 99 Ky. 24, 34 S. W. 711; *Shoe, etc., Bank v. Wood*, 142 Mass. 563, 8 N. E. 753; *Wayne County Savings Bank v. Low*, 81 N. Y. 566, 37 Am. Rep. 533; *Barrett v. Dodge*, 16 R. I. 740, 19 Atl. 530, 27 Am. St. Rep. 777.

³⁹ *State Mutual Fire Ins. Assoc. v. Brinkley Stave & Heading Co.*, 61 Ark. 1, 31 S. W. 157, 29 L. R. A. 712, 54 Am. St. Rep. 191; *Commonwealth Mutual Fire Ins. Co. v. Wm. Knabe Mfg. Co.*, 171 Mass. 265, 50 N. E. 516; *Northampton Mut. Ins. Co. v. Tuttle*, 40 N. J. L. 476; *Davis v. Manufacturers' Mut. Fire Ins. Co.*, 67 N. H. 218, 34 Atl. 464; *Hyde v. Goodnow*, 3 N. Y. 266; *Fidelity Mutual Life Assoc. v. Harris*, 94 Tex. 25, 57 S. W. 635, 86 Am. St. Rep. 813; *Galloway v. Standard Fire Ins. Co.*, 45 W. Va. 237, 31 S. E. 969.

⁴⁰ See *supra*, § 81 *ad fin.*

⁴¹ *Ibid.*

the place of the contract is where the offer was complied with by sending the thing requested. On the other hand, if goods,⁴² or notes,⁴³ or anything else is sent without authority, and not in response to an offer, it is itself an offer and cannot be accepted except at the place of destination, and if any contract is formed it is formed there.⁴⁴ If the offer contemplates a bilateral contract, the place of the contract is where the acceptance and counter-promise of the offeree is made. Therefore in contracts by mail, or by telegraph, when these means of communication are authorized by the offer, the place of the contract is the place where the reply is mailed,⁴⁵ or delivered to the telegraph company.⁴⁶ Similarly in contracts by telephone it has been held that the place of the contract is the place at which the acceptor speaks.⁴⁷ If the use of the means of communication adopted by the offeree was not authorized by the offer, no contract can be complete until the acceptance is received. The place of a contract thus formed, therefore, is the place where the acceptance is received.

What has been said thus far relates to the place where a simple contract is formed. A formal contract becomes binding when the last requisite formality is complied with. In a contract under seal, this is when the instrument is delivered, and the place of contract is therefore the place of delivery.⁴⁸

⁴² See generally Williston on Sales, §§ 278 *et seq.*

⁴³ *Bell v. Packard*, 69 Me. 105, 31 Am. Rep. 251; *Emerson Co. v. Proctor*, 97 Me. 360, 364, 54 Atl. 849. See also *Hewitt v. Bank*, 64 Neb. 463, 90 N. W. 250.

⁴⁴ See cases cited in the preceding notes.

⁴⁵ *Bank of Yolo v. Sperry Flour Co.*, 141 Cal. 314, 315, 74 Pac. 855, 65 L. R. A. 90; *Worcester Bank v. Wells*, 8 Met. 107; *W. G. Ward Lumber Co. v. American &c. Mfg. Co.*, 247 Pa. 451, 93 Atl. 470, Ann. Cas. 1918, A. 451.

⁴⁶ *Garrettson v. North Atchison Bank*, 47 Fed. 867; *Tyng v. Converse*, 180 Mich. 195, 146 N. W. 629; *Perry*

v. Mount Hope Iron Co., 15 R. I. 380, 5 Atl. 632, 2 Am. St. Rep. 902; *Tillinghast v. Boston, etc., Lumber Co.*, 39 S. C. 484, 18 S. E. 120, 22 L. R. A. 49.

⁴⁷ *Bank of Yolo v. Sperry Flour Co.*, 141 Cal. 314, 74 Pac. 855, 65 L. R. A. 90; *Tyng v. Converse*, 180 Mich. 195, 146 N. W. 629; *Planters' Oil Co. v. Whitesboro Cotton Oil Co.* (Tex. Civ. App.), 146 S. W. 225; *Cuero Cotton Oil & Mfg. Co. v. Feeders' Supply Co.* (Tex. Civ. App.), 203 S. W. 79. See criticism of these cases, *supra*, § 82.

⁴⁸ *Baring v. Inland Revenue Commissioners*, [1898] 1 Q. B. 78. In regard to what constitutes delivery, see *infra*, § 210.

§ 98. Estoppel to deny the elements of a contract.

There is no reason to suppose that the ordinary principles of estoppel do not apply to the formation of contracts. If, therefore, either party misrepresents an element of fact essential for the existence or non-existence of a contract, and the other party justifiably relies upon this representation and takes detrimental action in consequence, it will not be open to the party making the representation to show his error. Thus, if an acceptor dates his acceptance at a date beyond the last moment when the offer would be open, and, relying on this date, the offeror changes his position, the acceptor could not show that the date was an error and that the acceptance was in fact seasonably dispatched.⁴⁹ So, it would seem, if after a letter of acceptance had been mailed completing a contract, the acceptor should telegraph a rejection of the offer, and relying on this rejection the offeror should change his position before the receipt of the acceptance, the acceptor should not be allowed to show that he had in fact accepted the offer while still open. It is essential, however, for the creation of an estoppel that there should be a misrepresentation of existing fact; it is not enough that relying upon a promise of future performance, the promisee changes his position.⁵⁰

⁴⁹ But if the offeror takes no action in reliance upon the erroneous date, the acceptor could show the truth. *Dunlop v. Higgins*, 1 H. L. C. 381; *Stock-*

ham v. Stockham, 32 Md. 196, 208.

⁵⁰ See *infra*, § 690 and as to estoppel to deny consideration, *infra*, §§ 115a, 139.

CHAPTER VI

CONSIDERATION

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§ 99. History of the law of consideration.

It is requisite in English and American law for the formation of a simple contract that legally sufficient consideration be given for the promise or promises therein. This doctrine finds no close analogy in the Roman or modern Civil Law. The history of the requirement is bound up with the history of the common-law action of *assumpsit*. Though certain parol contracts were recognized by the law prior to the rise of the action of *assumpsit*,¹ yet it was only by means of that action that the formation of an infinite variety of contracts without a sealed writing, became possible, and after its development the kinds of parol agreements previously recognized were enforced generally by means of that action so that its requirements were applied to them. The action of *assumpsit* was originally a form of action on the case and regarded as sounding in tort like the action of deceit. "The earliest cases in which an *assumpsit* was laid in the declaration were cases against a ferryman who undertook to carry the plaintiff's horse over the river, but who overloaded the boat, whereby the horse was drowned; against surgeons who undertook to cure the plaintiff or his animals, but who administered contrary medicines or otherwise unskillfully treated their patient; against a smith for laming a horse while shoeing it; against a barber who undertook to shave the beard of the plaintiff with a clean and wholesome razor, but who performed his work negligently and unskillfully to the great injury of the plaintiff's face; against a carpenter who undertook to build well and faithfully, but who built unskillfully."² From cases of misfeasance, like those just alluded to, the step was soon taken to cases of nonfeasance where the only wrong was a failure

¹ See 8 Harv. L. Rev. 252, by Ames.

² The History of *Assumpsit*, 2 Harv. L. Rev. 1, 2. In this and a succeeding

article, *ib.* 53, Professor Ames definitively traced the early law on the subject.

to do what had been promised. Somewhat later a promise to pay a precedent debt was enforced, the precedent debt, it was said, serving as consideration for the assumpsit. It will be seen that the consideration in these two classes of cases is entirely different. In the first class the gist of the action is an injury to the plaintiff caused by his entrusting his person or property to the defendant in reliance on the latter's promise or undertaking. The defendant is regarded as a tortfeasor because after assuming to act and inducing the plaintiff to change his position, he has negligently injured the plaintiff or his property, or has failed altogether to do as he agreed. In the second class of cases the thing which makes the defendant's promise enforceable is the precedent debt which originally arose in consequence of some benefit or *quid pro quo* received by the defendant, though not at the time the promise was made.³ It is from these two classes of cases that the frequently quoted alternative in definitions of consideration, a detriment to the plaintiff or a benefit to the defendant, is derived. Gradually the action of assumpsit became differentiated from other actions on the case and regarded as sounding in contract like covenant and debt, rather than tort.

§ 100. Differing modern tests of consideration.

In view of the varying underlying bases of the legal rights which have been enforced in the action of assumpsit, it is not surprising that there is difficulty in reducing to one fixed standard the consideration in all cases. There may still be found several somewhat distinct and conflicting ideas as to what constitutes a sufficient consideration.

1. The idea of promissory estoppel or tort. According to this test, the reason for the enforcement of a promise would be the justifiable reliance upon the promise, making it wrongful for the promisor who has aroused expectation in the promisee and induced him to act, to withdraw from his promise.

³ Occasionally in the early books, consideration is used in a looser sense, as meaning any motive or reason for making a promise; or even as meaning deliberation. Some relics of the first of

these meanings may be found in some exceptional cases in modern law, see Pound, 13 Ill. L. Rev. 435, but it has no acceptance as a general definition.

2. The idea that the consideration is the price requested and received by the promisor for the promise. This idea is undoubtedly the fundamental and as to most cases the generally accepted idea of consideration at the present time. This usage of the word also accords with the usage in executed transactions when we speak of the consideration for a deed or for a sale.⁴

3. A past indebtedness or other situation which makes it just that a promise should be enforced. This idea is in modern times largely discredited except in certain special classes of cases, which must now be regarded as exceptional.

It is sometimes supposed by critics of the doctrine of consideration that the requirement relates to the form rather than the substance of a contract.⁵ But this is a misunderstanding. Though a peppercorn *may* be sufficient consideration for a promise,⁶ whether or not it is, depends on whether it was in fact the exchange or at least a requested detriment induced by the promise.⁷ Courts of equity have professed to establish no different criterion of what constitutes a contract from that fixed by courts of law. On certain matters, however, equitable doctrines have arisen which are logically inconsistent with any principle of consideration recognized by courts of law. The most striking of the cases where obligations have been enforced in equity without consideration valid at law are:

1. Gratuitous declarations of trust by the owner of property.

2. Promised gifts which because something in the nature of a fraud would otherwise be perpetrated or because of the relationship of the parties, equity enforces specifically.⁸

Since a trust involves both a personal obligation and a property right, the doctrine established by Lord Eldon that a voluntary declaration of trust without change of possession creates an enforceable right,⁹ is inconsistent with the princi-

⁴ See Langdell, Summary of Contracts, §§ 45 et seq.

⁵ See, e. g., Markby, Elements (6th ed.), 309; Lorenzen, 28 Yale L. J. 621.

⁶ *Infra*, § 115.

⁷ *Ibid.*

⁸ See a full discussion of Consideration in Equity by Pound in 13 Ill. L. Rev. 435.

⁹ *Ex parte* Pye, 18 Ves. 140; Jones v. Lock, L. R. 1 Ch. 25; Ames's Case, Trust (2d ed.), 125 n.

ples that a promise is not binding without consideration, and that a gift without delivery is ineffectual.¹⁰

§ 101. Distinction between actual consideration and valid consideration.

It is not everything requested or given in exchange for a promise which will make the promise enforceable. In other words, it is not everything which the parties agree upon as consideration which the law will treat as valid consideration. It is frequently said that a promise has no consideration when what is meant is that the consideration given, though requested and furnished as requested, is not a valid, or sufficient or legal consideration to make the promise enforceable. Clearness of thought is promoted by using the word consideration as meaning consideration in fact, irrespective of its legal sufficiency or validity. The elliptical use of the word as meaning whatever may be legally necessary to make a promise binding results in an unnecessary multiplication of meanings for one word, since consideration is a word in common legal use in relation to other matters than the formation of simple contracts. If it is said then that a promise has no consideration, the meaning properly is that nothing was in fact given in exchange for the promise or that no action was taken in reliance upon it, either because the promise was intended as a gratuity or because the thing for which it was offered was not given. If it is said that a promise is not supported by sufficient or good or valid consideration, the meaning is that though the promisor may have asked and received a return for his promise, the return is not such as the law considers sufficient to make the promise enforceable.

When the words "sufficient consideration" are used, no question of illegality or of public policy in any restricted sense is to be understood. It is doubtless generally true that consideration given in fact but illegal, or in violation of public policy, will not support a promise;¹¹ and it is also true that whatever may be the requirements of sufficient consideration, those requirements, like all rules of law, are in a broad sense

¹⁰ See *infra*, § 440.

¹¹ It is not invariably true. See *infra*, §§ 1630-1632.

dictated by public policy. Nevertheless, the distinction is important between consideration which is merely insufficient, and consideration which is illegal or in violation of some other public policy than that which requires an equivalent satisfactory to the law to be given for a promise in order that the promise shall be binding.¹²

§ 102. Definition of valid consideration in unilateral contracts.

The requirement ordinarily stated for the sufficiency of consideration to support a promise is, in substance, a detriment incurred by the promisee or a benefit received by the promisor at the request of the promisor.¹³ For unilateral contracts, which were the earliest recognized by the law and may still be regarded as the typical form, the statement is as accurate as a brief general statement can be. For bilateral contracts it will be found that some modification of statement is necessary; though in substance the fundamental requirements are the same.¹⁴ That a detriment suffered by the promisee at the promisor's request is sufficient, though the promisor is not benefited is well settled.¹⁵ It will be found that in most cases where there is a detriment to the promisee there will also be a benefit to the promisor, because when the promisee

¹² See *infra*, § 134.

¹³ See for example Comyn's Dig. Action on the Case in Assumpsit, B. 1. *Jones v. Ashburnham*, 4 East, 455; *Thomas v. Thomas*, 2 Q. B. 851; *Bolton v. Madden*, L. R. 9 Q. B. 55, 56; *Currie v. Misa*, L. R. 10 Ex. 153, 162; *Kemp v. Nat. Bank of the Republic*, 109 Fed. 48, 52, 48 C. C. A. 213; *Clark's Appeal*, 57 Conn. 565, 19 Atl. 332; *Ryan v. Hamilton*, 205 Ill. 191, 68 N. E. 781; *People v. Commercial Life Ins. Co.*, 247 Ill. 92, 93 N. E. 90; *Eastman v. Miller*, 113 Iowa, 404, 85 N. W. 635; *Brady v. Equitable Trust Co.*, 178 Ky. 693, 199 S. W. 1082; *Chicora Fertilizer Co. v. Dunan*, 91 Md. 144, 46 Atl. 347, 50 L. R. A. 401; *Doyle v. Dixon*, 97 Mass. 208, 213, 93 Am. Dec. 80; *New York Mining Co. v. Martin*, 13 Minn. 417, 421; *Headley v. Leavitt*,

65 N. J. Eq. 748, 55 Atl. 731; *Atlantic Pebble Co. v. Lehigh Valley R.*, 89 N. J. L. 336, 342, 98 Atl. 410; *Frear v. Hardenbergh*, 5 Johns. 272, 277, 4 Am. Dec. 356; *Rector, etc., St. Marks Church v. Teed*, 120 N. Y. 583, 24 N. E. 1014; *Union Bank v. Sullivan*, 214 N. Y. 332, 108 N. E. 558; *Eastman Land Co. v. Long-Bell Lumber Co.*, 30 Okl. 555, 120 Pac. 276; *Butson v. Missz*, 81 Oreg. 607, 160 Pac. 530; *Ballard v. Burton*, 64 Vt. 387, 24 Atl. 769, 16 L. R. A. 664; *Utah Nat. Bank v. Nelson*, 38 Utah, 169, 111 Pac. 907; *Drovers' Deposit Nat. Bank v. Tichenor*, 156 Wis. 251, 145 N. W. 777.

¹⁴ See *infra*, §§ 103-103f.

¹⁵ *Riddle v. Hudson* (Okla., 1919), 172 Pac. 921. See also cases in this section, *passim*, also *infra*, § 113.

does something detrimental to himself at the request of the promisor, the promisor must be assumed to make the request because he desired the performance in question and regarded it as beneficial to himself. It is true there may not be always such a *quid pro quo* as was necessary in the early law to create a debt;¹⁶ but though the historical derivation of benefit as part of the definition of consideration may be from the *quid pro quo* in the action of debt, this derivation has so far been lost sight of that at the present time benefit would doubtless receive a wider meaning. But, as has been said, detriment to the promisee is enough without benefit to the promisor.

{ There are a few cases, however, where there may be benefit to the promisor though no detriment to the promisee. These cases make it essential to decide whether a benefit to the promisor is of itself sufficient. Eminent recent writers on the law of contracts have endeavored to find the test solely in the detriment to the promisee,¹⁷ and their view is supported by the numerous *dicta* to the effect that performance of the promisee's legal duty is insufficient consideration for a promise;¹⁸ since such performance may be beneficial to the promisor, but cannot be legally detrimental to the promisee. But in the cases where such statements have been made there generally was no more legal benefit to the promisor (since he received only a performance to which he was legally entitled) than there was detriment to the promisee. In one class of cases, however, namely, where the promisee's previous legal obligation was not to the promisor, but to a third person, there may be no detriment to the promisee, since he performs only what he was bound to do, and yet a benefit to the promisor to which he was not previously legally entitled. The weight of authority in these cases undoubtedly supports the view that such an agreement is invalid, and therefore by implication holds that a benefit to the promisor, is not a sufficient consideration.¹⁹ On the other hand are to be considered not only the numerous statements of courts and writers, that a benefit to the promisor

¹⁶ See *supra*, § 11

(3d ed.), p. 185; Ames, 12 Harv. L. Rev. 515.

¹⁷ Langdell, Summary of Contracts, § 64; Wald's Pollock on Contracts

¹⁸ See *infra*, §§ 120-133.

¹⁹ See *infra*, § 131.

is a sufficient alternative to the requirement of detriment to the promisee, but also cases which uphold the validity of agreements in which the consideration does not move from the promisee.²⁰ On the whole, it seems better to take the wider rule. A promise made in return for a benefit to the promisor must have been seriously made, and it has been paid for at the price which the promisor requested and he has gained an advantage therefrom. This seems a sufficient reason for enforcing the promise, and the circumstance that the action of *assumpsit* was historically developed from an action of tort in which the gist of the action was an injury, or detriment to the promisee caused by reliance on the promise, seems an inadequate argument to the contrary. The law of contracts has travelled a long way from this beginning, and there seems no reason if the broader meaning makes for convenience at the present time why the natural meaning of the definition as laid down for centuries should be restricted for historical reasons.²¹

²⁰ See *infra*, § 114, also Edmund M. Morgan, 1 Minn. L. Rev. 383.

²¹ Not infrequently, in cases where legal detriment suffered by the plaintiff in exchange for the defendant's promise might be found, the decision is rested wholly or partly on benefit received by the defendant. Thus in *Richmond, etc., Ry. Co. v. Richmond, etc., Railroad Co.*, 96 Va. 670, 673, 675, 32 S. E. 787, the court had in question an agreement between two railroads to share the expenses of erecting gates and maintaining a watchman at the crossing of their tracks. The court said: "It is said, however, that this contract is without consideration; that the Electric Company had the right, with or without its consent, to cross its tracks, authority to do so having been conferred by the City of Richmond. This we concede, but we know that the crossing of railways at grade is always attended with danger, and that when this crossing occurs in the streets of a city the danger

is greatly enhanced. It was, therefore, for the mutual convenience, safety, and protection of the two companies that some arrangement should be made by which the danger incident to the situation might be diminished, if not wholly obviated. Counsel for the Electric Company says that the erection of gates does not tend to diminish the danger, and was not to the advantage of the Electric Company, because its employees are thereby induced to rely upon such means of protection against accident, and relax their own vigilance, and are rendered less attentive to their duties. We think, however, that we can with propriety assume that it is a matter of common knowledge that the tendency of gates and a gatekeeper is to promote safety. . . . The contract [having thus been entered into and ratified] is, we find, supported by a sufficient consideration in the benefits which it has conferred upon the parties thereto, in the safety and protection

§ 102a. Technical meaning of benefit and detriment.

Benefit and detriment have a technical meaning. Neither the benefit to the promisor nor the detriment to the promisee need be actual. "It would be a detriment to the promisee, in a legal sense, if he, at the request of the promisor and upon the strength of that promise, had performed any act which occasioned him the slightest trouble or inconvenience, and which he was not obliged to perform."²² Thus abstaining from smoking and drinking, though in fact in the particular case a benefit to the promisee's health, finances and morals and of no benefit to the promisor is a legal detriment and if requested as such is sufficient consideration for a promise.²³ So obtaining signatures to a petition is a sufficient consideration though the petition is so defective as to be useless and the signatures are, therefore, of no benefit to the promisor.²⁴ Detriment, therefore, as used in testing the sufficiency of consideration means legal detriment as distinguished from detriment in fact. It means giving up something which the promisee had a right to keep or doing something which he had a right not to do.²⁵ And benefit correspondingly must mean the receiving as the exchange for his promise of something which the promisor was not previously entitled to receive. That the promisor desired it for his own advantage and had no previous right to it is enough to show that it was beneficial.²⁶ If the promisor requested the act not for his own

in the operation of their respective roads, which we are authorized to infer is in some measure due to the flagman employed, and gates erected in accordance with its terms."

²² *Bigelow v. Bigelow*, 95 Me. 17, 22, 49 Atl. 49.

²³ *Hamer v. Sidway*, 124 N. Y. 538, 27 N. E. 256, 12 L. R. A. 463, 21 Am. St. Rep. 693; *Talbot v. Stemmons Ex'r*, 89 Ky. 222, 12 S. W. 297, 25 Am. St. Rep. 531.

²⁴ *Corey v. Newton*, 9 Col. App. 181, 48 Pac. 156.

²⁵ This might not, however, be pushed to its ultimate logical extremity. Receiving a gift would probably not be

held sufficient consideration to support a promise by the donor to make another. *Hoffman v. Moreman*, 184 Ala. 220, 63 So. 942; and see *infra*, § 103d. n. *Sed quare*, if the parties really intended a bargain.

²⁶ Proof that the test is based on the previous legal right of the promisee to keep the consideration and of the promisor to receive it may be found in decisions holding payment of a debt, whether in fact advantageous to one party and detrimental to the other, no valid consideration for a promise, *infra*, § 120; and likewise performance of duties imposed by contract, *infra*, § 131, or by law, *infra*, § 132, invalid

advantage, but from a charitable desire to benefit a third person, it may be doubted whether there is such a benefit as the law requires. Thus if, as consideration of his promise, A requests B to perform a legal duty which B owes to C, and B does so, it is insufficient consideration unless A requested the act for his own advantage, not C's.²⁷ The fact that performance of his own promise will benefit the promisor is immaterial. A promisor cannot give himself consideration for his own promise.²⁸

It is probable also that no performance can serve as consideration. "If no benefit is received by the obligee except what he was entitled to under the original contract, and the other party to the contract parts with nothing except what he has already bound for, there is no consideration." *Feldman v. Fox*, 112 Ark. 223, 164 S. W. 766, 767. The principle stated in the text is not infrequently lost sight of, and an inquiry made whether an act was detrimental in fact to the promisee or beneficial in fact to the promisor. See, e. g., *Brown v. Brew*, 99 Wash. 560, 169 Pac. 992.

²⁷ In the cases cited, *infra*, § 121, which hold performance or promises of performance of a legal duty to a third person a sufficient consideration, there are expressions indicating that in the opinion of the court sometimes performance by B at A's request of B's legal duty to C, might be beneficial to A, and sometimes might not be.

²⁸ The error of such reasoning (for it can be considered nothing else) was committed in *Union Bank v. Sullivan*, 214 N. Y. 332, 108 N. E. 558. There the President and members of the Executive Committee of the bank gave their note to the bank for \$175,000, in order that a loss of that amount which the bank had suffered might not be deducted from the apparent surplus in the bank's statement of its condition. The court said in support of its argument that the signers of the note

had received sufficient consideration for their respective promises:—"Certainly those who became liable on the note secured a distinct benefit which accrued directly from the contract. Each share of stock which they held represented an aliquot part of the bank's assets and whatever increased the assets benefited the holders of the stock." It might be argued with equal force that a promise to buy property is binding without any promise to sell it, since if the promise is performed, the promisor will receive the benefit of the purchased property. A promise by a stockholder to make a present to a corporation is surely not binding, merely because a fraction of the gift will enure to his advantage in the increased value of his stock. The true analysis of the situation presented by the New York case is this: Mutual promises by A and B that each will make a gift to C, are binding. This is an ordinary case of a bilateral contract for the benefit of a third person. In the actual case the promises in question were not made by the promisors to one another but were made to the bank. In consideration of A's promise to the bank, B also promised to the bank. It is therefore a case where the consideration does not move from the promisee (see *infra*, § 114), but where in other respects the usual requirements for the formation of contracts may be found.

sideration if the promisee had no power to refrain from performing the act. This question can generally arise only where negative performance is requested. If the promisee refrains as requested, but could not, had he wished, have done otherwise, he has certainly incurred no detriment and can hardly be regarded as having conferred a benefit.²⁹

§ 103. Application to bilateral contracts of the definition of consideration in unilateral contracts.

The earliest simple contracts recognized by the law were unilateral. The first recognition of bilateral contracts seems to have been about the end of the sixteenth century.³⁰

When endeavoring to apply the doctrine of consideration to bilateral contracts a lawyer instinctively seeks to apply the same definition that has been adopted for unilateral contracts. Let it be supposed that this is detriment to the promisee or perhaps, as an alternative, benefit to the promisor. Such detriment or benefit may be sought in bilateral agreements either in the making of a promise in fact, or in the obligation in law created by a promise. Professor Ames took the former alternative;³¹ Sir Frederick Pollock,³² though saying, "It is true that the promise itself, not the obligation thereby created is the consideration," has inserted in the last edition of his treatise a passage which seems inconsistently to imply that not the promise in fact, but the obligation of the promise is requested;³³ and at all events is explicit that whether or

²⁹ In *Wichita Mill & Elevator Co. v. Liberal Elevator Co.*, 243 Fed. 99, 102, 155 C. C. A. 629, the court held that a seller's delay in shipping goods, though requested as consideration, created no contract, "for such delay was caused by its absolute inability to ship and not by its compliance with the buyer's request."

³⁰ *Strangborough v. Warner*, 4 Leonard, 3 (1589); *Gower v. Capper*, Cro. Eliz. 543 (1597); *Nichols v. Rayn-bred*, Hob. 88 (1615). In *Pecke v. Redman, Dyer*, 113 (1555), the parties had entered into a bilateral agreement for the sale of grain in installments.

The defendant failed to pay for installments furnished, and the judges were evenly divided in opinion as to the plaintiff's right to recover for future profit as well as for the non-payment for what had already been delivered.

³¹ 12 Harv. L. Rev. 29, 32.

³² *Principles of Contract*, 8th Eng. ed., 192, 3d Am. ed., 202.

³³ "If it be suggested that the mere utterance of words of promise is trouble enough to be a consideration, the answer is that such is not the nature of the business. Moving of the lips to speak or of the fingers to write is not what the promisor offers or the promisee ac-

not the making of the promise as a fact or the obligation of the promise in law is requested, the reason that a promise is sufficient consideration is because it creates a detrimental obligation. Professor Langdell also ³⁴ is explicit only to the same extent. He says that the making of a "binding promise" is something of value; and in his argument,³⁵ applies his test for consideration—detriment to the promisee—to the obligation assumed to be created by the promise.³⁶

It seems probable that generally speaking, it is the promise in fact which the offeror requests—not a legal obligation. This is shown, as Professor Ames has said, by the form which such an offer ordinarily takes in fact, and by the form in which a bilateral contract is declared upon, the plaintiff stating merely that in consideration of his promise, the defendant promised. An offeror contemplating the formation of a bilateral contract says nothing of obligations, and asks only a promise in fact. Whether the offeror has bound himself by an obligation and whether he has got one in return is for the law to decide. This is true generally in the formation of contracts.³⁷ If it were true that the request of the offeror were for an obligation rather than for a promise in fact, no fair construction of the offer could permit any other conclusion than that the obligation requested by the offeror was an effective and enforceable obligation, not one unenforceable or voidable at the option of the promisor. Yet, promises which are voidable or unenforceable on account of fraud, infancy, the Statute of Frauds, or illegality, are sufficient to support counter-promises.³⁸ If the counter-promisor in such a bargain requested a legal obligation, it can hardly be true that he has received what he asked for. Certainly no offeror who in terms requested an obligation could have had in mind such a feeble bond.

cepts." Pollock (8th Eng. ed.), 191. No doubt even if merely a promise in fact is asked for, the request contemplates, not the utterance of the words as a meaningless formula, but as a manifestation of the speaker's intent. Possibly this is all the learned author means.

³⁴ Summary of Contracts, § 81.

³⁵ *E. g.*, Summary of Contracts, § 84.

³⁶ Professor Ashley, who follows Langdell closely, argues that "in the average case" it is the obligation not merely the promise in fact which the offer for a bilateral contract requests. Law of Contracts, § 31.

³⁷ See *supra*, § 21.

³⁸ See *infra*, § 105.

It will not do to urge that a voidable or unenforceable obligation is recognized by the law as within the pale of legal obligations. The inquiry here concerns what the offeror in fact requests and the law cannot, under recognized rules, impose a contract upon him unless he has been given what his request reasonably should be understood to mean. Contracts where one promise is voidable or unenforceable present some difficulty with regard to the law of consideration,³⁹ but it has not been supposed that they violate fundamental principles of mutual assent.

It is doubtless generally true, though not always, that the reason why the offeror requests a promise in fact is because he expects thereby to acquire an obligation in law, but the reason for his request must not be confused with the request itself.

It must be admitted, however, that it is possible for an offeror to request in his offer the creation of a legal obligation. A can certainly say to B,—“If you will give me a simple contract right against you for your horse, I will give you a simple contract right against me for one hundred dollars,” and it will probably not be doubted that acceptance of such an offer will create a contract, or that the validity of an agreement which provided in terms for the exchange of legal obligations, barring perhaps cases of voidable and of unenforceable promises, will be tested in the same way as if the offeror had requested a promise in fact rather than an obligation in law. So that even if ordinarily it is merely a promise in fact for which the offeror asks, as it is at least possible that an obligation in law may be requested, any difficulties which are involved in that assumption must be met. A technical difficulty, at least, in applying to bilateral contracts the test of consideration applicable to unilateral contracts exists either on the assumption that a promise in fact is requested or on the assumption that an obligation in law is desired.

If it is the promise in fact which the offeror requests, the inquiry naturally follows, why does not a bilateral contract arise whenever a requested promise is given in response to an offer? No satisfactory answer to this question can be made

³⁹ See *infra*, § 105.

if the definition of consideration in unilateral contracts is of universal application, for whichever of various definitions that have been suggested as appropriate for unilateral contracts is adopted, the act of making a promise at request will technically satisfy its requirements.

On the other hand, if the offeror were conceived of as asking for a legal obligation, the opposite difficulty is presented in any attempt to apply to bilateral agreements the definition of consideration appropriate to unilateral contracts. The inquiry has been made by Sir Frederick Pollock, "What logical justification is there for holding mutual promises good consideration for each other? None, it is submitted."⁴⁰ And this conclusion is justified, if the only principles which we have to go upon are that the offeror requests a legal obligation as the return for his offer, and that in that legal obligation must be found a detriment or benefit necessary under the definition of consideration in unilateral contracts. For these premises involve inevitably a circular line of argument. If a detriment is necessary to support a promise, and therefore to give rise to an obligation binding upon either party, there can be no detriment without an obligation, and, under the rule of consideration which it is sought to apply, there can be no obligation without a detriment. Moreover, the burden is on one who asserts there is a contract to establish it. He will never be able to establish a bilateral contract upon these premises.⁴¹

⁴⁰ 28 *Law Quarterly Rev.* 101; Pollock on Contracts, 8th Eng. ed., 191.

⁴¹ It is at this point that the argument of Professor Langdell, in his essay on consideration, in 14 *Harv. L. Rev.* 496, fails. On page 504, he states the method of pleading in contracts, and says that by alleging and proving mutual promises "the plaintiff will, in the absence of any proof by the defendant, establish his case unless the court shall be of opinion that one of the mutual promises, even if supported by a sufficient consideration, is not binding." But the cases of pleading suggested

are not in point. It is, of course, true that a defendant who seeks to show that the facts stated in the declaration are not the only essential ones in the case, must allege and prove the additional facts; but when all the facts are before the court, the burden is always on the plaintiff to establish a legal cause of action. The question is not here in regard to disputed facts; all the facts must be taken as known. Under such circumstances the plaintiff has no right to assume that he has a cause of action in order to argue that he has one, nor can the court make any such assumption. When Professor

§ 103a. A distinct principle is necessary to explain bilateral contracts.

To avoid the difficulties just stated, it is necessary to state further that "the act of exchanging the promises makes them enforceable which has been called "one of the secret paradoxes of the Common Law,"⁴² and thereupon also to inquire whether exchanging all mutual promises makes them enforceable, or whether this is true of only a certain kind of mutual promises and if so, what is the kind.

It makes very little ultimate difference therefore whether, conceiving that the mutual assent given in the creation of a bilateral contract is an assent to an exchange of promises in fact, one is driven to ask why all mutual promises⁴³ which do not contravene public policy do not make contracts (unless it is asserted that they all do) as logic would lead us to suppose; or whether the theory is accepted that a bilateral contract is based on assent to an exchange of legal obligations and in view of the impossibility of ever logically proving the existence of mutual obligations from the definition of consideration in unilateral contracts, it is asserted as a further principle that the exchange of the promises makes them enforceable and the limits of this apparent principle are sought. Whichever point of view is taken, one is turned to the cases to find what kind of mutual promises have been held by the law sufficient consideration for one another; but before doing so, the arguments

Langdell says the plaintiff will establish his case by proving mutual promises unless apart from consideration one of the promises is not binding, he can be justified in so asserting only if he assumes each promise by one having capacity is necessarily a detrimental obligation to the promisor, or if he assumes the mere making of a promise in fact by such a person is a sufficient detriment. The universality of his statement will not strictly be justified even if he were permitted to assume that any promise which if binding would impose a detriment is sufficient consideration, though I believe from his general argument that the last is the

assumption he actually made. But certainly none of these three propositions can be accepted without proof that it represents the law. In fact all of them seem to be at variance with the law and, therefore, unsound.

⁴² 30 Law Quarterly Rev. 129, presumably by Sir Frederick Pollock. There seems nothing paradoxical about it. All that is necessary is to understand and to state that the rules governing consideration in unilateral contracts will not cover the bilateral situation, and that a special rule is required.

⁴³ That is, all mutual promises which would be valid if under seal.

advanced by Professor Ames that all mutual promises not opposed to public policy create contracts should be answered.

91 § 103b. Ames's theory of consideration.

Though the technical requirements of the definition of consideration in unilateral contracts may be fulfilled by giving any promise in fact, it is obvious that a promise which assures the performance of an act which the law regards as of no value, is merely a technical exchange for a counter-promise, and that if the law is to be practically as well as technically reasonable, the mere making of such a promise irrespective of its content, should be insufficient. The only possible answer to this is to maintain, as Professor Ames maintained, that any act whatever, other than a promise, is sufficient consideration for a unilateral contract. If this is true it is reasonable to assert that the promise of any act may likewise be sufficient consideration. But it cannot be admitted that any act or forbearance which is requested as the consideration for a unilateral contract is legally sufficient.

Professor Ames's argument in support of his thesis as to unilateral contracts, is based on an examination of the law governing three classes of cases: namely, those where the consideration consists of, UK

1. The forbearance to prosecute a groundless claim;
2. The performance of a preëxisting contractual duty to a person other than the promisor;
3. The performance of a preëxisting contractual duty to the promisor himself.

As to the first group of cases, if they are assumed to go to the farthest extreme which has been suggested,⁴⁴ there is no inconsistency with the definition that not any act or forbearance whatever but only one which is a legal detriment to the promisee or legal benefit to the promisor is sufficient to support a unilateral contract; for it may well be argued that one who has an honest belief in the validity of his claim has a legal right to attempt its enforcement, and that to forbear to exercise this right is a legal detriment. It seems to have been at one time assumed by the English law that only one who has a

⁴⁴ See *infra*, § 135.

valid claim has a right to attempt to enforce his demand. The modern law simply rejects this artificial assumption.

The second group of cases, which includes those where performance of a preëxisting contractual duty to a person other than the promisor is the consideration, affords still less support to the argument. Such cases as sustain the validity of the consideration (a numerical minority) do so because the court holds the promisor in the second contract has received a benefit from the performance of the promisee, not because anything requested is sufficient consideration.⁴⁵

The third class of decisions which Professor Ames examines consists of cases where performance of a contractual duty to the promisor himself, is the consideration given for the defendant's promise. These are mainly cases where payment of part of a liquidated debt was made in consideration of an agreement to discharge the whole.

That payment of a liquidated debt or part of it will not support any promise by the creditor, is conceded by Professor Ames to be the general rule of law, but he cites early authorities showing that in the sixteenth century the law was probably otherwise. Where there are scores of decisions in the eighteenth and nineteenth centuries, an inquiry as to the law of the sixteenth century is merely of historical interest. That some modern courts have objected to the law on this matter is doubtless true, and it is also true that inconsistently with the general rule several creditors may by simple contract compound their claims against a common debtor and bind themselves effectually to discharge the balance due them; but it is equally clear that the general rule is almost universally settled law, and that it is regarded by the courts not as an exceptional doctrine but as an exemplification of the general principle that an act which is neither legally detrimental to the promisee, nor legally beneficial to the promisor, is insufficient consideration to support a promise. The extent of the changes which have been made by statute or decision in various jurisdictions of the doctrine that payment of part of the debt is insufficient to support an agreement to discharge

⁴⁵ See *infra*, § 131.

the whole debt, is not great. In only a very few jurisdictions, the law has been changed by decision.⁴⁶

The decisions where some performance to which the promisee was bound to the promisor other than the payment of a debt (as for instance completing a building or other piece of work) is given as the consideration for a promise are to the same effect. Almost uniformly they deny the validity of such consideration.⁴⁷

The result, therefore, of the three classes of cases to which Professor Ames appeals, is that in one of the groups (the third), the decisions are necessarily opposed to this theory. In the other two groups the conclusion reached by a large proportion, perhaps the majority of courts, cannot be reconciled with his definition; and those decisions which support the validity of the consideration are rested by the courts on other grounds than those suggested by him; and these other grounds are harmonious with the decisions on the law of consideration generally, and with the definitions customarily given by the courts. *contra*

Since, therefore, a due regard for judicial authority prevents one from believing the law to be that any act requested may serve for the consideration of a unilateral contract, it seems unreasonable, even if there were no other difficulty, to hold that the making of any promise would be sufficient to support a counter-promise. Moreover, there are further difficulties precluding assent to such a theory. While it would explain more simply than any other the fact that a voidable or unenforceable promise is sufficient consideration to support a counter-promise, the argument goes too far, for it would also follow that a void promise or an illusory promise would be sufficient consideration; but the law, of course, is otherwise. A promise which is void is insufficient consideration,⁴⁸ and the cases

⁴⁶ See *infra*, §§ 120 *et seq.*

⁴⁷ See *infra*, § 130.

⁴⁸ Thus the promise of a married woman under disability to contract is not sufficient to support a counter-promise. *Smith v. Plomer*, 15 East. 607, 610; *Shaver v. Bear River, etc., Co.*, 10 Cal. 396; *Warner v. Crouch*, 14

Allen (Mass.) 163; *Andriot v. Lawrence*, 33 Barb. 142. See also *Howe v. Wildes*, 34 Me. 566; *Warren v. Castello*, 109 Mo. 338, 19 S. W. 29, 32 Am. St. Rep. 669; *Henrici v. Davidson*, 149 Pa. 323, 24 Atl. 334; *Williams v. Graves*, 7 Tex. Civ. App. 356, 26 S. W. 334; *Shenandoah Co. v. Dun-*

indicate no inquiry on the part of the courts whether the party giving a promise in exchange for the void promise knew or did not know the facts which made void the promise he received.⁴⁹

Illusory promises also, on Professor Ames's theory, would furnish sufficient consideration if requested as the exchange for a counter-promise, and that they are frequently so requested with intent to make a bargain cannot be successfully disputed. A contractor or seller is often so eager to obtain work, or a sale, that he will gladly subject himself to an absolute promise in return for one which leaves performance optional with the other party. This is most commonly illustrated in agreements to buy or sell goods where the quantity is fixed by the wishes of one of the parties. But a promise to buy such a quantity of goods as the buyer may thereafter order,⁵⁰ or to take goods "in such quantities as may be desired,"⁵¹ is insufficient consideration for a counter-promise.

Finally, the whole reasoning of the cases in regard to consideration is opposed to any theory that mutual promises are universally sufficient consideration for one another. There would be no occasion for all the discussions in the opinions. It would be enough for the court to say, without more, that the parties had made mutual promises.⁵²

lop, 86 Va. 346, 10 S. E. 239. But see *Chamberlin v. Robertson*, 31 Ia. 406. And wherever the promise of an infant is void and not merely voidable, it is not sufficient. *Johnson v. Rockwell*, 12 Ind. 76, 81; *Cannon v. Alsbury*, 1 A. K. Marsh. (Ky.) 76, 77, 10 Am. Dec. 709.

⁴⁹ See *Meyer v. Haworth*, 8 A. & E. 467. If lack of knowledge of these facts made a difference, it might be urged that mistake rather than lack of consideration was the reason for the invalidity of the bargain.

⁵⁰ *Great Northern Ry. v. Witham*, L. R. 9 C. P. 16; *Cold Blast Transportation Co. v. Kansas City Bolt Co.*, 114 Fed. 77, 52 C. C. A. 25, 57 L. R. A. 696; *T. B. Walker Mfg. Co. v. Swift*, 200 Fed. 529, 119 C. C. A. 27.

⁵¹ *American Cotton Oil Co. v. Kirk*, 68 Fed. 791; *Columbia Wire Co. v. Freeman Wire Co.*, 71 Fed. 302; *Rafolovitz v. American Tobacco Co.*, 29 Abb. N. C. 406, 23 N. Y. S. 274; *Hoffman v. Maffioli*, 104 Wis. 630, 80 N. W. 1032, 47 L. R. A. 427. See *infra*, § 104.

⁵² In *White v. Bluett*, 23 L. J. (N. S.) Ex. 36, Alderson, B., having this in mind said of a bilateral agreement: "If this agreement were good, there could be no such thing as a *nudum pactum*. There is a consideration on one side, and it is said the consideration on the other side is the agreement itself. If that were so there could never be a *nudum pactum*." See also *Denver Pressed Brick Co. v. Le Fevre*, 25 Colo. App. 304, 138 Pac. 434.

§ 103c. Definitions of Pollock and Leake.

Since, then, it cannot be admitted that mutual promises are always sufficient consideration for one another, it becomes necessary to determine in what cases a promise is a sufficient consideration for a counter-promise. Two tests have been suggested either explicitly or implicitly:

1. Sir Frederick Pollock and Professor Langdell apply this test: If the obligation of a promise would be a detriment to the promisor (assuming that the promise creates a binding obligation) the promise is sufficient consideration.

2. "That most accurate of writers, Mr. Stephen Leake,"⁵³ whose work on contracts has long been a standard treatise, says, however,—

"So far as regards the matter of the consideration, as being executed or executory, it may be observed that whatever matter, if executed, is sufficient to form a good executed consideration; if promised, is sufficient to form a good executory consideration: so that the distinction of executed and executory consideration has no bearing upon the question of the sufficiency of any particular matter to form a consideration."⁵⁴

The second of the views thus stated seems to be that sanctioned by the law, and, moreover, intrinsically is the more reasonable of the two. When bilateral contracts were first recognized no elaborate discussion was had of the requirements of a promise which might be sufficient consideration for another promise. It was simply decided that a promise was sufficient consideration for another promise. It was not long, however, before some definition was made of the character of a promise which would be sufficient consideration for another promise. Lord Holt stated that "where the doing a thing will be a good

⁵³ 2 Law Quarterly Rev. 113.

⁵⁴ Leake on Contracts (1st ed.), page 314; (2d ed.), pp. 612, 613. In the third edition the author states in his preface that finding the book "has been more used in the practice of the profession than in the study of the law, for which as originally prepared, he thought it might perhaps be useful . . . he has endeavored to revise the work

strictly for the service of the profession with the single aim of presenting a convenient digest of the leading principles of the law of contracts as derived from judicial exposition." The author, with this aim in view, considerably diminished the size of the book, and the passage, above quoted, was omitted.

consideration, a promise to do that thing will be so too." ⁵⁵ In subsequent cases there has been very little attempt at exact definition, but the notorious failure of the courts to mark the distinction between unilateral and bilateral contracts until recently (of which the failure to provide any brief name to distinguish the two is an indication), shows that the court must have applied to bilateral contracts a test which would be just as applicable had the contract been unilateral, and an examination of the cases shows that even where it plainly appears that the contract was bilateral, the court in discussing the sufficiency of consideration, considered the character of the things promised. ⁵⁶

But occasionally a court has made a statement in clear terms. Lord Blackburn, than whom no better modern authority could be cited, stated the principle as follows:

⁵⁵ *Thorp v. Thorp*, 13 Mod. 455, (1701).

⁵⁶ In *Thomas v. Thomas*, 2 Q. B. 851, there was plainly set out a written agreement containing mutual promises. The court in considering the sufficiency of consideration examined the nature of the things promised. Thus Lord Denman said: "Then the obligation to repair is one which might impose charges heavier than the value of the life estate." So *Patteson, J.*, in speaking of the sufficiency of the plaintiff's promise, expressly considers the sufficiency of the things promised by her; namely, payment of rent and making of repairs. Such statements as that made in *Benson v. Phipps*, 87 Tex. 578, 29 S. W. 1061, 47 Am. St. Rep. 128, "a promise to do what one is not bound to do, or to forbear what one is not bound to forbear, is a good consideration for a contract," necessarily involve the assumption that no promise is sufficient consideration unless the thing promised would be. In *Morrow v. Southern Express Co.*, 101 Ga. 810, 28 S. E. 998, and *Simpson v. Sanders*, 130 Ga. 265, 268, 60 S. E. 541, the court said: "If one assumes under

such an agreement [by mutual promises] to do a special act beneficial to another, and that other under the terms of the contract is under no obligation to perform an act of corresponding advantage to the former, the agreement is without such consideration as will support the promise of the party assuming to perform." In *Schuler v. Myton*, 48 Kans. 282, 29 Pac. 163, the court said: "It is well settled that an agreement to do or the doing of which one is already bound to do does not constitute a consideration for a new promise." Similarly in *Cobb v. Cowdery*, 40 Vt. 25, 28, 94 Am. Dec. 370, the court said: "And so it would be in any other case where the only consideration for the promise of one party was the promise of the other party to do, or his actual doing, something which he was previously bound in law to do." See also *Robinson v. Jewett*, 116 N. Y. 40, 22 N. E. 224, where in dealing with a written contract containing mutual promises and signed by both parties the court (at page 53) discusses the insufficiency of certain acts promised to serve as consideration.

"The general rule is, that as executory agreement by which the plaintiff agrees to do something on the terms that the defendant agrees to do something else, may be enforced, if what the plaintiff has agreed to do is 'either for the benefit of the defendant or to the trouble or prejudice of the plaintiff.' " ⁵⁷ The Minnesota court has made an equally plain statement:

"The case is, then, one of a promise on the part of the plaintiff to do something of advantage in law to the defendant, and on the part of the defendant to do something of advantage in law to the plaintiff—a case of mutual promises, one of which is the consideration of the other. The agreement was valid and binding upon both parties." ⁵⁸

The elaborate definition given in *Currie v. Misa*,⁵⁹ "A valuable consideration in the sense of the law may consist either in some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other," contains in substance the same principle.⁶⁰

The definitions of modern American text writers often state clearly the same test.⁶¹

§ 103d. Reasons for Preferring Leake's definition.

Unless it can be shown that the statements thus referred to are opposed to actual decisions, or at least that there are plainly inconsistent judicial statements in the books, these quotations must be regarded as accurate statements of the law. There seem no judicial statements inconsistent with them. So far as decisions go, the cases are few where an

⁵⁷ *Bolton v. Madden*, L. R. 9 Q. B. 55, 56.

⁵⁸ *Schweider v. Lang*, 29 Minn. 254, 13 N. W. 33, 43 Am. Rep. 202.

⁵⁹ L. R. 10 Exch. 153.

⁶⁰ To have stated the matter exactly, the words "or undertaken" which are contained in the last clause of the definition, should also have been included in the first clause.

⁶¹ Such promise is as lawful a consideration as the thing promised would have been." Page, Contract, § 296.

"A promise given in consideration and because of the fact that another promise is given, is binding provided the promise given is for the performance of some act which if executed would be a sufficient consideration for an obligatory contract." Elliott, Contracts, § 231. "A promise to do an act, or forbearance from doing an act, is just as valuable consideration for a promise as the act or forbearance would be." 9 Cyc. 323.

actual difference of result would be produced, according as one accepts Sir Frederick Pollock's definition, or Mr. Leake's. The most sharply defined difference is in regard to the third party cases, which have been more discussed than any others relating to the law of consideration.

Under the definition of Sir Frederick Pollock and Professor Langdell a bilateral agreement between B. and C. by which B. promises to do something which he was previously legally bound to do by contract with A., is a valid contract, since assuming B.'s promise to C. to be binding, it imposes a new detriment on B., namely, liability to a new person in case of non-performance of the promised act; though both Sir Frederick Pollock and Professor Langdell contend that had B. performed the act in question at C.'s request instead of promising to perform it, the previous obligation to A. would have prevented the performance from being a detriment in law to B., and no new contract would be formed.

Under Mr. Leake's definition, no distinction is possible between cases where the second agreement is bilateral and where it is unilateral. If the performance is sufficient consideration for a contract, the promise of performance is likewise sufficient. If actual performance is sufficient, so is a promise of performance. And the authorities make no distinction.⁶²

Another class of cases which is inconsistent with the theory which I have attributed to Sir Frederick Pollock and Professor Langdell, consists of bilateral agreements, in which one promise is a promise to pay a debt. It is well settled that such agreements are not binding.⁶³

These cases are decided on the ground that the performance of the promise to pay the debt involves no legal detriment to one party or legal benefit to the other; and yet the promise if binding would involve a detriment since it extends the period of the Statute of Limitations. The same argument is applicable to forbearance and promises of forbearance of a groundless suit against a third person, especially in jurisdictions where forbearance to bring a groundless though honest claim against the promisor is held insufficient consideration. There is nothing in the cases relating to this matter to warrant the supposition

⁶² See *infra*, § 131.

⁶³ See *infra*, § 120.

that the law is different when the suit to be forborne is against a third person, and the legal duty to forbear is therefore not to the promisee,⁶⁴ and if a promise of similar forbearance to sue the promisee would be insufficient, the promise to forbear to sue a third person would also be insufficient consideration.⁶⁵ Yet such a promise if binding would subject the promisor to a new duty. This may be followed with a similar argument regarding forbearance to commit a tort against a third person. It is of course certain that such a promise is not a valid consideration. This must be accounted for under the view now criticised as resting solely on public policy, but it has generally been supposed that such an agreement also lacked consideration.⁶⁶ A promise to receive a pure benefit also which under the theory in question would be sufficient consideration cannot be so regarded.⁶⁷ A mutual agreement to rescind a unilateral obligation, which is much the same thing as a promise to give, is, it is well settled, ineffectual.⁶⁸

Finally, Mr. Leake's test seems the better of the two in question, because, as already said, it seems intrinsically unreasonable that a promise of an act should ever be regarded by the law as greater value than actual performance of that very act. As the matter has been well put,⁶⁹ the contrary view involves the assertion "that a bird in the hand is worth less than [the same] bird in the bush."⁷⁰

§ 103e. Promises which are not binding are insufficient consideration.

Whatever may be the character of the thing promised, a promise will be of no value unless it is binding; and the rule,

⁶⁴ See *Smith v. Algar*, 1 B. & Ad. 603; *Mascolo v. Montesanto*, 61 Conn. 50, 23 Atl. 714, 29 Am. St. Rep. 170; and *infra*, § 135.

⁶⁵ *Bates v. Sandy*, 27 Ill. App. 552; *Herbert v. Mueller*, 83 Ill. App. 391; *Anderson v. Nystrom*, 103 Minn. 168, 114 N. W. 742, 13 L. R. A. (N. S.) 1141, 123 Am. St. Rep. 320.

⁶⁶ See *infra*, § 132.

⁶⁷ *Forth v. Stanton*, 1 Saund. 210; *Wilt v. Hammond*, 179 Mo. App. 406,

165 S. W. 362. See also *Hoffman v. Moreman*, 184 Ala. 220, 63 So. 942.

⁶⁸ *Foster v. Dawber*, 6 Exch. 839, 851; *Williams v. Stern*, 5 Q. B. D. 409; *Westmoreland v. Porter*, 75 Ala. 452; *Crawford v. Millsbaugh*, 13 Johns. 87; *Kidder v. Kidder*, 33 Pa. 268; and see *infra*, § 1829.

⁶⁹ Professor Ballantine, 11 Mich. L. Rev. 427.

⁷⁰ See, however, *infra*, § 123.

though general; that mutual promises *are* binding which promise some act or forbearance, which would itself be sufficient consideration, is not universal. There are other reasons besides lack of consideration which make promises void—notably lack of capacity. The qualification which thus must be made to the definition of consideration in bilateral contracts is as essential to Professor Langdell's definition as to Leake's. Both definitions propose a general test to determine when mutual promises are binding; and neither test can be applied successfully where the promisor wholly lacks capacity, or where for any other reason than lack of consideration the promise is void.⁷¹

For the same reason a promise in a bilateral agreement which is void for lack of a proper counter-promise to serve as consideration, is itself insufficient consideration, since it is not binding, and is therefore valueless. This is an obvious consequence of the requirement of consideration in bilateral contracts. The principle is ordinarily stated in the axiom that in a bilateral agreement both promises must be binding or neither is binding.⁷² In recent years in a few States this application of the law of consideration has sometimes been referred to as if based on some special requirement of "mutuality," but no other doctrine than that of consideration is involved.⁷³

§ 103f. Final definition of valid consideration in bilateral contracts.

Before a final summary is attempted it should be observed that it is not essential in order that a promise shall be sufficient

⁷¹ "A promise is a good consideration for a promise. But no promise constitutes a consideration which is not obligatory upon the party promising," per Sanborn, J. *Coldblast Transportation Co. v. Kansas City Bolt & Nut Co.*, 114 Fed. 77, 52 C. C. A. 25, 57 L. R. A. 696. A contract must be obligatory upon both parties so that each may have an action upon it. *McGowin & Co. v. R. J. & B. F. Camp Lumber Co.*, 192 Ala. 35, 68 So. 263, 264.

⁷² "Either all is a *nudum pactum* or else the one promise is as good as the

other." *Harrison v. Cage*, 5 Mod. 4118, per Holt, C. J.: "The promises must be concurrent and obligatory upon each at the same time to render either binding." *Morrow v. Southern Express Co.*, 101 Ga. 810, 28 S. E. 998; *Simpson v. Sanders*, 130 Ga. 265, 268, 60 S. E. 541; *Reding v. Anderson*, 72 Ia. 498, 34 N. W. 300; *Citizens' Nat. Life Ins. Co. v. Murphy*, 154 Ky. 88, 156 S. W. 1069; *El Paso, etc., R. Co. v. Eichel* (Tex. Civ. App.), 130 S. W. 922.

⁷³ See criticism of this terminology, *infra*, § 140.

consideration that its performance will certainly prove detrimental to the promisor or beneficial to the promisee. A conditional promise is sufficient consideration. The performance of such a promise does not necessarily involve either detriment or benefit, since the condition upon which any action of the promisor is to take place may not happen. But the possibility that the condition may happen, involves a chance of detriment which is sufficient to make the promise valid consideration.⁷⁴ Even though the condition in a promise relates to an unknown fact which is already determined so that if the parties knew the truth it would be apparent that the promisor really bound himself for nothing the consideration is sufficient.⁷⁵

The result of this argument is that no briefer definition of sufficient consideration in a bilateral contract can be given than this: Mutual promises in each of which the promisor undertakes some act or forbearance that will be, or apparently may be, detrimental to the promisor or beneficial to the promisee, and neither of which is rendered void by any rule of law other than that relating to consideration, are sufficient consideration for one another.

Cases where a promisor warrants the truth of existing facts have been put in opposition to the argument that a promise must in order to furnish sufficient consideration be a promise of something which would if actually given be sufficient consideration for a unilateral contract. It is said:

"I agree that a horse which I sell shall be sound, or shall win a race; or that a man shall pay his debts; or that a ship shall come safe to port: in all these cases my promise is a valid consideration for a counter-promise. Yet the soundness or speed of the horse, the solvency of the third party, or the safety of the ship could not be a valid consideration for a promise made to me."⁷⁶ Here, there is no inconsistency or exception. A warranty or promise of the truth of an existing fact can only be understood as meaning a promise to be responsible in damages

⁷⁴ See *infra*, § 112. Where under the law three of the thirteen saloons in a town would be compelled to go out of business, and the saloon keepers agree that three of them, including plaintiff, should be given \$400 each to retire,

there was a valuable consideration for the promise to pay. *Jones v. Mæss*, 76 Wash. 517, 136 Pac. 680.

⁷⁵ See *infra*, § 119.

⁷⁶ Professor Beale, 17 Harv. L. Rev. 82.

if the fact asserted is not true. The warranty of the existence of an event in the future when construed means either a promise to bring about the existence of the event or a promise to pay damages if the event does not happen,⁷⁷ and either the present causation of the fact or the present payment of damages for the unsoundness or lack of speed of the horse, the insolvency of the third party, or the loss of the ship would be as sufficient consideration as the promise of warranty.

46 § 104. A promise which by its terms may be performed without detriment to the promisor or benefit to the promisee is insufficient consideration.

What have already been referred to as illusory promises are insufficient consideration.⁷⁸ Such a promise is a promise merely in form. Even if recognized by law it would impose no obligation, since the promisor by virtue of the condition always has it in his power to keep his promise and yet escape performance of anything detrimental to himself or beneficial to the promisee. Such a condition is called in the Civil Law a potestative condition.⁷⁹ The insufficiency of such a promise as consideration is most commonly illustrated in agreements to buy or sell goods where the quantity is fixed by the wishes of one of the parties. A promise to buy such a quantity of goods as the buyer may thereafter order,⁸⁰ or to take goods in such quantities "as may be desired," or as the buyer "may want" ⁸¹ is not sufficient consideration since the buyer may

⁷⁷ See Holmes, Common Law, 299. The distinguished author's extension of the latter construction to all contracts seems erroneous. It is merely a question of fact whether a promisor agrees to "take the risk" of an event happening (that is to pay for the consequences if it does not happen) or agrees to cause it to happen. See *infra*, § 130.

⁷⁸ See *supra*, §§ 37-49.

⁷⁹ *New Iberia Sugar Co. v. Lagarde*, 130 La. 387, 58 So. 16.

⁸⁰ *Great Northern Ry. Co. v. Witham*, L. R. 9 C. P. 16; *Cold Blast Transportation Co. v. Kansas City*

Bolt Co., 114 Fed. 77, 52 C. C. A. 25, 57 L. R. A. 696; *T. B. Walker Mfg. Co. v. Swift*, 200 Fed. 529, 119 C. C. A. 27; *Las Palmas Winery v. Garrett*, 167 Cal. 397, 139 Pac. 1077. See also *Gross v. Stamper*, 165 N. Y. S. 214. See also *Pratt Consolidated Coal Co. v. Short*, 191 Ala. 378, 68 So. 63; *Buick Motor Co. v. Thompson*, 138 Ga. 282, 75 S. E. 354.

⁸¹ *American Cotton Oil Co. v. Kirk*, 68 Fed. 791, 15 C. C. A. 540; *Columbia Wire Co. v. Freeman Wire Co.*, 71 Fed. 302; *Higbie v. Rust*, 211 Ill. 333, 336, 71 N. E. 1010; *Parks v. Griffith & Boyd Co.*, 123 Md. 233, 91 Atl. 581;

refrain from buying at his option and without incurring legal detriment himself or benefiting the other party.⁸²

It was held in an early Minnesota case that an agreement to sell all that the buyer might require or want in his business was open to the same objection, though the buyer promised to buy all he should require;⁸³ but the weight of authority is clearly otherwise,⁸⁴ and rightly. Though it may be true

Rafolovits v. American Tobacco Co., 73 Hun, 87, 29 Abb. N. C. 408, 25 N. Y. S. 1036; *Hoffman v. Maffioli*, 104 Wis. 630, 80 N. W. 1032, 47 L. R. A. 427; *Texas Produce Exchange v. Sorrell* (Tex. Civ. App.), 168 S. W. 74. See also *Hagelhurst Lumber Co. v. Mercantile &c. Co.*, 166 Fed. 191. It will be noticed that such words as "may want" are somewhat ambiguous. If they mean "may need in his business" or even if they mean all that the buyer may choose to buy of the kind of goods in question from any source, there is a contract. See following notes.

⁸² Other illustrations of this principle may be found in *Harvester King Co. v. Mitchell, etc., Co.*, 89 Fed. 173; *Wagner v. Meakin*, 92 Fed. 76, 33 C. C. A. 577; *Ellis v. Dodge*, 237 Fed. 860; *Morrow v. Southern Express Co.*, 101 Ga. 810, 28 S. E. 998; *Chicago, etc., Ry. Co. v. Jones*, 53 Ill. App. 431; *Missouri, etc., Ry. v. Bagley*, 60 Kans. 424, 56 Pac. 759; *Clark v. Bankers Trust Co.*, 177 N. Y. App. D., 627, 164 N. Y. S. 544.

⁸³ *Bailey v. Austrian*, 19 Minn. 535. See also *Cool v. Cuninghame*, 25 S. Car. 136.

⁸⁴ *Church v. Proctor*, 66 Fed. 240, 13 C. C. A. 426 (contract to buy what buyer required in his business); *Loudenback Fertilizer Co. v. Tennessee Phosphate Co.*, 121 Fed. 298, 58 C. C. A. 220, 61 L. R. A. 402 (contract to buy buyer's "entire consumption" of phosphate rock); *Klipstein v. Allen*, 123 Fed. 992 (contract to buy all quebracho needed for buyer's factory); *T. B. Walker Mfg. Co. v. Swift*, 200

Fed. 529, 119 C. C. A. 27, "We take care of buyer's needs this year"); *Jenkins v. Anaheim Sugar Co.*, 247 Fed. 958, 160 C. C. A. 658, L. R. A. 1918 E, 293 (contract to buy and sell buyer's "August requirements"); *National Furnace Co. v. Keystone Mfg. Co.*, 110 Ill. 427 (contract to buy all iron buyer should use, need, or consume in his business); *Minnesota Lumber Co. v. Whitebreast Coal Co.*, 160 Ill. 85, 43 N. E. 774, 31 L. R. A. 529 (contract to buy buyer's "requirements of coal"); *Warden Coal Washing Co. v. Meyer*, 98 Ill. App. 640 (contract to give buyer's "trade"); *Smith v. Morse*, 20 La. Ann. 220 (contract to buy all ice buyer required for his hotel); *Parks v. Griffith & Boyd Co.*, 123 Md. 233, 91 Atl. 581 (contract to buy such goods as might be needed in an established business); *Ziehm v. Frank Steil Brewing Co.*, 131 Md. 582, 102 Atl. 1005 (contract to use seller's beer exclusively); *Burgess Fibre Co. v. Broomfield*, 180 Mass. 283, 62 N. E. 367 (contract to buy all iron which seller might desire to sell); *Cooper v. Lansing Wheel Co.*, 94 Mich. 272, 54 N. W. 39, 34 Am. St. Rep. 341 (contract to buy all wheels buyer might "want" during ensuing season); *Hickey v. O'Brien*, 123 Mich. 611, 82 N. W. 241, 49 L. R. A. 594, 81 Am. St. Rep. 227 (contract to buy all ice necessary to carry on buyer's business); *Dailey Co. v. Clark Can Co.*, 128 Mich. 591, 87 N. W. 761 (contract to buy all the cans buyer should use in its factory); *Ames Brooks Co. v. Aetna Ins. Co.*, 83 Minn. 346, 86 N. W. 344 (contract

that a seller by ceasing to manufacture may relieve himself from any performance and still keep a promise to sell all the goods he manufactures, and similarly a buyer by going out of business may avoid performance while still observing the terms of an agreement to buy all that he requires, these results can be obtained only by doing something which is in itself a legal detriment, namely, the cessation of business. Even a promise to buy or sell only as much as the promisor chooses is a sufficient consideration when coupled with the agreement that whatever the buyer or seller chooses to buy or sell he will buy from or sell to the promisee. To put the matter in another way—the promise of a seller not to manufacture except for the buyer, or the promise of a buyer not to buy except from a particular seller, is clearly a promise to do something detrimental. A few cases⁵⁵ seem to admit that though a contract to buy and sell the requirements or output of a particular factory is a valid contract, an agreement which gives the buyer an option to take no goods is invalid, although the buyer agrees that if he should buy any goods of the kind in question from any one he would buy them from the seller.

These decisions cannot be supported. Though a court will be reluctant to give a contract a construction which gives the buyer so wide a power unless the language of the contract

for a shipper's "insurance business" for a season); *Miller v. Leo*, 35 N. Y. App. Div. 589, 55 N. Y. S. 165, *affd.*, without opinion, 165 N. Y. 619, 59 N. E. 1126 ("necessary brick, lime, and cement which I may require at my two jobs"); *Asahel Wheeler Co. v. Mendleson*, 180 N. Y. App. D. 9, 167 N. Y. S. 435 (contract by buyers for "their supply" of certain drugs). *East v. Cayuga Lake Ice Line*, 21 N. Y. S. 887 (contract for all ice buyer might require in his business).

⁵⁵ *Crane v. Crane*, 105 Fed. 869, 45 C. C. A. 96 (an agreement to buy and sell what a retail merchant, "should require for his trade" was held bad because the retail merchant

could increase or diminish his orders as fluctuations in the price at which he could sell made desirable); *Jenkins v. Anaheim Sugar Co.*, 237 Fed. 278 (*rev'd*, 247 Fed. 958, 160 C. C. A. 658, L. R. A. 1918 E, 293); *Huggins v. Southeastern Lime & Cement Co.*, 121 Ga. 311, 48 S. E. 933 (an agreement that certain cement should be sold exclusively through the buyer's agency was held invalid since the buyer need take none). See also *Long Syrup Refin. Co. v. Corn Products Refin. Co.*, 193 Fed. 929, 113 C. C. A. 557; *Pittsburgh Plate Glass Co. v. H. Neuer Glass Co.*, 253 Fed. 161, 165 C. C. A. 61; *Simpson v. Sanders*, 130 Ga. 265, 60 S. E. 541.

clearly requires that construction, but we rather seek to find the more reasonable intention that the seller has agreed to sell and the buyer to take the buyer's normal or ordinary needs, subject to the slight variation of a business continuing on substantially the same scale,⁸⁶ yet if the wider power is given, the contract is not without sufficient consideration.⁸⁷ •

The same principles may be involved in contracts to employ. The promise of either party may be optional, if the exercise of the option not to employ or to serve involves a detriment to the promisee, or benefit to the promisor.⁸⁸ But a promise to employ as long as it suits the employer is insufficient consideration.⁸⁹ And in any case where a promise in terms or in effect provides that the promisor has a right to choose one of two more alternatives, and by choosing one will escape without suffering a detriment or giving the other party a benefit, the promise is insufficient consideration.⁹⁰ The same

⁸⁶ *Wells v. Alexandre*, 130 N. Y. 642, 20 N. E. 142; *New York Central, etc., Co. v. United States Radiator Co.*, 174 N. Y. 331, 66 N. E. 967; *Moore v. American Molasses Co.*, 179 N. Y. App. Div. 505, 166 N. Y. Supp. 4.

⁸⁷ *Ramey Lumber Co. v. John Schroeder Lumber Co.*, 237 Fed. 39, 150 C. C. A. 241; *Burgess Fibre Co. v. Broomfield*, 180 Mass. 283, 62 N. E. 367; *Vickrey v. Maier*, 164 Cal. 384, 774, 129 Pac. 273, 276. Also cases cited *supra*, n. 83.

⁸⁸ In *McMullan v. Dickinson Co.*, 63 Minn. 405, 65 N. W. 661, the promise was to employ for the "period of time during which the corporate business might be carried on." This promise of employment was rightly held sufficient consideration since though the corporation might at will cease to do business, this in itself would be a legal detriment. So in *Shaw v. Hudson Engineering Co.*, 155 Ky. 4, 159 S. W. 653, a contract to employ for so long a time as the employer should use certain patent rights assigned to it by the employee was upheld. See also

Wood v. Duff-Gordon, 177 N. Y. App. D. 624, 164 N. Y. S. 576.

⁸⁹ *Gulf, etc., R. Co. v. Winton*, 7 Tex. Civ. App. 57, 26 S. W. 770; *Missouri, etc., R. Co. v. Smith*, 98 Tex. 47, 81 S. W. 22, 66 L. R. A. 741, 107 Am. St. Rep. 607.

⁹⁰ Thus, though a promise to extend an interest-bearing debt for a fixed period is supported by the debtor's promise to pay interest for that period, the promise of extension would be without valid consideration if the debt was not interest bearing or if the period of the extension was terminable at the debtor's option. A promise to pay interest during such time as the debtor may choose to delay payment, where it is left optional with the debtor to pay whenever he choose, may be performed without new legal detriment by the immediate payment of the debt. *McManus v. Bark*, L. R. 5 Exch. 65; *Austin Real Estate Co. v. Bahn*, 87 Tex. 582, 29 S. W. 646. So a promise to pay a sum of money is not supported by a promise to pay an annuity after the payment has been

consequence follows where a bilateral agreement in question expressly reserves to one party the right of immediate cancellation at any time.⁹¹ On the other hand, if the performance of every alternative open by the terms of a promise involves a detriment, the promise will be a valid consideration.⁹²

§ 105. A bilateral agreement may be valid though one party may avoid the agreement or avoid performance of his own promise.

A defence given by the law to one promisor in a bilateral agreement enabling him at his option to avoid the whole agreement will not prevent his promise from being sufficient consideration for the counter-promise. This principle finds application in several classes of cases. A bilateral agreement between an infant and an adult though voidable by the infant is binding upon the adult.⁹³ So a promise made by an insane

made, if there is no obligation to receive the money, since by refusing to accept the money, the promisor of the annuity would by the terms of his promise escape any obligation to pay the annuity and he would incur no detriment by refusing to receive money to which he was not previously entitled. *Montpelier Seminary v. Smith's Estate*, 69 Vt. 382, 38 Atl. 66. See also *Olmstead v. Distilling Co.*, 77 Fed. 265, 267; *Brown v. Brew*, 99 Wash. 560, 169 Pac. 992; *Wood v. Duff-Gordon*, 177 N. Y. App. D. 624, 164 N. Y. S. 576. So an order given to seller's agent which by its terms makes the obligation of the seller to fill the order subject to the seller's approval, is a mere offer until the seller has given his approval. *Cooper Wagon & Buggy Co. v. Stedronsky Bros. Co.*, 24 S. Dak. 381, 123 N. W. 846; *Thomas Mfg. Co. v. Lyons*, 29 S. Dak. 600, 137 N. W. 340, and see *supra*, § 43. These principles seem to have been lost sight of in *Thomas v. Thomas*, 2 Q. B. 851. There the plaintiff in return for a promise to convey a life estate in a house, agreed

to pay a portion of the ground rent and keep the premises in repair at all times during which she should have possession. As there was no promise on her part, and none could fairly be implied, that she should take possession or keep possession, it was wholly at her option whether she should incur any detriment or not. Remaining out of possession was no legal detriment since she had no right of possession at the time the agreement was made. The point was not raised, and the court held the agreement binding.

⁹¹ See *supra*, § 45. But a promise by the seller of stock to repurchase it from the buyer for what the latter paid, if he at any time became dissatisfied, is supported by sufficient consideration if the buyer actually purchases the stock, *Hills v. Hopp*, (Ill. 1919), 122 N. E. 510, though a bilateral agreement to buy and sell which the buyer had a right to cancel at any time could be enforced by neither.

⁹² See *supra*, n. 89.

⁹³ *Holt v. Ward Clarencieux*, 2 Strange, 937; *Warrick v. Bruce*, 2

person (when promises made by such a person are voidable),⁹⁴ or a promise of one who has been induced to enter into a bargain by fraud,⁹⁵ or a promise unenforceable because within the Statute of Frauds and because the memorandum required by the Statute is signed by one party only,⁹⁶ is sufficient to support a counter-promise. The same principle is involved where one promise only of a bilateral agreement is enforceable because

M. & S. 205; *Bruce v. Warwick*, 6 Taunt. 118; *Harmon v. Harmon*, 51 Fed. Rep. 113; *Wright v. Buchanan* (Ill., 1919), 123 N. E. 53; *Johnson v. Rockwell*, 12 Ind. 76, 81; *Allen v. Berryhill*, 27 Iowa, 534, 1 Am. Rep. 309; *Cannon v. Alsbury*, 1 A. K. Marsh. 76, 10 Am. Dec. 709; *Breckenridge v. Ormsby*, 1 J. J. Marsh. 236, 19 Am. Dec. 71; *Latrobe v. Deitrich*, 114 Md. 8, 22, 78 Atl. 983; *Thompson v. Hamilton*, 12 Pick. 425, 23 Am. Dec. 619; *Atwell v. Jenkins*, 163 Mass. 362, 40 N. E. 178, 28 L. R. A. 694, 47 Am. St. Rep. 463; *Monaghan v. Agricultural Ins. Co.*, 53 Mich. 238, 243, 18 N. W. 797; *Hunt v. Peake*, 5 Cowen, 475, 15 Am. Dec. 475; *Union Central Life Insurance Co. v. Hilliard*, 63 Ohio St. 478, 491, 59 N. E. 230, 81 Am. St. Rep. 644; *O'Rourke v. John Hancock L. Ins. Co.*, 23 R. I. 457, 50 Atl. 834, 57 L. R. A. 496, 91 Am. St. Rep. 643.

⁹⁴ *Harmon v. Harmon*, 51 Fed. 113; *Allen v. Berryhill*, 27 Iowa, 534, 1 Am. Rep. 309; *Atwell v. Jenkins*, 163 Mass. 362, 40 N. E. 178, 28 L. R. A. 694, 47 Am. St. Rep. 463.

⁹⁵ *Plympton v. Dunn*, 148 Mass. 523, 527, 20 N. E. 180.

⁹⁶ *Allen v. Bennett*, 3 Taunt. 169; *Thornton v. Kempster*, 5 Taunt. 786, 789; *Laythorp v. Bryant*, 2 Bing. N. C. 735; *Berkwith v. Clark*, 188 Fed. 171, 110 C. C. A. 207; *Lee v. Vaughan Seed Store*, 101 Ark. 68, 141 S. W. 496, 37 L. R. A. (N. S.) 352; *Cavanaugh v. Casselman*, 88 Cal. 543, 26 Pac. 515; *Easton v. Montgomery*, 90 Cal. 307, 27 Pac. 280, 25 Am. St. Rep. 123; *Hodges*

v. Kowing, 58 Conn. 12, 18 Atl. 979, 7 L. R. A. 87; *Perkins v. Hadsell*, 50 Ill. 216; *Shirley v. Shirley*, 7 Blackf. (Ind.) 452; *Burke v. Mead*, 159 Ind. 252, 64 N. E. 880; *Knapp v. Beach*, 52 Ind. App. 573, 101 N. E. 37; *Schaefer v. Whitham*, 146 Ia. 64, 67, 124 N. W. 763; *Engler v. Garrett*, 100 Md. 387, 59 Atl. 648; *Williams v. Robinson*, 73 Me. 186, 40 Am. Rep. 352; *Old Colony R. R. Corp. v. Evans*, 6 Gray, 25, 66 Am. Dec. 394; *Morin v. Marts*, 13 Minn. 191; *Ivory v. Murphy*, 36 Mo. 534; *Cunningham v. Williams*, 43 Mo. App. 629; *Moore v. Thompson*, 93 Mo. App. 336, 348, 67 S. W. 680; *Gartrell v. Stafford*, 12 Neb. 545, 11 N. W. 732, 41 Am. Rep. 767; *Sabre v. Smith*, 62 N. H. 663; *Clason v. Bailey*, 14 Johns. 484; *McCrea v. Purmot*, 16 Wend. 460, 30 Am. Dec. 103; *Justice v. Lang*, 42 N. Y. 493, 1 Am. Rep. 576; *Mason v. Decker*, 72 N. Y. 595, 28 Am. Rep. 190; *Lord v. Cronin*, 154 N. Y. 172, 47 N. E. 1088; *Case Threshing Machine Co. v. Smith*, 16 Or. 381, 18 Pac. 641; *Douglass v. Spears*, 2 Nott. & McC. 207, 10 Am. Dec. 588; *Dyer v. Winston*, 33 Tex. Civ. App. 412, 77 S. W. 227, and see *infra*, § 586. The cases of *Houser v. Hobart*, 22 Ida. 735, 127 Pac. 997, 43 L. R. A. (N. S.) 410, and of *Wilkinson v. Heavenrich*, 58 Mich. 574, 26 N. W. 139, 55 Am. Rep. 708 (see also *Willebrandt v. Sisters of Mercy*, 185 Mich. 366, 152 N. W. 85), are to the contrary, but in view of the great weight of opposing authority, cannot be supported.

of illegality.⁹⁷ In most of these cases the right of the privileged party is to avoid the whole agreement, restoring the original status of both parties, but in case of infancy, and sometimes in other cases the privileged party may avoid performance of his own promise though keeping the benefit of the performance of the other party.

✓ The rule exemplified by these cases must be regarded as an exception to the general principles of consideration. This may readily be seen by supposing that the terms of a voidable obligation such as the law imposes on promisors of the classes just enumerated, be put in words and then made as a promise by an adult under no disability. It will be obvious that the promise is insufficient to support a counter-promise. Whether the infant's promise be translated as meaning—I promise to perform if I choose, or I promise to perform if I conclude to ratify, or I promise to perform unless I choose to avoid the whole agreement on both sides, in any event it is clear that the promise is illusory since its performance is by its very terms at the option of the promisor, and he can exercise this option without depriving himself of anything to which he was entitled before the formation of the agreement. The same line of argument is applicable to any voidable or unenforceable promise. That a promise which in terms reserves the option of performance to the promisor is insufficient to support a counter-promise is well settled.⁹⁸ And the promise is no more effectual because the condition contained in it is in the form a condition subsequent rather than a condition precedent. As has been seen an agreement which one party reserves the right to cancel at his pleasure, cannot create a contract.⁹⁹

⁹⁷ See *infra*, §§ 1630, 1631.

⁹⁸ *Roberts v. Smith*, 4 H. & N. 315; *Montreal Gas Company v. Vasey*, [1900] A. C. 595; *Oakland Motor Car Co. v. Indiana Automobile Co.*, 201 Fed. 499, 121 C. C. A. 319; *Velie Motor Car Co. v. Kopmeier Motor Co.*,

194 Fed. 324, 114 C. C. A. 284; *Vogel v. Pekoc*, 157 Ill. 339, 42 N. E. 386, 30 L. R. A. 491; *Lydick v. Baltimore & Ohio R. Co.*, 17 W. Va. 427.

⁹⁹ *Velie Motor Car Co. v. Kopmeier Motor Co.*, 194 Fed. 324, 114 C. C. A. 284. See *supra*, § 45.

§ 106. An insufficient bilateral agreement may sometimes by performance on one side become a valid unilateral contract.

As is shown elsewhere ¹ each promise in a bilateral contract must be sufficient consideration for the other, or both promises are invalid. Accordingly if either promise is too indefinite for enforcement, or if either promise for any reason is insufficient consideration, both promises fail. But a promise that was originally too indefinite, may by performance become definite and as the other party to the bargain must be regarded as continuously assenting to receive such performance in return for his own promise, a valid unilateral contract arises on receipt of such performance.² So a bilateral agreement illegal in the inception, because it was made on Sunday, may by performance on one side on Monday become a valid unilateral contract.³ So if the promise on one side of a bilateral agreement is invalid as consideration because it promises nothing detrimental to the promisor or beneficial to the promisee, though both promises are consequently invalid, yet if performance is made of the counter-promise and that performance was something detrimental to the promisor or beneficial to the promisee, the promise which was itself insufficient as consideration, thereupon becomes binding, since sufficient consideration has now been received for it, and it is no longer necessary that the promise which was insufficient as consideration, should serve as such. This is because only promises need consideration. Transfers, or other actual performances may be made without consideration. Unilateral contracts must be supported by consideration only on one side. So in the case supposed, the performance which has been rendered needs no consideration though the promise to give it originally did. Since the performance has been rendered under no mistake of fact, it cannot be recovered back, and being received as the consideration for a promise, that promise now becomes binding. It certainly cannot lie in the mouth of the promisor to say that since the promise, which he has made is of such slight value he will not perform

¹ *Supra*, § 103.

² See *infra*, §§ 1704, 1707.

³ See *supra*, § 49.

it at all though he has been paid for doing so.⁴ So while a promise void for incapacity of the promisor will not support a counter-promise, if the void promise is actually performed, the performance may become sufficient consideration to support the counter-promise.⁵ And other instances may be found where a bilateral agreement originally unenforceable gives rise, when performed on one side, to a binding unilateral contract.⁶

§ 107. Written as well as oral promises need consideration.

It was suggested in several cases in the latter part of the eighteenth century that the requirement of consideration was for the sake of evidence only, and that therefore written contracts needed no consideration.⁷ This notion, however, was promptly overthrown by the House of Lords which held that "if contracts be merely written and not specialties they are. . . void and a consideration must be proved;"⁸ and except as a consequence of statutes, it is everywhere law that the same rules of consideration apply to written as well as to oral contracts.⁹

In some States which have by statute changed the rules of the common law in regard to sealed instruments, written

⁴ In *Ward v. Goodrich*, 34 Col. 369, 82 Pac. 701, 2 L. R. A. (N. S.) 201, 114 Am. St. Rep. 167, the court said: "while it is settled that the promising to do, or the doing of that which the promisor is already legally bound to do, does not as a rule constitute consideration for a reciprocal promise, or support a reciprocal undertaking given by the promisee, it by no means follows that such promise may not be enforced against such promisor by the promisee, although its enforcement compels the performance of that which was already a legal obligation."

⁵ *Yerkes v. Richards*, 170 Pa. 346, 32 Atl. 1089; *Bowker v. Harris*, 30 Vt. 424.

⁶ *Detroit R. Co. v. Forbes*, 30 Mich. 165.

⁷ This suggestion was first made by Lord Mansfield in *Pillans v. Van*

Mierop, 3 Burr. 1663. Lord Mansfield was trained in the Civil Law; and the Common Law doctrine of Consideration was evidently distasteful to him. This is shown not simply by his suggestion in regard to written contracts but by his support of the doctrine of moral consideration. The suggestion in *Pillans v. Van Mierop* was followed in *Williamson v. Losh*, Chitty on Bills (9th ed.), 75 n. Langdell Cas. Cont. 186.

⁸ *Rann v. Hughes*, 7 T. R. 350, n. (a). See also *Brown v. Adams*, 1 Stew. (Ala.) 51, 18 Am. Dec. 36; *Cook v. Bradley*, 7 Conn. 57, 18 Am. Dec. 79; *Thacher v. Dinsmore*, 5 Mass. 299, 4 Am. Dec. 61; *People v. Shall*, 9 Cow. 778; *Clark v. Small*, 6 Yerg. 418; *Beverleys v. Holmes*, 4 Munf. 95.

⁹ See cases in this chapter, *passim*.

contracts have been partially elevated to the position of specialty agreements.¹⁰

§ 108. The promises in negotiable paper require consideration between a promisor and his immediate promisee.

The rule of the common law was well settled prior to the enactment of the Negotiable Instruments Law in accordance with the statement at the head of this section, so that a drawer or maker was not liable to the payee if he proved that the instrument was given without consideration;¹¹ nor was an indorser liable to his immediate indorsee;¹² nor either drawer, maker or indorser even to a remote holder who was neither himself a holder for value, nor a successor to the rights of such a holder.¹³ But the promise of an acceptor of a bill even though made subsequent to the plaintiff's acquisition of the instrument is regarded as supported by the consideration received by the drawer.¹⁴ The Negotiable Instruments Law¹⁵ was doubtless intended to codify the common law on the subject, and in the main unquestionably does so. There are, however, distinctions both at common law and under the statute between negotiable paper and ordinary simple written contracts with reference to consideration even as between immediate parties. In the first place "every negoti-

¹⁰ See *infra*, § 218.

¹¹ *Holliday v. Atkinson*, 5 B. & C. 501, s. c., 8 Dowl. & R. 163; *Abbott v. Hendricks*, 1 M. & G. 791; *Simpson Centenary College v. Tuttle*, 71 Iowa, 596, 33 N. W. 74; *Loudermilk v. Loudermilk*, 93 Ga. 443, 21 S. E. 77; *Mader v. Cool*, 14 Ind. App. 299, 42 N. E. 945, 56 Am. St. Rep. 304; *Klein v. Keyes*, 17 Mo. 326; *Clement v. Reppard*, 15 Pa. St. 111. Many decisions holding the gift of the maker's own check or note ineffectual are collected in 27 L. R. A. (N. S.) 308. A contrary decision where the court failed to observe the distinction between an attempted gift of the donor's own note and a gift of a third person's

note is *Harman v. Harman's Est.*, 167 Ia. 106, 149 N. W. 72.

¹² *Hoopes v. Northern Nat. Bank*, 102 Fed. 448, 450, 42 C. C. A. 436; *Platt v. Snipes*, 43 Ark. 21; *Peale v. Addicks*, 174 Pa. 543, 34 Atl. 201; *Bank of the Ohio Valley v. Lockwood*, 13 W. Va. 392, 425, 31 Am. Rep. 768.

¹³ *Russ Lumber, etc., Co. v. Muscupiabe Land, etc., Co.*, 120 Cal. 521, 52 Pac. 995, 65 Am. St. Rep. 186; *Skinner v. Raynor*, 95 Iowa, 536, 64 N. W. 601; *Hale v. Aldaffer*, 5 Kan. App. 40, 47 Pac. 320, 52 Pac. 194.

¹⁴ *Spurgin v. McPheeters*, 42 Ind. 527; *National Park Bank v. Saitta*, 127 N. Y. App. Div. 624, 111 N. Y. Supp. 927.

¹⁵ Secs. 24-28. See *infra*, § 1146.

able instrument is deemed *prima facie* to have been issued for a valuable consideration; and every person whose signature appears thereon to have become a party thereto for value,"¹⁶ though when evidence is introduced tending to show that no consideration was given some courts hold that the ultimate burden of establishing its existence is upon the holder.¹⁷ Further, though any consideration sufficient to support a simple contract is also sufficient for a promise on a negotiable instrument,¹⁸ some things are sufficient to support a promise on negotiable paper which are not sufficient consideration for other promises. Thus an ordinary oral or written promise to pay an antecedent debt does not create a new obligation;¹⁹ but a negotiable instrument is unquestionably sufficiently supported by an agreement to receive it in discharge of an antecedent debt.²⁰

Whether an instrument, or a signature on an instrument, given to secure a prior debt of a third party is binding if the creditor makes no agreement to extend or discharge the indebtedness or to forbear action upon it is not clear from the words of the statute.²¹ If under the statute such a instrument or signature is binding, the law to that extent has been changed; for prior to the enactment of the statute it was clear that after a negotiable instrument had been delivered for sufficient consideration, one who subsequently

¹⁶ N. I. L., Sec. 24, *infra*, § 1146; *Carter v. Butler*, 264 Mo. 306, 174 S. W. 399; *First Nat. Bank v. Stallo*, 160 N. Y. App. Div. 702, 145 N. Y. Supp. 747; *Murphy v. Skinner's Estate*, 160 Wis. 554, 152 N. W. 172.

¹⁷ *Lombard v. Byrne*, 194 Mass. 236, 238, 80 N. E. 489; *Connors Bros. v. Sullivan*, 220 Mass. 600, 108 N. E. 503; *Abrahamson v. Steele*, 176 N. Y. App. D. 865, 163 N. Y. S. 827; *Ginn v. Dolan*, 81 Ohio St. 121, 90 N. E. 141, 135 Am. St. Rep. 761; *First Nat. Bank v. Paff*, 240 Pa. 513, 87 Atl. 841. In these cases the Negotiable Instruments Law was not cited. There are, however, contrary decisions. *In re Chismore's Est.*, 175 Iowa, 495, 496, 157 N. W. 139; *Piner v. Brittain*, 165 N. C. 401, 81 S. E. 462; *State Bank v.*

Morrison, 85 Wash. 182, 147 Pac. 875; and under Secs. 24 and 28 of the Negotiable Instruments Law it seems clear that whatever the law may have been previously, the burden is now thrown upon the defendant not only of introducing some evidence of lack of consideration, but of ultimately establishing such lack by a preponderance of evidence. See *infra*, § 1146.

¹⁸ N. I. L., Sec. 25, *infra*, § 1146.

¹⁹ Though doubtless formerly it did. See *infra*, § 143.

²⁰ N. I. L. Sec. 25, *infra*, § 1146; *Wallabout Bank v. Peyton*, 123 N. Y. App. Div. 727, 108 N. Y. 42; *infra*, § 1922.

²¹ See *In re Thompson*, 165 Cal. 290, 131 Pac. 1045, also *infra*, § 1146, for a discussion of the point.

signed **was** not liable without new consideration;²² unless it was **part of** the agreement, made when the original consideration was **given**, that he should so sign. Another possible distinction from ordinary simple contracts should be observed. Whatever may be the rule in regard to such contracts as to the person from whom consideration must move, there is no doubt that an obligation upon a negotiable instrument may be supported by consideration received by the obligor from some one other than the obligee,²³ as well as by consideration furnished to some one other than the obligor.²⁴

It has sometimes been supposed that the modern doctrine concerning the requirement of consideration for negotiable paper between immediate parties is an innovation and that formerly a bill or note, like a covenant under seal, needed no consideration even between immediate parties.²⁵ It is clear, however, though the question may not have arisen with sufficient frequency before the nineteenth century to establish the law beyond dispute, the modern rule of law is no novelty. It was stated in 1722, in words that might be repeated to-day.²⁶

²² *Savage v. First Nat. Bank*, 112 Ala. 508, 20 So. 398; *Tenney v. Prince*, 4 Pick. 385, 16 Am. Dec. 347; *West Coast Co. v. Bradley*, 111 Minn. 343, 127 N. W. 6; *Howard v. Jones*, 13 Mo. App. 596; *Bank of Carrollton v. Lattin*, 37 Okla. 8, 130 Pac. 144, 44 L. R. A. (N. S.) 481; *Ryan v. McKerral*, 15 Ont. Rep. 460. See also *Crofts v. Beale*, 11 C. B. 172.

²³ See *infra*, § 114.

²⁴ *Bridges v. Vann*, 88 Kan. 98, 127 Pac. 604; *Seager v. Drayton*, 217 Mass. 571, 105 N. E. 461. This is true of ordinary simple contracts as well as negotiable instruments. *Underwood v. Lovelace*, 61 Ala. 155; *Mulcrone v. American Lumber Co.*, 55 Mich. 622, 22 N. W. 67. See *infra*, § 113.

²⁵ Blackstone makes a statement in 2 Comm. 446, which is hard to interpret as having any other meaning, and largely on the strength of this Professor Ames believed that the requirement of consideration was a modern in-

novation. 2 Cas. Bills and Notes, 876.

²⁶ *Brown v. Marsh*, Gilbert's Eq. Rep. 154, two judges there were of the opinion that the consideration of a note "was not enquirable no more than the consideration of a bond." "The other two Judges thought there was a great Difference between a Note and a Bond, notwithstanding the Statute [of Anne which declared promissory notes negotiable like bills of exchange]; for in the Case of a Bond, where there were Solemnities of contracting, viz. the Sealing and Delivery, if there was no Consideration, yet if there was no Fraud in obtaining the Bond, the Money was a Gift in Law to the Oblige; but the Note was no more than a Simple Contract, and notwithstanding the Statute says, that the Money shall be due and payable by Virtue of the Note, that only makes the Note itself Evidence of the Consideration, which it was not before the Statute." The

§ 109. Agreements under seal need no consideration.

At Common Law a sealed promise or covenant was binding by its own force.²⁷ It is often said that such instruments are "presumed" to have consideration, or "import" consideration. This mode of statement, though antedating Lord Coke's time,²⁸ is absurd historically, since sealed instruments were binding centuries before the development of simple contracts and the law of consideration.²⁹ Such expressions have led to confusion by inducing the supposition that a seal was but presumptive evidence of consideration and that other evidence might be admitted to show that no consideration in fact existed;³⁰ whereas a sealed promise to make a gift for no consideration whatever is binding.³¹ The changes

facts of the case it is true presented a question of failure, not lack of, consideration, but the comparison with a bond indicates that the judges were not confining their observations to a case of failure as distinguished from lack of consideration. The reporter's note (page 155) makes this more evident. The reporter says in support of the argument that the defence was good: "If not, A. might recover against B., where there was no debt; and certainly the Statute did not design that a Man should recover, where there was no Debt at all; for the Statute only makes Promissory Notes, as Bills of Exchange; and though the Acceptor and Indorser were bound to pay those Bills, whether they had received any Consideration or not, because the Acceptor accepts it for the Honour of the Drawer, and the Indorser negotiates it; yet the Drawer of the Bill was not obliged to pay it to the Person, in whose Behalf the Bill was drawn, unless he had paid him a Consideration; but the owning a Value received, was Evidence *prima facie*, that a Consideration was paid to the Drawer of the Bill."

²⁷ See *infra*, § 217.

²⁸ In *Sharlington v. Strotton*, 1 Plow.

* 298, * 309, Bromley, *arguendo* said: "Every deed imports in itself a consideration, viz: the will of him who made it, and therefore where the agreement is by deed it shall never be called a *nudum pactum*." and see *infra*, § 217.

²⁹ In an anonymous case, Bellewe, 111 (1385), it was said: "In debt on contract the plaintiff shall show in his count for what cause the defendant became the debtor. Otherwise in debt on obligation, for the obligation is contract in itself." Also reported in Bellewe, 32; Fitz. Ab. Annuities, pl. 54.

³⁰ This is best shown in the statutes referred to, *infra*, § 218.

³¹ In *Krell v. Codman*, 154 Mass. 454, 28 N. E. 578, 14 L. R. A. 860, 26 Am. St. Rep. 260, a voluntary covenant to pay the plaintiffs twenty-five hundred pounds, six months from the covenantor's death, was enforced. Such a covenant creates an immediate indebtedness which could be proved in bankruptcy against the covenantor if he had become bankrupt before his death. *Ex parte Tindal*, 8 Bing. 402. Other cases where sealed covenants have been held binding without consideration are—*Sivell v. Hogan*, 119 Ga. 167, 46 S. E. 67; *Adams v. Peabody Coal Co.*, 230 Ill. 469, 82 N. E. 645; *Flet-*

that have been made by statute in the nature and effect of sealed instruments are elsewhere considered.³² Courts of equity though they recognize the validity of a contract under seal without consideration, generally deny relief to a mere volunteer;³³ but make some exceptions to their denial.³⁴

§ 110. Good consideration and valuable consideration.

Consideration not infrequently becomes important in executed transfers of property, especially in the law of fraudulent conveyances; and in such transfers courts of equity have recognized as a vital element in sustaining a contested conveyance, not only a valuable consideration, but also what has been called a good or meritorious consideration; that is, affection based on kindred by blood or marriage. Such reasoning has no place in the law of executory contracts. What is described as good or meritorious consideration will not support a promise. It is in fact nothing more than motive or moral obligation.³⁵

Marriage is regarded by the law as a valuable consideration and marriage or promise of marriage is sufficient consideration for a promise.³⁶

cher v. Fletcher, 191 Mass. 211, 77 N. E. 758; *McMillan v. Ames*, 33 Minn. 257, 22 N. W. 612; *Hale v. Dressen*, 73 Minn. 277, 76 N. W. 31; *Aller v. Aller*, 40 N. J. L. 446; *Waln v. Waln*, 58 N. J. L. 640, 34 Atl. 1068; *Wester v. Bailey*, 118 N. C. 193, 24 S. E. 9; *Miles v. Hemenway*, 59 Ore. 318, 117 Pac. 273; *Evans v. Dravo*, 24 Pa. 62, 62 Am. Dec. 359; *Clymer v. Groff*, 220 Pa. 580, 69 Atl. 1119; *Monro v. National Surety Co.*, 47 Wash. 488, 92 Pac. 280; *Walterman v. Village of Norwalk*, 145 Wis. 663, 130 N. W. 479.

³² See *infra*, § 218.

³³ See *infra*, § 217, *ad fin.*

³⁴ See Pound, "Consideration in Equity," 13 Ill. L. Rev. 435.

³⁵ See *infra*, §§ 147-149. In *Conover's Adm'r v. Brown's Ex'rs*, 49 N. J. Eq. 156, 23 Atl. 507, the court sustained a promissory note given to a

daughter without valuable consideration for the purpose of equalizing distribution of the maker's estate, by treating the note as a sealed note in view of the words "witness my hand and seal" contained in the note, though in fact there was no seal. This case, however, depends on the jurisdiction of a court of equity to make a transaction conform to the real intent of the parties; and the only importance of the "good" consideration afforded by the payee being the maker's daughter was to obviate the rule generally applied by Courts of Equity (see *infra*, § 217, *ad fin.*) that an imperfect gift will not be aided.

³⁶ The commonest illustration of this is found in mutual promises to marry which have always been held to constitute a good contract, since the case of *Harrison v. Cage*, 5 Mod. 411.

The question most commonly arises, not in the law of contracts, but in the law of conveyances fraudulent as against creditors; and here it is held also that marriage is a valuable consideration, and a reasonable marriage settlement made or promised in writing (to comply with the Statute of Frauds) can not be attacked by the settlor's creditors.³⁷ But whether the question concerns an executory contract or a conveyance, the marriage or promise of marriage must have been contemporaneous or subsequent to the promise or conveyance for which consideration is sought and must have been given as consideration. A previous marriage is of no more validity than any other past consideration.³⁸

§ 111. Consideration distinguished from motive.

Though desire to obtain the consideration for a promise may be and ordinarily is, the motive inducing the promisor to enter into a contract, yet this is not essential nor, on the other hand, can any motive serve in itself as consideration.³⁹ Thus, A may be moved by friendship to agree to sell his horse to B for one hundred dollars. If there is an actual agreement to make the exchange of the horse for money, there will be a contract though A's motive for entering into the transaction was friendship.⁴⁰ On the other hand, if there be no legal consideration, no motive, such as love and respect, or affection

Other illustrations are of promises made by a third party to either the prospective husband or wife of property in consideration of the marriage. *Shadwell v. Shadwell*, 9 C. B. (N. S.) 159; *Skeete v. Silberberg*, 11 T. L. Rep. 491; *Wright v. Wright*, 114 Iowa, 748, 87 N. W. 709, 55 L. R. A. 261; *Arnold v. Estis*, 92 N. C. 162; *Leib v. Dobriner*, 111 N. Y. Supp. 650, 60 N. Y. Misc. 866.

³⁷ See *Peachey on Marriage Settlements*, 62; *Prewitt v. Wilson*, 103 U. S. 22, 26 L. Ed. 360; *Nance v. Nance*, 84 Ala. 375, 4 So. 699; *Cohen v. Knox*, 90 Cal. 266, 27 Pac. 215, 13 L. R. A. 711; *Tolman v. Ward*, 86 Me. 303, 29 Atl. 1081, 41 Am. St. Rep. 556; *Smith v.*

Allen, 5 Allen, 454, 81 Am. Dec. 758; *J. P. Leininger Lumber Co. v. Dewey*, 86 Neb. 659, 126 N. W. 87; *De Hierapolis v. Reilly*, 168 N. Y. 585, 60 N. E. 1110; *Clay v. Walter*, 79 Va. 92. Cf. *Miles v. Monroe*, 96 Ark. 531, 132 S. W. 643.

³⁸ *Re Holland*, [1902] 2 Ch. 360; *Deshon v. Wood*, 148 Mass. 132, 19 N. E. 1, 1 L. R. A. 518; *Borst v. Corey*, 15 N. Y. 505. See also *Moore v. Green*, 145 Fed. 472, 76 C. C. A. 242.

³⁹ "Motive is not the same thing with consideration." *Thomas v. Thomas*, 2 Q. B. 851. See also *Philpot v. Gruninger*, 14 Wall. 570, 20 L. Ed. 743.

⁴⁰ See *Puterbaugh v. Puterbaugh*, 131 Ind. 288, 30 N. E. 519, 15 L. R. A. 341.

for another ⁴¹ or a desire to do justice,⁴² or fear of trouble,⁴³ or a desire to equalize the shares in an estate,⁴⁴ or to provide for a child,^{44a} or regret for having advised an unfortunate investment,^{44b} will support a promise. This is a distinction between the consideration of the Common Law and the *causa* of the Roman Law. Consideration is a present exchange for a promise. *Causa* is some adequate reason for making a promise, and may be either a present exchange or an existing state of facts.⁴⁵ As the Civil Law is in force in Louisiana, the requirement of consideration does not there obtain.⁴⁶

§ 112. Consideration distinguished from condition.

As has been seen ⁴⁷ an offer is a conditional promise; that is, a promise to take effect only if the exchange demanded for it is given. But the promise in an offer may be subject to other conditions than the giving of the requested consideration. Thus, an offer to insure property in exchange for a premium is a promise to pay insurance money in case the building insured is destroyed if a premium is paid. A conditional promise may be sufficient consideration, and "when a man acts in consideration of a conditional promise, if he gets the promise he gets all that he is entitled to by his act, and if, as events turn out, the condition is not satisfied, and the promise calls for no performance, there is no failure of consideration." ⁴⁸

⁴¹ Schnell v. Nell, 17 Ind. 29, 79 Am. Dec. 453; Duttera v. Babylon, 83 Md. 536, 35 Atl. 64; Fischer v. Union Trust Co., 138 Mich. 612, 101 N. W. 852, 68 L. R. A. 987.

⁴² Thompson v. Hudgins, 116 Ala. 93, 22 So. 632.

⁴³ Vehon v. Vehon, 70 Ill. App. 40; Mawhinney v. Cassio, 63 N. J. L. 412, 43 Atl. 676.

⁴⁴ Parish v. Stone, 14 Pick. 198, 25 Am. Dec. 378.

^{44a} Conrad v. Manning, 125 Mich. 77, 83 N. W. 1038.

^{44b} Martin's Estate, 131 Pa. St. 638, 18 Atl. 987.

⁴⁵ *Supra*, § 4.

⁴⁶ La. Civ. Code, Art. 1896. "By the cause of the contract . . . is meant the consideration or motive for making it." A promise to the creditor of another to pay the debt is held to require no other cause or consideration than the existence of the debt. New Orleans, etc., R. Co. v. Chapman, 8 La. Ann. 97.

⁴⁷ *Supra*, § 25.

⁴⁸ Holmes, J. in Gutlon v. Marcus, 165 Mass. 335, 336, 43 N. E. 125.

So it was held in Ehlen v. Selden, 99 Md. 699, 59 Atl. 120, that where an agreement was made by which the plaintiff was to hold himself in readiness to lend the defendant money on

But in some cases it is so clear that a conditional gift was intended that even though the promisee has incurred detriment, the promise has been held unenforceable.⁵¹

balls according to directions, the court held that the use of the ball was consideration. It would seem in fact that the purchase of the ball was the real consideration, if a consideration existed, and the use of the ball merely a condition. A more extreme case is *De LaBere v. Pearson, Ltd.*, [1907] 1 K. B. 483, *affd.*, [1908] 1 K. B. 280, stated *supra*, § 32. A promise to pay a debt if the plaintiff make oath to its correctness was held an offer and binding on the oath being made, in *Brooks v. Ball*, 18 Johns. 337. See also 1 Vin. Abr. 298, pl. 22; *Seaward v. Lord*, 1 Me. 163, 10 Am. Dec. 50. Cf. *McBride v. Adams*, 84 N. Y. S. 1060, where the promise of a husband to pay the debt of his wife when apprised of the amount, was held gratuitous and not an offer in consideration of information given. The facts in *Devocmon v. Shaw*, 69 Md. 199, 14 Atl. 464, 9 Am. St. Rep. 422, suggest the same question. An uncle promised to pay the expenses of his nephew's trip to Europe. The court held that the detriment incurred in making the trip to Europe was the consideration for the defendant's promise. As judgment had been given by default, however, and the question involved in the case was merely the assessment of damages, it seems that no larger question can have been really involved than whether the trip to Europe might be consideration for a contract, not whether it actually was. See further *Dendy v. Russell*, 67 Kans. 721, 74 Pac. 248; *Howe v. Watson*, 179 Mass. 30, 60 N. E. 415; *Berry v. Graddy*, 1 Met. (Ky.) 553; *Bigelow v. Bigelow*, 95 Me. 17, 49 Atl. 49; *Steele v. Steele*, 75 Md. 477, 23 Atl. 959; *Adams v. Honness*, 62 Barb. 326; *Stone v. Demarest*, 95 N. Y. Misc. 543, 159 N. Y. S.

800; *Richardson v. Gosser*, 26 Pa. 335.

⁵¹ In *Kirksey v. Kirksey*, 8 Ala. 131, the defendant wrote to his sister-in-law the plaintiff, who had recently lost her husband, that he felt grieved to hear of her condition and added "If you will come down and see me, I will let you have a place to raise your family, and I have more open land than I can tend; and on the account of your situation, and that of your family, I feel like I want you and the children to do well." The plaintiff on receiving this letter left her home and moved with her family sixty or seventy miles to the residence of the defendant, who gave her the use of a house and land for two years, but thereafter requested her to leave. The court held the promise a mere gratuity. The decision was followed in *Forward v. Armstead*, 12 Ala. 124; *Bibb v. Freeman*, 59 Ala. 612. In the latter case the court said: "It is often a matter of great difficulty to discern the line which separates promises creating legal obligations from mere gratuitous agreements. Each case depends so much on its own peculiar facts and circumstances that it affords but little aid in determining other cases of differing facts. The promise or agreement, the relation of the parties, the circumstances surrounding them, and their intent, as it may be deduced from these, must determine the inquiry. If the purpose is to confer on the promisee a benefit from affection and generosity, the agreement is gratuitous. If the purpose is to confer a *quid pro quo*—if there is something to be received, in exchange for which the promise is given, the promise is not gratuitous, but of legal obligation." See also in accord, *Clark v. Clark*,

§ 113. To whom the consideration must move.

It is well settled that whether a benefit to the promisor is or is not a sufficient consideration, a detriment to the promisee is. This is equivalent to saying that if the promisee parts with something at the promisor's request, it is immaterial whether the promisee receives anything, and necessarily involves the conclusion that the consideration given by the promisee for a promise need not move to the promisor, but may move to any one requested by the offer. The commonest illustration of consideration moving to another than the promisor is the consideration for a guaranty, and a mere reference to this class of cases is sufficient authority.⁵²

§ 114. From whom the consideration must move.

It is frequently laid down that consideration must move from the promisee, or plaintiff,⁵³ and it is not infrequently supposed that this rule is the essential reason for objection to contracts for the benefit of a third person. Upon any proper analysis, however, such is not the case. In promises for the

71 Ga. 818; *Smith v. Force*, 31 Minn. 119, 16 N. W. 704; *Richards Exec. v. Richards*, 46 Pa. 78; *Dougherty v. Torrence*, 25 Pa. C. C. 317. *Boord v. Boord*, *Pelham (So. Aust.)*, 58.

⁵² Not only a guaranty of a debt incurred at the guarantor's request, but a guaranty of dividends, given by an individual in consideration of the promisee's subscription to the stock of a corporation illustrates the principle. *West v. King*, 163 Ky. 561, 174 S. W. 11. See, further, other cases where the consideration did not enure to the benefit of the promisor, cited *supra*, § 102, and *Isgrig v. Franklin Nat. Bank*, 53 Ind. App. 217, 101 N. E. 398; *Sears v. Krekel (Mo. App.)*, 184 S. W. 911; *Mack v. Mack*, 87 Neb. 819, 128 N. W. 527, 31 L. R. A. (N. S.) 441; *Southern Realty Co. v. Hannon*, 89 Neb. 802, 132 N. W. 533; *Froude v. Fleischmann*, 178 N. Y. App. D. 257, 164 N. Y. S. 1003; *Jamison-Semple Co. v. Richard*, 78 N. Y. Misc. 355,

138 N. Y. Supp. 401; *Trustees v. Mebane*, 165 N. C. 644, 81 S. E. 1020; *Davis v. Blum*, 104 S. C. 218, 88 S. E. 465; *Clement v. Rowe*, 33 S. Dak. 499, 146 N. W. 700; *Gauss-Lagenberg Hat Co. v. Alley (Tex. Civ. App.)*, 154 S. W. 1062; *Ballard v. Burton*, 64 Vt. 387, 24 Atl. 769, 16 L. R. A. 664; *Nicholson v. Neary*, 77 Wash. 294, 137 Pac. 492.

⁵³ In *Thomas v. Thomas*, 2 Q. B. 851, *Patterson, J.*, said (and these words are often quoted): "Consideration means something which is of some value in the eye of the law, moving from the plaintiff; it may be some detriment to the plaintiff, or some benefit to the defendant; but at all events it must be moving from the plaintiff." "One of the most elementary rules of English law is that which requires the consideration for a simple contract to move from the promisee; and it is too well settled to admit of dispute in any court." 32 L. Qu. Rev. 6.

benefit of a third person the consideration moves from the promisee (though not from the plaintiff), and the difficulty is not to find a contract, but to find a reason for allowing the beneficiary, who is not the promisee, to sue upon the contract. Where the consideration does not move from the promisee the question involved is whether any contract exists. Does the law require that promises shall be paid for by the promisee, or does it merely require that the promise shall be paid for by some one? This is not merely another way of stating the inquiry, whether a detriment to the promisee is essential to the validity of consideration, or whether a benefit to the promisor is enough. For it may be said that such a benefit is enough, but that it must move from the promisee; and the rule so stated and applied though it would generally involve the existence of a detriment to the promisee, would not do so at least in one class of cases.⁵⁴ In spite of *dicta* to the effect that consideration must move from the plaintiff or promisee, it seems better to adopt the broader rule. So far as possible the law should enforce reasonable business agreements seriously made, and, certainly it is a possible and reasonable agreement for A to pay B a price or consideration for a promise made by B to C. In spite of the rule of the English Common Law it is not surprising, therefore, to find an express provision in the Indian Contract Act,⁵⁵ defining consideration as moving from the promisee "or any other person." Such actual decisions as have been made in the United States also seem to support the view here advocated. Without doubt a promissory note made to a payee in return for a consideration received by the maker from a third person is binding,⁵⁶⁻⁵⁸ and the same result has been reached in cases of ordinary simple contracts.⁵⁹

⁵⁴ See *infra*, § 131a.

⁵⁵ Sec. 2(d).

⁵⁶⁻⁵⁸ *Pierce v. Harper*, 249 Fed. 867, 162 C. C. A. 101; *Fanning v. Russell*, 94 Ill. 386; *McIntire v. Yates*, 104 Ill. 491; *Hatton Exr. v. Jones*, 78 Ind. 466; *Mize v. Barnes*, 78 Ky. 506; *Nichols v. Nichols*, 136 Mass. 256; *Spooner v. Spooner*, 155 Mass. 52, 28 N. E. 1121; *Eaton v. Libbey*, 165 Mass. 218, 42 N. E. 1127, 52 Am. St. Rep. 511;

Crosier v. Crosier, 215 Mass. 535, 102 N. E. 901; *Horn v. Fuller*, 6 N. H. 511; *Farley v. Cleveland*, 4 Cow. 432, 15 Am. Dec. 387, *sub nom. Cleveland v. Farley*, 9 Cow. 739.

⁵⁹ *Pigott v. Thompson*, 3 B. & P. 149, by Lord Alvanley; *Bell v. Sappington*, 111 Ga. 391, 36 S. E. 780; *Owenby v. Georgia Baptist Assembly*, 137 Ga. 698, 74 S. E. 56, citing Ga. Civ. Code, § 4249; *Schmucker v. Sibert*, 18 Kan.

There is perhaps greater difficulty in supposing a bilateral contract than a unilateral where the consideration does not move from the promisee to the promisor. In a unilateral contract only one party need furnish consideration; in a bilateral contract each party must furnish consideration, since there are two promises each of which must be supported by consideration. Nevertheless, even a bilateral agreement has been held binding in England which consisted of a promise from A to B given in consideration of a promise by B to C.⁶⁰ This decision, however, though not cited, must be regarded as overruled by a later case decided by the House of Lords, which insists on the necessity of consideration moving from the plaintiff.⁶¹ This form of bilateral agreement is perhaps exemplified also in a novation where A owes B money and

104, 111, 26 Am Rep. 765; *Williamson v. Yager*, 91 Ky. 282, 286, 15 S. W. 660, 34 Am. St. Rep. 184; *Cabot v. Haskins*, 3 Pick. 83; *Palmer Bank v. Insurance Co.*, 166 Mass. 189, 195, 196, 44 N. E. 211, 55 Am. St. Rep. 387; *Van Eman v. Stanchfield*, 10 Minn. 255; *Hamilton v. Hamilton*, 127 N. Y. App. Div. 871, 112 N. Y. Supp. 10; *Gold v. Phillips*, 10 Johns. 412; *Lawrence v. Fox*, 20 N. Y. 268, 270, 271, 276, 277; *Rector v. Teed*, 120 N. Y. 583, 24 N. E. 1014. In *Merrill v. Peaslee*, 146 Mass. 460, 16 N. E. 271, 4 Am. St. Rep. 334, *Holmes, J.*, in a dissenting opinion said: "We must assume, and the majority of the court do assume that a consideration furnished by a married woman who is a *cestui que trust* will sustain a promise by her husband to her trustee. Whatever might be thought upon this point as a new question, it has been settled, not without discussion, and we are bound by the decisions. *Butler v. Ives*, 139 Mass. 202, 29 N. E. 654. See *Nichols v. Nichols*, 136 Mass. 256." In *De Cicco v. Schweizer*, 221 N. Y. 431, 117 N. E. 807, consideration furnished by two jointly was held to support a promise to one.

* *West Yorkshire Darracq Agency,*

Ltd., v. Coleridge, [1911] 2 K. B. 326. The head-note of this case reads: "All the directors of a company in liquidation mutually agreed to forego their respective claims to directors' fees then owing. The liquidator was a party to the agreement on behalf of the company. Subsequently the company sued one of the directors for work done, and the director counter-claimed against the company for his fees earned previously to the agreement. It was held that although there was no consideration for the agreement moving from the company, the fact of the liquidator being a party to it rendered it binding as between the director and the company; and that the agreement was, therefore, a good defence to the counter-claim." The directors in effect, all made promises to the company through its liquidator, and their respective promises were held binding though neither the company nor its liquidator parted with consideration. See also the somewhat similar case of *Union Bank v. Sullivan*, 214 N. Y. 332, 108 N. E. 558, commented upon *supra*, § 102. *ad fin.*

⁶¹ *Dunlop Pneumatic Tyre Co. v. Selfridge*, [1915] A. C. 847.

A, B, and C, agree that in consideration of the discharge of A, C shall become liable in A's place. In such a case it must either be supposed that the consideration of C's promise to B to pay the debt is B's agreement with A to discharge him, or that B's promise to C to discharge A can be taken advantage of by A. That such a novation is binding and is effectual both to discharge A and to render C liable is well settled,⁶² though there is little satisfactory discussion in the cases of the reasons for it. It has also been held that a promise made by the obligor of a bond to the obligee that if the bond shall be assigned payment will be made to the assignee, is enforceable in his own name and right by an assignee.⁶³ Here if the obligor

⁶² *Tatlock v. Harris*, 3 T. R. 174, 180; *Bird v. Gammon*, 3 Bing. (N. C.) 883; *Bilborough v. Holmes*, 5 Ch. D. 255; *In re Errington*, [1894] 1 Q. B. 11, 14; *In re Ransford*, 194 Fed. 658 (C. C. A.); *Underwood v. Lovelace*, 61 Ala. 155; *Trudeau v. Poutre*, 165 Mass. 81, 42 N. E. 508; *Heaton v. Angier*, 7 N. H. 397, 28 Am. Dec. 353; *Corbett v. Cochran*, 3 Hill L. (S. C.) 41, 44, 30 Am. Dec. 348. In the case last cited the court said—"Where the promise is to pay another's debt, in consideration of his being discharged, it seems to be well settled now, that there need be no consideration moving between the person promised for, and the person who promises." See also *Roe v. Haugh*, 12 Mod. 133. In 6 Harv. L. Rev. 184, Lectures on Legal History, 298, Professor Ames explains the validity of a novation on the ground of an ordinary bilateral agreement with C, the new debtor, as part of which, B, the creditor, agrees with C, the new debtor, to discharge A, the old debtor. This, Mr. Ames argues, would operate as an equitable defence to A, since if the creditor B should sue A after the agreement with C, the damages recovered by B would be recovered over again from him on account of his breach of his contract with C. That an agreement with C for sufficient consideration

to discharge A should be at least an equitable defence to A, need not be denied. This solution seems to involve, however, a recognition of the right of a beneficiary to enforce a promise for his benefit, and hence can hardly justify the result in every jurisdiction. If the sole right on the promise was in C as promisee, whatever was recoverable against B for breach of his agreement with C would be recoverable by C. It would be only on the theory that the contract was made for A's benefit that A would be entitled to any interest in such damages, or any right, legal or equitable, in the contract. But a novation is good in jurisdictions which deny a right to a beneficiary as well as in those which admit the right. Moreover, a novation is as good where C enters into the transaction for his own benefit in order to discharge an indebtedness of his own to A by assuming A's indebtedness to B, as in cases where A was intended to be the sole beneficiary of C's promise. Furthermore, it should be observed that a novation was valid at law as a discharge of A's liability long before equitable defences were allowed at law.

⁶³ *Fenner v. Meares*, 2 W. Bl. 1269; *Innes v. Dunlop*, 8 T. R. 595; *Warren v. Wheeler*, 21 Me. 484. See also

can be regarded as promising the assignee such consideration as there is comes from the assignment by the assignor.

6¹ § 115. Adequacy of consideration.

It is an "elementary principle that the law will not enter into an inquiry as to the adequacy of the consideration."⁶⁴ This rule is almost as old as the law of consideration itself.⁶⁵ Therefore anything which fulfils the requirements of consideration will support a promise whatever may be the comparative value of the consideration, and of the thing promised. Thus allowing a defendant to weigh boilers is sufficient consideration for a promise to give them up in good condition,⁶⁶ and surrendering a document though it has no value is sufficient consideration for a promise to pay a large price.^{66a} The surrender of a piece of paper on which a void guaranty had been written was sufficient consideration for a promise to pay ten thousand pounds.⁶⁷ A quit-claim deed conveying such interest as the grantor may have is sufficient consideration though the grantor in fact had no interest.⁶⁸ So delivering for record an invalid deed,⁶⁹ or transferring worthless corporate stock.⁷⁰

It must be observed, however, that if the consideration bargained for was not the paper but a right supposed to be but not in fact evidenced by the paper, the fact that the paper was itself surrendered will not support a promise, since the

Crocker v. Whitney, 10 Mass. 319; *Parkhurst v. Dickerson*, 21 Pick. 307. In *Innes v. Dunlop* the court said "The assignment of the bond to the plaintiff was a consideration for the assumpsit by the defendant."

⁶⁴ *Westlake v. Adams*, 5 C. B. (N. S.) 248, 265, per Byles, J.

⁶⁵ In *Sturlyn v. Albany*, Cro. Eliz. 67, it is said: "when a thing is to be done by the plaintiff, be it never so small, this is sufficient consideration to ground an action."

⁶⁶ *Bainbridge v. Firmstone*, 8 A. & E. 743.

^{66a} *Wilkinson v. Oliveira*, 1 Bing. (N. C.) 490; *Haigh v. Brooks*, 10 A. & E. 309; *Wiltton v. Eaton*, 127 Mass. 174; *Judy v. Louderman*, 48 Oh. St.

562; *Churchill v. Bradley*, 58 Vt. 403, 56 Am. Rep. 563. But see *McCullum v. Edmonds*, 109 Ala. 322, 19 So. 501.

⁶⁷ *Haigh v. Brooks*, 10 A. & E. 309. To the same effect is *Harran v. Klaus*, 79 Wis. 383, 385, 48 N. W. 479.

⁶⁸ *McNeal v. Calkins*, 50 Ill. App. 17; *Mullen v. Hawkins*, 141 Ind. 363, 40 N. E. 797; *Rowe v. Barnes*, 101 Ia. 302, 70 N. W. 197; *Washington Life Ins. Co. v. Marshall*, 56 Minn. 250, 57 N. W. 658. But see *infra*, § 137.

⁶⁹ *Hall v. Sears*, 210 Mass. 185, 96 N. E. 141. But see *infra*, § 137.

⁷⁰ *State Bank v. Gates*, 114 Ia. 323, 86 N. W. 311; *Atwater v. Stromberg*, 75 Minn. 277, 77 N. W. 963. See also *Coles v. Kennedy*, 81 Ia. 360, 46 N. W. 1038, 25 Am. St. Rep. 503.

surrender of the paper is here merely a condition, not a consideration.⁷¹ Therefore, it is generally true, that a note given in renewal for one void for want of consideration is like the first invalid and unenforceable.⁷² Discharging a debt barred by the Statute of Limitations,⁷³ or naming a child in accordance with the wishes of the promisor,⁷⁴ are sufficient considerations, and other illustrations might easily be given of the principle that adequacy of consideration is immaterial.⁷⁵ Sometimes a consideration of one dollar or other small sum is paid or alleged to have been paid in return for a promise to give or do something of considerable value. There seems no reason to depart in such a case from the general rule that adequacy of consideration will not be regarded,⁷⁶ though an inquiry

⁷¹ See quotation from *Foster v. Dawber*, 6 Exch. 839, 948, *supra*, § 112.

⁷² *Alabama Nat. Bank v. Halsey*, 109 Ala. 196, 19 So. 522; *Cochran v. Perkins*, 146 Ala. 689, 40 So. 351; *Pacific Rys. Advertising Co. v. Carr*, 29 Cal. App. 722, 725, 157 Pac. 529; *Gilbert v. Brown*, 123 Ky. 703, 97 S. W. 40, 7 L. R. A. (N. S.) 1053; *Schroeder v. Fink*, 60 Md. 436; *Widger v. Baxter*, 190 Mass. 130, 76 N. E. 509; *Comings v. Leedy*, 114 Mo. 454, 21 S. W. 804.

⁷³ *Jackson v. Stone* (Tex. Civ. App.), 155 S. W. 960.

⁷⁴ *Wolford v. Powers*, 85 Ind. 295; *Daily v. Minnick*, 117 Ia. 563, 91 N. W. 913, 60 L. R. A. 840; *Eaton v. Libbey*, 165 Mass. 218, 42 N. E. 1127, 52 Am. St. Rep. 511; *Gardner v. Denison*, 217 Mass. 492, 105 N. E. 359, 51 L. R. A. (N. S.) 1108.

⁷⁵ *Bloodworth v. Booser*, 99 Ark. 238, 138 S. W. 457; *Colt v. McConnell*, 116 Ind. 249, 19 N. E. 106; *Mullen v. Hawkins*, 141 Ind. 363, 40 N. E. 797; *Train v. Gold*, 5 Pick. 380, 384; *Wilton*, 127 Mass. 174; *Whitney v. Clary*, 145 Mass. 156, 13 N. E. 393; *Mason v. Flanagan*, (Mass. 1919,) 123 N. E. 614; *Williams v. Jensen*, 75 Mo. 681; *Perkins v. Clay*, 54 N. H. 518; *Traphagen's Ex. v. Voorhees*, 44 N. J. Eq. 21, 12 Atl. 895; *Worth v. Case*, 42 N. Y. 362;

Earl v. Peck, 64 N. Y. 596; *Cowee v. Cornell*, 75 N. Y. 91, 31 Am. Rep. 428; *Judy v. Louderman*, 48 Oh. St. 562, 29 N. E. 181; *Cumming's Appeal*, 67 Pa. 404; *Presbyterian Board v. Smith*, 209 Pa. 361, 58 Atl. 689; *Townsend v. Neuhardt*, 139 Tenn. 695, 203 S. W. 255; *Griffin v. Bell* (Tex. Civ. App.), 202 S. W. 1034; *Giddings v. Giddings' Admr.*, 51 Vt. 227, 31 Am. Rep. 682.

⁷⁶ In *Dutchman v. Tooth*, 5 Bing. N. C. 577, a guaranty was given in consideration of two shillings and sixpence. The court held this consideration sufficient. In *Lawrence v. McCalmont*, 2 How. 426, 452, 11 L. Ed. 326, and in *Davis v. Wells*, 104 U. S. 159, 26 L. Ed. 686, a contract of guaranty stated to be for the consideration of one dollar, was held to be supported by sufficient consideration. In *Smith v. Bangham*, 156 Cal. 359, 104 Pac. 689, 28 L. R. A. (N. S.) 522, an option was given for the sum of one dollar to convey land worth seventeen thousand dollars on tender of that sum within a limited time, and the option was held specifically enforceable, although it was found by the trial court that the sum of one dollar was grossly inadequate.

So options for the consideration of one dollar were enforced in *Guyer v. Warren*, 175 Ill. 328, 51 N. E. 580.

whether the dollar was really bargained for as the consideration, will always be pertinent; for where a promise of value is stated to have been made for a small money consideration, there is often reason to doubt whether a bargain to exchange the sum mentioned for the promise was really intended by the parties.⁷⁷ The only exception to the legal sufficiency of inadequate consideration is where the consideration is of the same nature as the thing promised and is equal or smaller in amount. The reason for this exception is that in such a case it is impossible for the law to indulge in the presumption of equivalence between the consideration and the promise. The most frequent illustration of this occurs in an exchange of money for a promise to pay money. A consideration of one dollar will not support a promise to pay at the same time and place a larger sum.⁷⁸ So a bargain stated to be "in consideration of one dollar by each to the other paid" does not support a contract even though it be assumed that the sum of one dollar was actually paid by each party to the other.⁷⁹ For the same reason an agreement to surrender and discharge mutual liquidated claims of unequal amounts is invalid.⁸⁰

See also *Seyferth v. Groves, etc., R. Co.*, 217 Ill. 483, 75 N. E. 522; *Lowther Oil Co. v. Guffey*, 52 W. Va. 88, 43 S. E. 101; *Tibbs v. Zirkle*, 55 W. Va. 49, 46 S. E. 701; *Rease v. Kittle*, 56 W. Va. 269, 49 S. E. 150.

In *Marsh v. Lott*, 8 Cal. App. 384, 97 Pac. 163, an option to sell land for \$100,000 was held sufficiently supported by a present payment of twenty-five cents. But see *contra*, *Thompson v. Reid*, 31 Ky. L. Rep. 176, 101 S. W. 964, where a consideration of one dollar was held insufficient; *Killebrew v. Murray*, 151 Ky. 345, 151 S. W. 662, where a promise to pay \$5 a year was held insufficient to support a promise of valuable rights; *Owens v. Corsicana Petroleum Co.* (Tex. Civ. App.), 169 S. W. 192, and cases cited. In the Texas case the right given one party to cancel a valuable contract at any time by the payment of \$5 was held to invalidate it.

⁷⁷ See, e. g., *Thompson v. Reid*, 31 Ky. L. Rep. 176, 101 S. W. 964.

⁷⁸ *Schnell v. Nell*, 17 Ind. 29, 79 Am. Dec. 453; *Shepard v. Rhodes*, 7 R. I. 470, 84 Am. Dec. 573; *Rease v. Kittle*, 56 W. Va. 269, 277, 49 S. E. 150. Any difference in place or medium of payment or priority in time will make the smaller payment sufficient consideration. See *infra*, § 121.

⁷⁹ *Hall v. Allfree* (Ind. App.), 99 N. E. 813. See also *Velie Motor Car Co. v. Kopmeier Motor Co.*, 194 Fed. 331, 331, 114 C. C. A. 284.

⁸⁰ *Walan v. Kerby*, 89 Mass. 1, 3; *Webster v. McLaren*, 19 N. D. 70, 123 N. W. 395. If one or both of were unliquidated the agreement would effectually discharge them. *Sawkins*, 5 C. B. 142; *Allen*, 12 Allen, 603; *Vander Denio*, 257; *Morehouse Bank*, 98 N. Y. 503.

In equity as at law, adequacy of consideration is of no importance in determining the existence of a contract, but it is of importance sometimes as a factor determining the right of the plaintiff to specific performance.⁸¹ Inadequacy of consideration is also important in connection with other circumstances as evidence where fraud is asserted as a defence.

§ 115a. Recital of consideration in sealed instruments.

Where a consideration of one dollar, or indeed any named consideration, would be valid if actually given, the question has been raised how far a recital of such consideration in a written instrument precludes the promisor from showing not only that he did not receive that consideration, or any consideration, but that he did not agree to receive it or anything else as the consideration for his promise. Presumably under the early common law, any recital in a deed estopped a party to the deed from showing it to be untrue.⁸² It is at least well settled that the recital of consideration in a deed of conveyance estops the grantor to deny the existence of that consideration for the purpose of impeaching the validity of the deed, as a deed of bargain and sale.⁸³

Lord Hardwicke was of the opinion that for whatever purpose such evidence was offered, proof could not be given that the consideration stated in a deed was in fact not the whole consideration, unless such words as "and other considerations" followed the statement of specific consideration.⁸⁴ But so strict a rule is no longer applied either in England or America. By a relaxation originating in equity and extending to courts of law, additional consideration may be shown which is not repugnant to the consideration named.⁸⁵

⁸¹ See *infra*, § 1425.

⁸² Early cases are collected and commented upon in: *McCrea v. Purmont*, Vend. 460, 467, 30 Am. Dec. 103.

also *Hawley v. Dibble*, 184 3, 151 N. W. 712; 1 Ill. Law 42, by Edward H. Decker. burn on Real Property 83; *Stannard v. Aurora*, 0 Ill. 469, 77 N. E. 254. Monk, 1 Ves. Sr. 127,

128. And see for the strict rule at law, *Rowntree v. Jacob*, 2 Taunt. 141; *Baker v. Dewey*, 1 B. & C. 704.

⁸³ *Clifford v. Turrell*, 1 Y. & C. (C. C.) 138, affd. 9 Jur. 633; *Leifchild's Cas.* L. R. 1 Eq. 231; *Peters v. McLaren*, 218 Fed. 410, 134 C. C. A. 198; *Cheeseman v. Nicholl*, 18 Col. App. 174, 70 Pac. 797; *Belden v. Seymour*, 8 Conn. 304, 21 Am. Dec. 661; *Hays v. Peck*, 107 Ind. 389, 8 N. E. 274; *Nichols*, etc.,

And, generally, at the present time, even though the consideration in fact was entirely different from the consideration named in the deed, and not merely additional to it, the truth may be shown for any purpose except the impeachment of the validity of the deed for lack of consideration,⁸⁶ unless the stated consideration is promissory in character and not merely a recital of fact.⁸⁷ Other recitals in a deed than those of consideration preclude an attempt to affect the validity of the instrument by denying their truth in any controversy between the parties.⁸⁸ A statement of a doctrine similar to that applicable to deeds is common in regard to insurance policies. It is held that the acknowledgment in a policy of the receipt of the premium estops the company to deny the validity of the policy on the ground of non-payment of the premium.⁸⁹

Co. v. Burch, 128 Ind. 324, 27 N. E. 737; *Bourne v. Bourne*, 92 Ky. 211, 17 S. W. 443; *Hodges v. Heal*, 80 Me. 281, 14 Atl. 11, 6 Am. St. Rep. 199; *Miller v. Goodwin*, 8 Gray, 542; *Barbee v. Barbee*, 109 N. C. 299, 13 S. E. 792; *Hayden v. Mentzer*, 10 S. & R. 329; *Harwood v. Harwood's Est.*, 22 Vt. 507; *Wilfong v. Johnson*, 41 W. Va. 283, 23 S. E. 730. And see decisions in the following note.

* *Mason v. Buchanan*, 62 Ala. 110; *Mobile Savings Bank v. McDonnell*, 89 Ala. 434, 8 So. 137, 9 L. R. A. 645; *Mewes v. Home Bank (Ark.)*, 172 S. W. 853; *Lay v. Gaines*, 130 Ark. 167, 196 S. W. 919; *Howell v. Moores*, 127 Ill. 67, 19 N. E. 863; *Lloyd v. Sandusky*, 203 Ill. 621, 631, 68 N. E. 154; *Fleming v. Reheis*, 275 Ill. 132, 113 N. E. 923; *Poor's Exr. v. Scott*, 24 Ky. L. Rep. 239, 68 S. W. 397; *Goodspeed v. Fuller*, 46 Me. 141, 71 Am. Dec. 572; *Cardinal v. Hadley*, 158 Mass. 352, 35 Am. St. Rep. 492; *Stotts v. Stotts*, 198 Mich. 605, 165 N. W. 761; *Houston v. Greiner*, 73 Or. 304, 144 Pac. 133; *Bibelhausen v. Bibelhausen*, 159 Wis. 365, 150 N. W. 516; *Chapman v. Schroeder*, 166 Wis. 330, 165 N. W. 295.

Cf. Myron v. Union R. Co., 19 R. I. 125, 32 Atl. 165. Where a deed is attacked for fraud or illegality the stated consideration may of course be contradicted for the purpose of impeaching the validity of the deed.

⁸⁷ The parol evidence rule which is equally applicable to sealed and unsealed writings here comes into play. See the following section.

⁸⁸ *Green v. Chicago & N. W. R. Co.*, 92 Fed. 873, 35 C. C. A. 68; *State v. United States, etc., Co.*, 81 Kans. 660, 670, 106 Pac. 1040, 26 L. R. A. (N. S.) 865; *Jefferson v. McCarthy*, 44 Minn. 26, 46 N. W. 140; *Board v. American L. & T. Co.*, 75 Minn. 489, 78 N. W. 113; *Blaco v. State*, 58 Neb. 557, 78 N. W. 1056.

⁸⁹ *Roberts v. Security Co., Ltd.*, [1897] 1 Q. B. 111; *Farnum v. Insurance Co.*, 83 Cal. 246, 23 Pac. 869, 17 Am. St. Rep. 233; *Provident Life Ins. Co. v. Fennell*, 49 Ill. 180; *Teutonic Life Ins. Co. v. Mueller*, 77 Ill. 22, 24; *Home Ins. Co. v. Gilman*, 112 Ind. 7, 13 N. E. 118; *Michael v. Mutual Ins. Co.*, 10 La. Ann. 737; *Consolidated, etc., Ins. Co. v. Cashow*, 41 Md. 59, 76; *Basch v. Humbolt, etc., Co.*, 35 N. J. L. 429;

Insurance policies are almost invariably written by corporations and under seal, so that the principle generally applicable to deeds might properly be held applicable to most insurance policies. Even though not under seal, an insurance policy may fairly be regarded as a mercantile speciality partaking rather of the character of a sealed instrument than of an ordinary written contract which is merely evidence of the contract and not itself the contract. It should also be observed that neither in the case of the insurance policy, nor of the deed of conveyance, is the question one of consideration for a contract. No policy of the law forbids a gratuitous conveyance, and in the insurance cases there is no question of gratuitous insurance. In all the cases unquestionably, if the insured had not paid the premium he had expressly or impliedly agreed to pay it; and the only question related to the enforcement of a condition in the policy that it should be invalid until the premium had been paid. Such a condition may of course be waived. It may also be added that if a contract in writing is made by statute the equivalent of a contract under seal at common law, so far as concerns the necessity of consideration, it may be that the rule of the common law in regard to estoppel by deed, so far as it still survives, should also be applied to any written conveyance or contract.

§ 115b. Recital of consideration in unsealed written agreements.

Where unsealed written contracts have not been given by statute the incidents of specialties, the mere fact that an agreement is in writing should not give to it any incident which at common law was peculiar to sealed writings. It has sometimes been too hastily supposed even where written

New York Central Ins. Co. v. Natl., etc., Ins. Co., 20 Barb. 471; Goit v. Insurance Company, 25 Barb. 189, 192; Kendrick v. Mutual Benefit Life Ins. Co., 124 N. C. 315, 32 S. E. 728; Southern Life Ins. Co. v. Booker, 9 Heisk. 606, 24 Am. Rep. 344. A similar rule has been stated as applicable to contracts of suretyship, 1 Brandt, Suretyship, § 52; McNerney v. Downs,

92 Conn. 139, 101 Atl. 494; States v. United States, etc., Co., 81 Kans. 660, 106 Pac. 1040, 26 L. R. A. (N. S.) 865. Such statements as to insurance policies and suretyship contracts, illustrate the disposition referred to in the preface of this book, to split up a general rule of the common law into a number of rules stated as if they were peculiar to a limited class of contracts.

contracts have not been given immunity from the requirement of consideration that a recital of the receipt of a specified consideration precludes the parties from disputing the validity of the instrument for lack of consideration. With such documents, however, it is only the parol evidence rule which need be considered. Beyond the limits of that rule there is no principle of estoppel by writing.⁹⁰ The parol evidence rule forbids any attempt to prove that the promises stated in a writing do not accurately represent the agreement of the parties;⁹¹ but it should be observed and insisted upon that the parol evidence rule has no application to recitals of fact. If it had, a recital of consideration could not be shown to be inaccurate in any particular, or, for any purpose, any more than a promise can be.⁹² It follows, therefore, that the only case where the parol evidence rule is applicable to a recital of consideration is where the consideration recited is itself a promise. That is, where the contract purports to be bilateral the parol evidence rule clearly forbids either party to a writing, though unsealed, to show that his own promise or that of his co-contractor was not accurately stated or was not given, as the writing states, in consideration of the other promise.⁹³ This is the only estoppel by writing. It should,

⁹⁰ "All contracts are by the laws of England distinguished into agreements by specialty, and agreements by parol; nor is there any such third class, as some of the counsel have endeavored to maintain, as contracts in writing." Skynner, C. B., delivering the opinion of all the judges to the Lord Chancellor, which was adopted by the House of Lords as a basis for affirming the decision of the Exchequer Chamber. *Rann v. Hughes*, 7 T. R. 350 n. (a).

⁹¹ It is nowhere questioned that in the case of an unsealed writing every freedom that is permissible in proving the consideration of a sealed instrument is allowable. *Keene v. Aetna Life Ins. Co.*, 213 Fed. 893; *Bolles v. Sachs*, 37 Minn. 315, 33 N. W. 862; *Barker v. Bradley*, 42 N. Y. 316, 320, 1 Am. Rep. 521; *Hendrick v. Crowley*, 31 Cal. 471;

Schneider v. Turner, 130 Ill. 28, 22 N. E. 497, 6 L. R. A. 164; *Gelpcke v. Blake*, 19 Ia. 263; *Voight v. Voight*, 96 Neb. 465, 148 N. W. 83; *Moore v. Ringo*, 82 Mo. 468; *Holmes' Appeal*, 79 Pa. 279; *Patchin v. Swift*, 21 Vt. 292.

⁹² See *Farquhar v. Farquhar*, 194 Mass. 400, 405, 80 N. E. 654.

⁹³ *St Louis & S. F. Ry. Co. v. Dearborn*, 60 Fed. 880, 23 U. S. App. 66, 9 C. C. A. 286; *Arnold v. Arnold*, 137 Cal. 291, 70 Pac. 23; *Harding v. Robinson*, 175 Cal. 534, 166 Pac. 808; *Brosseau v. Jacobs' Pharmacy Co.*, 147 Ga. 185, 93 S. E. 293; *Pickett v. Green*, 120 Ind. 584, 22 N. E. 737; *Reisterer v. Carpenter*, 124 Ind. 30, 24 N. E. 371; *Indianapolis U. Ry. Co. v. Houlihan*, 157 Ind. 494, 60 N. E. 943; *Cohen v. Jackoboice*, 101 Mich. 409, 59 N. W. 665; *Carter v. Weber*, 138

however, be observed that frequently when consideration is recited in a written contract as having been given, it will be true that though the consideration was not given the parties in fact agreed that the consideration recited should be given as such. This intention on any theory may be shown, since the evidence supports the instrument though varying a recital. But the recital of the receipt of a fictitious consideration is also common in written agreements, where in fact there was no consideration, and no intention to give any. Where, for instance, a consideration of one dollar is recited as having been paid in return for a stated promise, the parties ordinarily have not actually bargained for any such exchange, and if the truth cannot be shown, a promise will be enforced which in fact has no valid consideration. It would be destructive of the doctrine of consideration to hold that an admission of consideration in an unsealed writing estopped the promisor in favor of the promisee, who of course knows the actual facts,⁹⁴ from showing that no consideration existed. If merely saying in writing that a specified fictitious consideration has been received is enough to make a promise binding, a new and hitherto unacknowledged kind of formal obligation has been created. Clear as this is on principle, a doubt has been cast upon it by a remark made by Story, J., of the United States Supreme Court, and by decisions which have followed his statement. He said: "The guarantor acknowledged the receipt of the one dollar, and is now estopped to deny it. If she has not received it, she would now be entitled to recover it."⁹⁵ And this remark has been quoted in a later decision of the same court⁹⁶ and has served as the basis for other decisions or statements to the same effect.⁹⁷ The error in Judge Story's

Mich. 576, 101 N. W. 818; *Kramer v. Gardner*, 104 Minn. 370, 116 N. W. 925, 22 L. R. A. (N. S.) 492; *Jackson v. Chicago, etc., R. Co.*, 54 Mo. App. 636; *Wells v. Aufrecht*, 96 Neb. 402, 147 N. W. 1125; *Ferry v. Stephens*, 66 N. Y. 321; *Union Machinery &c. Co. v. Darnell*, 89 Wash. 226, 154 Pac. 183. But see *Fusting Ex. v. Sullivan*, 41 Md. 162.

⁹⁴ As to a third person who justifi-

ably relies on a recital of consideration, however, there may well be an estoppel. *Watkins v. Robertson*, 105 Va. 269, 54 S. E. 33, 5 L. R. A. (N. S.) 1194, 115 Am. St. Rep. 880.

⁹⁵ *Lawrence v. McCalmot*, 2 How. 426, 452, 11 L. Ed. 326.

⁹⁶ *Davis v. Wells*, 104 U. S. 159, 167, 26 L. Ed. 686.

⁹⁷ *Southern Bell Tel. & Tel. Co. v. Harris*, 117 Ga. 1001, 44 S. E. 885;

statement, for error it must be considered, is not that it directly denies any principles of law, but by a fictitious construction assumes to treat an acknowledgment of the receipt of one dollar by way of consideration if not true literally, because no money was received as amounting to a promise to give a dollar. Having thus fictitiously treated an admission of an alleged fact as a promise to make it true, the parol evidence rule becomes applicable to the case.⁹⁸ If this were sound the same principle might be applied to every written receipt. The argument is answered in a New York decision:⁹⁹ "It is said that it is an agreement to receive the sum named in full payment of his contract. That statement, however, is incorrect, for it does nothing of the sort. Nothing is promised. At most it is a mere admission of a past transaction or of an existing fact. It is a mere acknowledgment that an amount of money has been received by the plaintiff in full payment of his account. Hence, it must be regarded as a receipt only and not as a contract.

"That such a receipt, being an informal and non-depositive writing, may be modified, explained or contradicted by parol, is well established by the authorities in this state and elsewhere."

The policy of the law requires consideration, and no agree-

Schneider v. Turner, 130 Ill. 28, 22 N. E. 497, 6 L. R. A. 164; *Seyferth v. Groves, etc., Co.*, 217 Ill. 483, 75 N. E. 522; *Riley v. International Banana Food Co.*, 185 Ill. App. 629, 637 (but see *Pabst Brewing Co. v. LePage*, 186 Ill. App. 468); *Fuller v. Artman*, 69 Hun, 546, 24 N. Y. S. 13 (but see *Komp v. Raymond*, 175 N. Y. 102, 108, 67 N. E. 113; *Lessler v. De Loynes*, 150 N. Y. App. Div. 868, 135 N. Y. S. 948); *McPherson v. Fargo*, 10 S. D. 611, 74 N. W. 1057, 66 Am. St. Rep. 723.

⁹⁸ In *Seyferth v. Groves, etc., R. Co.*, 217 Ill. 483, 75 N. E. 522, a consideration of one dollar recited in a writing as given for an option was in fact tendered, but declined for the reason that if the dollar was wanted at all, the

promisor would "take it all at once;" that is, when the option should be exercised, and the land to which it related paid for. The court said (at page 486), "It was equivalent to saying to appellee that he waived the payment, or that he preferred postponement of the payment, or that, as between the parties, it should be considered as paid though the money was not to be received until a later adjustment," and held the option binding in spite of a subsequent revocation. It seems impossible to support the decision. To admit that consideration may be waived is to say that the rule of law requiring consideration can be changed if the parties object to it.

⁹⁹ *Komp v. Raymond*, 175 N. Y. 102, 108, 67 N. E. 113.

ment of the parties to forego the requirement can take its place. It will be observed that the so-called estoppel amounts at most to an agreement to forego consideration. Both parties know the facts. There is no reliance on a misstatement. Where the parties state a promise as consideration, as has been seen, the parol evidence rule fastens that agreement upon them irrespective of their actual intention or oral agreement.¹ But the recital of an alleged past fact which both parties know to be untrue will not deceive the court, and should not operate as a promise when the parties have manifested no intent to promise.² A statement in a written contract of an

¹ See further, *infra*, § 610.

² *Presbyterian Church v. Cooper*, 112 N. Y. 517, 20 N. E. 352; *McCourt v. Peppard*, 126 Wis. 326, 105 N. W. 809. In *Stewart v. Chicago, etc., R. Co.*, 141 Ind. 55, 59, 40 N. E. 67, a release was set up as a defence to an action for personal injuries. The release recited a consideration of \$31.50. Want of consideration was set up by way of replication. The court said, at page 59, "In *Pickett v. Green*, 120 Ind. 584, in speaking of the rule that the consideration expressed in a writing may be varied or contradicted by parol this court has said: 'The reason generally given for the rule is, that the language with reference to the consideration is not contractual; it is merely by way of recital of a fact, viz., the amount of the consideration, and not an agreement to pay it, and hence such recitals may be contradicted.'

"Referring to the general rule that parol evidence cannot be admitted to contradict the terms of a written contract, it was there further said that 'out of this grows the exception to the rule first above stated, that where the contract is complete upon its face, a stipulation as to the consideration becomes contractual, and where there is either a direct and positive promise to pay the consideration named, or an assumption of an encumbrance on the

part of a grantee in a deed which becomes binding upon its acceptance, then the ordinary rules with reference to contracts apply, and the consideration expressed can no more be varied by parol than any other portion of the written contract.'

"In our judgment, the consideration expressed in the writing before us is not contractual, but is manifestly a recital of the amount of the consideration. It includes no agreement to pay or assume any sum or liability. It may be considered apart from the obligations of the appellant, and its statement was not essential to the validity of such obligations, but it might have been established by parol. We have no doubt that the cases correctly applying the rule that no parol inquiry may be made into the consideration expressed, are those where the consideration consists in the performance of some duty which is, by the terms of the writing, undertaken on the one side for the benefit of the other. Such duties cannot be diminished or enlarged by parol. As we have said, the consideration of the contract before us involves the performance of no duty. The contract recites, as a consideration for the relinquishment therein stated, the payment to the appellant of a sum of money.

"If this recital is false, the same

existing fact, as that something other than a promise has been received as consideration, though not conclusive, is, however, *prima facie* evidence of that fact.³

§ 116. Charitable subscriptions.

The very term charitable subscription indicates that the subscriber's promise is made as a gift and not in return for consideration. There is no bargain between the parties. Even if one were attempted it is open to doubt whether the acceptance or promise to accept a pure benefit—as a sum of money—can legally be sufficient consideration for a promise to confer the benefit;⁴ but this point need not be troublesome because no bargain of the sort is contemplated. Nor does it help the matter that a charitable subscription is generally not a promise to give money unconditionally but to give it for a certain object. A promise to give a tramp \$20, for an overcoat is no more binding than a promise to give him \$20 to spend as he pleases.⁵ Nor has the law generally accepted the principle that reliance on a gratuitous promise makes the promise binding.⁶ A promise to give a church a thousand dollars towards a new build-

right exists to prove that fact by parol, as exists in any possible case, where the consideration alone of a contract may be attacked by parol. Under the second paragraph of reply, it may be proven that no sum whatever was received, and under the third paragraph, it may be proven that a sum was received, not at the time of, or as the consideration for, the execution of the instrument, but at another time, though falsely, and colorably carried into the instrument." In *Koppitz-Melchers Brewing Co. v. Behm*, 130 Mich. 649, 653, 90 N. W. 676, the court said: "If, as contended by the plaintiff, this writing contains the entire contract, and cannot be varied or added to by parol, it is a unilateral contract, [i. e., a gratuitous promise] which only becomes binding when the consideration therein mentioned is paid."

³ *Blum v. Mitchell*, 59 Ala. 535;

Whitney v. Stearns, 16 Me. 394; *Frank v. Irgins*, 27 Minn. 43, 6 N. W. 380; *Jerome v. Whitney*, 8 Johns. 321; *Eastern Plank Rod Co. v. Vaughan*, 20 Barb. 155, 14 N. Y. 546; *Lessler v. De Loynes*, 150 N. Y. App. Div. 868, 135 N. Y. S. 898 (contract under seal); *Jones v. Holliday*, 11 Tex. 412, 62 Am. Dec. 487; *Thrall v. Newell*, 19 Vt. 202, 47 Am. Dec. 682; *Bibelhausen v. Bibelhausen*, 159 Wis. 365, 150 N. W. 516.

⁴ See *supra*, § 103d.

⁵ In *Martin v. Meles*, 179 Mass. 114, 60 N. E. 397, *Holmes, C. J.*, said: "Of course the mere fact that a promisee relies upon a promise made without other consideration does not impart validity to what before was void. *Bragg v. Danielson*, 141 Mass. 195, 196, 4 N. E. 622." See also *Thorne v. Deas*, 4 Johns. 84.

⁶ See *infra*, § 139.

ing, is equally gratuitous. Clear as this is, and though in England such a subscription is not binding,⁷ in the United States, on such a great variety of reasoning, as in itself shows the lack of any really valid consideration, charitable subscriptions have been held either contracts or offers to contract. The view most commonly held is that such a subscription is an offer to contract which becomes binding as soon as the work towards which the subscription was promised has been done or begun, or liability incurred in regard to such work on the faith of the subscription.⁸

Since the subscription in its inception is regarded as an offer, until the work has been done or liability incurred the subscription is revocable by death, insanity, or otherwise.⁹

⁷ *In re Hudson*, 54 L. J. Ch. 811. See also *Reinhart v. Bugar*, 43 Ont. L. R. 120.

⁸ *Young Men's Christian Assoc. v. Estill*, 140 Ga. 291, 78 S. E. 1075, 48 L. R. A. (N. S.) 783; *Miller v. Ballard*, 46 Ill. 377; *Trustees v. Garvey*, 53 Ill. 401, 5 Am. Rep. 51; *Richelieu Hotel Co. v. International Co.*, 140 Ill. 248, 29 N. E. 1044; *University of Des Moines v. Livingston*, 57 Ia. 307, 10 N. W. 738, 65 Ia. 202, 21 N. W. 564, 42 Am. Rep. 42; *McCabe v. O'Connor*, 69 Ia. 134, 28 N. W. 573; *First Church v. Donnell*, 110 Ia. 5, 81 N. W. 171; *Brokaw v. McElroy*, 162 Ia. 288, 143 N. W. 1087, 50 L. R. A. (N. S.) 835; *Gittings v. Mayhew*, 6 Md. 113; *Cottage St. Church v. Kendall*, 121 Mass. 528, 23 Am. Rep. 286; *Sherwin v. Fletcher*, 168 Mass. 413, 47 N. E. 197; *Robinson v. Nutt*, 185 Mass. 345, 70 N. E. 198; *Albert Lea College v. Brown*, 88 Minn. 524, 93 N. W. 672, 60 L. R. A. 70; *Pitt v. Gentle*, 49 Mo. 74; *School District Kansas City v. Sheidley*, 138 Mo. 672, 40 S. W. 656, 37 L. R. A. 406, 60 Am. St. Rep. 576; *James v. Clough*, 25 Mo. App. 147; *Ohio, etc., College v. Love's Ex'r*, 16 Oh. St. 20; *Irwin v. Lombard Univ.*, 56 Ohio St. 9, 46 N. E. 63; *sub nom. Irwin v. Webster*, 36 L. R. A. 239 (cf. *John-*

son v. Otterbein Univ., 41 Ohio St. 527); *In re Converse's Est.*, 240 Pa. 458, 87 Atl. 849; *Young Men's Christian Assoc. v. Olds Co.*, 84 Wash. 630, 147 Pac. 406; *Hodges v. Nalty*, 104 Wis. 464, 80 N. W. 726; *Sargent v. Nicholson*, 25 Dom. L. R. 638, 26 Manitoba L. R. 53; *Young Men's Christian Assoc. v. Rankin*, 27 Dom. L. R. 417. See also *Lasar v. Johnson*, 125 Cal. 549, 58 Pac. 161; *Galt's Ex. v. Swain*, 9 Gratt. 633, 60 Am. Dec. 311. The use of the defendant's subscription as an inducement to others to subscribe was held to make it binding in *Board of Trustees v. Noyes*, 165 Ia. 601, 146 N. W. 848.

⁹ *Grand Lodge v. Farnham* 70 Cal. 158, 11 Pac. 592; *Pratt v. Baptist Soc.*, 93 Ill. 475, 34 Am. Rep. 187; *Beach v. First Church*, 96 Ill. 177; *Augustin v. Methodist Society*, 72 Ill. App. 452; *Davis v. Campbell*, 93 Ia. 524, 532, 61 N. W. 1053; *Sullivan v. Corbett*, 3 Kans. App. 390, 42 Pac. 1105; *Helfenstein's Est.*, 77 Pa. 328, 18 Am. Rep. 449; *First Church v. Gillis*, 17 Pa. Co. Ct. 614. See also *Reimensnyder v. Gans*, 110 Pa. 17, 2 Atl. 425; cf. *In re Converse's Est.*, 240 Pa. 458, 87 Atl. 849, where the court held that the fact that other subscriptions had been induced in reliance on the promise of a

The difficulty with this view is two-fold. In the first place, "if A says, 'I will give you, B, £1000,' and B, in reliance on that promise, spends £1,000 in buying a house, B cannot recover the £1000 from A."¹⁰ The detriment is incurred in reliance on a promise which on its face was intended as a gift and not a bargain. Moreover, if the subscription could be treated as requesting a consideration, the consideration requested is certainly not beginning work or incurring liability, but doing the whole work toward which the subscription was made. Therefore, if the subscription was an offer at all, it would not ripen into a contract until the work had been done.¹¹ It is held in other jurisdictions that the promise of each subscriber is supported by the promises of the others.¹² The difficulty with this view is its lack of conformity to the facts. It is doubtless possible for two or more persons to make mutual promises that each will give a specified amount to a charity or other object,¹³ but in the case of ordinary charitable subscriptions, the promise of each subscriber is made directly to the charity or its trustees, and it is frequently made without any reference to the subscriptions of others. If induced at all by previous or expected subscriptions, this inducement only affects the motive of the subscriber; it cannot be said that the previous subscriptions were given in exchange for the later one. Indeed the earlier subscriptions would be open to the objection of being past consideration so far as a later subscription was concerned. The case is no better if the subscriptions are made conditional upon a certain amount being subscribed, this requirement must ordinarily be con-

subscriber made his promise irrevocable by death.

¹⁰ *In re Hudson*, 54 L. J. Ch. 811, by Pearson, J.

¹¹ See *supra*, § 60.

¹² *Christian College v. Hendley*, 49 Cal. 347; *Owenby v. Georgia Baptist Assembly*, 137 Ga. 698, 74 S. E. 56; *Higert v. Trustees of Indiana Asbury University*, 53 Ind. 326; *Petty v. Trustees of Church of Christ*, 95 Ind. 278; *Allen v. Duffie*, 43 Mich. 1, 4 N. W. 427, 38 Am. Rep. 159; *Congregational Soc. v. Perry*, 6 N. H. 164, 25 Am. Dec. 455; *Edinboro Academy v.*

Robinson, 37 Pa. 210, 78 Am. Dec. 421. See also *First Church v. Pungs*, 126 Mich. 670, 86 N. W. 235; *Homan v. Steele*, 18 Neb. 652, 26 N. W. 472. See also *Hodges v. Nalty*, 104 Wis. 464, 80 N. W. 726, 113 Wis. 567, 89 N. W. 535; *Hodges v. O'Brien*, 113 Wis. 97, 88 N. W. 901.

¹³ *Tweddle v. Atkinson*, 1 B. & S. 393; *Rogers v. Galloway College*, 64 Ark. 627, 44 S. W. 454, 39 L. R. A. 636; *Lasar v. Johnson*, 125 Cal. 549, 58 Pac. 161; *LaFayette Corporation v. Ryland*, 80 Wis. 29, 49 N. W. 157.

strued as merely a condition and not a consideration; though, here again, it is possible to make an offer to contract to pay a certain sum in consideration of subscriptions of a certain amount being obtained. In a few cases it has been held that the fact that other subscriptions had been induced by the subscription in question was a sufficient consideration;¹⁴ but this view is even more difficult to maintain than the others which have been stated. On no reasonable construction of the facts can it be said that a subscriber in an ordinary charitable subscription makes his promise in exchange for the promisee's inducing other subscribers to subscribe.

In still other cases it has been held that the acceptance of the subscription by the beneficiary or its representatives imports a promise to apply the funds properly, and this promise supports the subscribers' promises.¹⁵

It is doubtless true that the charity to which subscription is made, or the trustees of the charity, impliedly promise to apply the funds in accordance with the terms of the subscription. But this promise is not made as the consideration or exchange for the subscriber's promise. A promise to give a trustee money in trust for another is no more binding than a promise to give the money directly to the beneficiary. In a few cases in the United States a tendency has been shown to restrict former authorities and treat charitable subscriptions as gratuitous and not binding.¹⁶ In truth the enforcement of

¹⁴ *Hanson Trustees v. Stetson*, 5 Pick. 506; *Watkins v. Eames*, 9 Cush. 537; *Ives v. Sterling*, 6 Met. 310 (but this theory was discredited in *Cottage St. Church v. Kendall*, 121 Mass. 528, 23 Am. Rep. 286); *Comstock v. Howd*, 15 Mich. 237 (but see *Northern, etc., R. v. Eslow*, 40 Mich. 222); *Irwin v. Lombard Univ.*, 56 Ohio St. 9, 46 N. E. 63; *In re Converse's Estate*, 240 Pa. 458, 87 Atl. 849.

¹⁵ *Barnett v. Franklin College*, 10 Ind. App. 103, 697, 37 N. E. 427, 432; *Collier v. Baptist Soc.*, 8 B. Mon. 68; *Trustees v. Fleming*, 10 Bush, 234; *Trustees of Maine Central v. Haskell*, 73 Me. 140; *Helfenstein's Est.*, 77

Pa. 328, 331, 18 Am. Rep. 449; *Trustees of Troy Academy v. Nelson*, 24 Vt. 189.

¹⁶ *Culver v. Banning*, 19 Minn. 303 (but see *Albert Lea College v. Brown*, 88 Minn. 524, 93 N. W. 672, 60 L. R. A. 870); *Presbyterian Church v. Cooper*, 112 N. Y. 517, 20 N. E. 352, 8 Am. St. Rep. 767; *Twenty-third St. Church v. Cornell*, 117 N. Y. 601, 23 N. E. 177, 6 L. R. A. 807 (*cf. Keuka College v. Ray*, 167 N. Y. 96, 60 N. E. 325); *Montpelier Seminary v. Smith's Estate*, 69 Vt. 382, 38 Atl. 66 (*cf. Grand Isle v. Kinney*, 70 Vt. 381, 41 Atl. 130).

charitable subscriptions is only to be supported if a promissory estoppel be regarded as a sufficient substitute for consideration.¹⁷ In a few decisions the court has frankly admitted that estoppel and not consideration was the ground on which recovery was allowed.¹⁸ The correctness of such decisions and the propriety of allowing a recovery on charitable subscriptions in any case where detriment had been incurred in reliance on them, must depend on the general allowance of such a promissory estoppel as an alternative for consideration.¹⁹

§ 117. Subscriptions for business purposes.

It is not uncommon for subscribers to contract for some business end either with one another or with a person or corporation to whom the subscriptions are payable. This means that the subscribers are not planning to make a gift of the money which they subscribe, but to receive an exchange for it. If this exchange is requested as a return for the subscription, the subscription is supported by valid consideration. Instances of such bargains may be found where subscribers, to induce a corporation to move its plant,²⁰ or to build a factory in a certain place,²¹ or to induce a municipality to make improvements,²² promise sums of money. Sometimes the bargain is unilateral, the subscribers making an offer which is accepted by the actual doing of the thing.²³ In such a case it would seem upon principle that the subscription was revocable until the act requested was fully completed;²⁴ but many courts would doubtless hold

¹⁷ See *infra*, § 139.

¹⁸ *Beatty v. Western College*, 177 Ill. 280, 52 N. E. 432, 42 L. R. A. 797, 69 Am. St. Rep. 242; *Simpson College v. Tuttle*, 71 Iowa, 596, 33 N. W. 74; *School District Kansas City v. Sheidley*, 138 Mo. 672, 40 S. W. 656, 37 L. R. A. 406, 60 Am. St. Rep. 576.

¹⁹ See *infra*, § 139.

²⁰ *Fort Wayne Electric Light Co. v. Miller*, 131 Ind. 499, 30 N. E. 23, 14 L. R. A. 804; *Bohn Mfg. Co. v. Lewis*, 45 Minn. 164, 47 N. W. 652.

²¹ *Gibbons v. Bente*, 51 Minn. 499, 53 N. W. 756, 22 L. R. A. 80; *Locke v. Taylor*, 161 N. Y. App. Div. 44, 146 N. Y. Supp. 256; *Gibbons v. Grinsel*,

79 Wis. 365, 48 N. W. 255; *Superior Consolidated Land Co. v. Bickford*, 93 Wis. 220, 67 N. W. 45.

²² *Gerard v. Seattle*, 73 Wash. 519, 132 Pac. 227.

²³ Such were the bargains in—*Curry v. Kentucky Western R. Co.*, 25 Ky. L. Rep. 1372, 78 S. W. 435; *Fort Wayne Electric Light Co. v. Miller*, 131 Ind. 499, 30 N. E. 23, 14 L. R. A. 804; *Bohn Mfg. Co. v. Lewis*, 45 Minn. 164, 47 N. W. 652; *Locke v. Taylor*, 161 N. Y. App. Div. 44, 146 N. Y. Supp. 256; *Superior Consolidated Land Co. v. Bickford*, 93 Wis. 220, 67 N. W. 45.

²⁴ See *supra*, § 60. Cf. cases cited in the preceding note.

that the incurring of expense by the offeree with a view to accepting the offer would make the subscription irrevocable.²⁵ The bargains, however, may be bilateral. A promise being made at the outset to the subscribers as well as by them.²⁶

A business subscription may take other forms. The subscribers individually may promise one another to contribute land or money to a business enterprise.²⁷ So the mutual promises of stockholders that their voting powers shall be vested in trustees are valid reciprocal considerations for each other.²⁸

§ 118. Subscriptions to stock in corporations.

Subscriptions to stock in corporations involve no different principles from other business subscriptions. The subscriber promises his payment in return for the promise of the corporation to give him stock.²⁹ The form in which the subscription is made is immaterial. Any facts showing actual assent will constitute a contract.³⁰ Until the contract of subscription is completed by acceptance, the subscriber may withdraw.³¹ Frequently subscriptions are made to the stock of corporations before the corporation is organized. It is then impossible to make a bilateral contract with the corporation, and, consequently, the subscription remains a mere offer until the corporation is organized and accepts

²⁵ See *Superior Consolidated Land Co. v. Bickford*, 93 Wis. 220, 67 N. W. 45. Also *supra*, § 116.

²⁶ *Gibbons v. Bente*, 51 Minn. 499, 53 N. W. 756, 22 L. R. A. 80; *Gibbons v. Grinsel*, 79 Wis. 365, 48 N. W. 255. In these cases a bilateral written agreement was drawn up in which a promise was made to build a dairy in return for the promises of the subscribers to pay certain sums.

²⁷ In *Martin v. Meles*, 179 Mass. 114, 60 N. E. 397, a number of manufacturers promise to contribute \$500 and such additional sums up to \$2000 as might be necessary, to a committee for defending suits arising out of certain patents. The court held the subscribers bound, finding consideration

in the promise of the committee to defend the suits.

²⁸ *Carnegie Trust Co. v. Security L. I. Co.*, 111 Va. 1, 68 S. E. 412, 31 L. R. A. (N. S.) 1186.

²⁹ *Harris's Case*, L. R. 7 Ch. 587; *Household Fire Ins. Co. v. Grant*, 4 Exch. D. 216, and cases in this section, *passim*.

³⁰ *Planters', etc., Co. v. Webb*, 144 Ala. 666, 39 So. 562; *Ventura, etc., Ry. Co. v. Collins* (Cal.), 46 Pac. 287; *Jackson, etc., Co. v. Walle*, 105 La. 89, 29 So. 503; *Nebraska, etc., Co. v. Lednický*, 79 Neb. 587, 113 N. W. 245.

³¹ *Re London & Northern Bank* (1900), 1 Ch. 220; and see cases in the following note.

the subscription.³² A subscription to an enterprise not yet incorporated might well be in the form of a bilateral contract with the promoter, with a provision that the promoter's right and liabilities should be assumed by the intended corporation when formed.³³

§ 119. A promise contingent on an unknown past event is valid consideration.

As has already been seen³⁴ a conditional promise may be sufficient consideration. The performance of such a promise does not necessarily involve a detriment since the condition upon which any action is to take place may not happen. But the possibility that the condition may happen, involves a chance of detriment which is sufficient to make the promise valid consideration. If, however, a condition in the promise relates to a matter which has already happened so that if the truth were known to the parties it would be apparent that the promisor really bound himself for nothing, it may be urged that the promise is insufficient consideration. For instance, the buyer and seller, for a lump price of a tract of land supposed to contain a certain number of acres may mutually agree that if the amount of land in the tract is less than was supposed when the sale was made, a deduction shall

³² *Bryant's Pond Steam Mill Co. v. Felt*, 87 Me. 234, 32 Atl. 888, 33 L. R. A. 593, 47 Am. St. Rep. 323; *Hudson Real Estate Co. v. Tower*, 156 Mass. 82, 30 N. E. 465, 161 Mass. 10, 36 N. E. 680, 42 Am. St. Rep. 379; *Plank's Tavern Co. v. Burkhard*, 87 Mich. 182, 49 N. W. 562; *Badger Paper Co. v. Rose*, 95 Wis. 145, 70 N. W. 302, 37 L. R. A. 162; *Providence, etc., Co. v. Kent, etc., Co.*, 19 R. I. 561, 35 Atl. 152; *cf. Jamestown Portland Cement Corp. v. Bowles*, 228 Mass. 176, 117 N. E. 41. In Pennsylvania it is held that a subscriber may withdraw only prior to the time when articles of incorporation are ready for filing. *Auburn, etc., Works v. Shultz*, 143 Pa. 256, 22 Atl. 904. And a few decisions seem to hold that after expense has been in-

curred in reliance upon the subscription, withdrawal cannot be made. *Cook v. Chittenden*, 25 Fed. 544; *Lewis v. Hillsboro, etc., Co. (Tex.)*, 23 S. W. 338; *Patty v. Hillsboro, etc., Co.*, 4 Tex. Civ. App. 224, 23 S. W. 336. It has also been held that in no case after several subscriptions have been made, can one subscriber withdraw without consent of the others, each subscriber being treated as contracting with the other subscribers. *Nebraska, etc., Co. v. Lednický*, 79 Neb. 587, 113 N. W. 245.

³³ See *infra*, § 306; and further in regard to subscriptions to corporations, *Cook on Corporations*, §§ 52 *et seq.*, 166 *et seq.*

³⁴ *Supra*, § 112.

be made in the price for each acre of deficiency; while if the amount of land in the tract exceeds what had been understood, a corresponding increase for each added acre shall be made. On a survey being made the tract proves larger than had been supposed. In actual fact, therefore, the seller in promising to pay for a possible deficiency promises nothing, since there was no deficiency. Nevertheless on these facts, it was held that the buyer's promise to pay for the excess was supported by sufficient consideration.³⁵ So it has been held that where several heirs agreed after a relative's death but before the contents of his will were known, that whatever the terms of the will they would divide the estate evenly, the agreement was held binding, although in actual fact those who received under the will less than a ratable share were promising nothing in return for the promises of those who under the will would take more than a ratable share to surrender some portion to the others.³⁶ So a wager on an unknown past event aside from the defence of illegality (which would now invalidate the agreement)³⁷ is a valid contract;³⁸ and other decisions to the same effect might be added.³⁹

It is believed that these decisions are sound in principle. The law looks at the matter not from the standpoint of universal intelligence but from the standpoint of the parties, and as the law is made for man, and not man for the law, this is the only proper attitude. From the standpoint of the parties in the cases referred to above, the risk is as real where the contingency has already happened, but is unknown, as is the case where the contingency has not yet happened. This is not saying that anything is detrimental which the parties think detrimental, but only that where on the facts known at

³⁵ *Seward v. Mitchell*, 1 Coldw. 87.

³⁶ *Supreme Assembly v. Campbell*, 17 R. I. 402. See also *Minehan v. Hill*, 144 N. Y. App. D. 854, 129 N. Y. S. 873.

³⁷ See *infra*, § 1668.

³⁸ *Sheppard, Actions* (2d ed.), 178; *March v. Pigot*, 5 Burroughs, 2802.

³⁹ *Barnum v. Barnum*, 8 Conn. 469, 21 Am. Dec. 689; *Rothrock v. Perkinson*, 61 Ind. 39; *Howe v. O'Mally*, 1

Murphy, 287, 3 Am. Dec. 693; *Kennedy's Ex. v. Ware*, 1 Pa. St. 445, 44 Am. Dec. 145. See also *Beckley v. Newland*, 2 P. Wms. 182; *McElvain v. Mudd*, 44 Ala. 48, 4 Am. Rep. 106; *Curry v. Davis*, 44 Ala. 281; *Pool v. Docker*, 92 Ill. 501. Cf. *Walker v. Walker*, Holt, 328, 5 Mod. 13; *Harding v. Walker*, Hempst. 53; *Smith v. Knight*, 88 Ia. 257, 55 N. W. 189.

the time of the bargain any reasonable person would think a detriment or a possible detriment was promised, the consideration is valid.

§ 120. Payment or promise of payment of a debt is not valid consideration.

Since a debtor incurs no legal detriment by paying part or all of what he owes, and a creditor obtains no legal benefit in receiving it, such a payment if made at the place where the debt is due in the medium of payment which was due, and at or after maturity of the debt, is not valid consideration for any promise. The question most commonly arises when a debtor pays part of a liquidated debt in return for the creditor's agreement that the debt shall be fully satisfied. Such an agreement on the part of the creditor needs for its support other consideration besides the mere part payment.

A chose in action, in the language of the Common Law, lies in grant and not in livery. Only by an agreement under seal, or by a promise for consideration can the whole or part of a debt which is represented by no tangible symbol capable of delivery be discharged.⁴⁰ Accordingly the agreement of the creditor to discharge the whole debt then and there due in consideration of the payment of part is unsupported by valid consideration.⁴¹ Occasional decisions may be found

* If represented by a note or bond, the intentional cancellation or surrender of that will discharge the debt whether the debtor pays part of the claim or nothing at all. See *infra*, §§ 1876 *et seq.*

⁴⁰ *Cumber v. Wane*, 1 Strange, 426; *Foakes v. Beer*, 9 A. C. 605; *Chicago etc., Ry. Co. v. Clark*, 178 U. S. 353, 44 L. Ed. 1099; *Hodges v. Tennessee Implement Co.*, 123 Ala. 572, 26 So. 490; *Black v. Slocumb Mule Co.*, 8 Ala. App. 440, 62 So. 308; *Scott v. Rawls*, 159 Ala. 399, 48 So. 710; *Reynolds v. Reynolds*, 55 Ark. 369, 18 S. W. 377 (*cf.* *Dreyfus v. Roberts*, 75 Ark. 354, 87 S. W. 641, 112 Am. St. Rep. 67; *North State F. I. Co. v. Dillard*, 88 Ark.

473, 115 S. W. 154); *Peacher v. Witter*, 131 Cal. 316, 63 Pac. 468; *Barnum v. Green*, 13 Col. App. 254, 57 Pac. 757; *Warren v. Skinner*, 20 Conn. 559; *Rose v. Hall*, 26 Conn. 392, 68 Am. Dec. 402; *State v. Northrop* (Conn.), 106 Atl. 504; *Jordy v. Maxwell*, 62 Fla. 236, 56 So. 946; *Hayes v. Mass. Mut. L. Ins. Co.*, 125 Ill. 626, 18 N. E. 322, 1 L. R. A. 303; *Knights Templars' Co. v. Crayton*, 209 Ill. 550, 70 N. E. 1066; *Farmers' &c. Assoc. v. Caine*, 224 Ill. 599, 79 N. E. 956; *Snow v. Griesheimer*, 220 Ill. 106, 109, 77 N. E. 110; *Woodbury v. United States Casualty Co.*, 234 Ill. 227, 120 N. E. 8; *Janci v. Cerny*, 287 Ill. 359, 122 N. E. 507; *Beaver v. Fulp*, 136 Ind. 595, 36 N. E. 418;

which are inconsistent with the general rule though that rule is admitted by the courts making the decisions. Thus it has been held in several cases that payment of a reduced rent in accordance with a parol agreement satisfies the tenant's obligation under the lease to pay a larger sum.⁴² Such a result, however, cannot be made consistent with accepted principles of consideration. A written but unsealed receipt in full signed by the creditor gives no added efficacy to the agreement.⁴³ Nor an indorsement of satisfaction on an execu-

Bender v. Been, 78 Iowa, 283, 43 N. W. 216, 5 L. R. A. 596; *Cartan v. Wm. Tackaberry Co.*, 139 Ia. 586, 117 N. W. 953; *St. Louis, etc., R. Co. v. Davis*, 35 Kan. 464, 11 Pac. 421; *New York L. I Co. v. Van Meter's Adm.*, 137 Ky. 4, 121 S. W. 438, 136 Am. St. Rep. 282; *Lee v. Oppenheimer*, 32 Me. 253; *Emmitsburg R. Co. v. Donoghue*, 67 Md. 383, 10 Atl. 233, 1 Am. St. Rep. 396; *Commercial Farmers' Bank v. McCormick*, 97 Md. 703, 55 Atl. 439; *Prudential Ins. Co. v. Cottingham*, 103 Md. 319, 63 Atl. 359; *Tyler v. Odd-Fellows' Mut. Relief Assoc.*, 145 Mass. 134, 13 N. E. 360; *Emerson v. Gerber*, 178 Mass. 130, 59 N. E. 666; *Attorney General v. Supreme Council*, 196 Mass. 151, 81 N. E. 966; *Upton v. Dennis*, 133 Mich. 238, 94 N. W. 728; *Demeules v. Jewel Tea Co.*, 103 Minn. 150, 114 N. W. 733, 123 Am. St. Rep. 315, 14 L. R. A. (N. S.) 954; *Wherley v. Rowe*, 106 Minn. 494, 119 N. W. 222; *Foster County State Bank v. Lammers* (Minn.), 134 N. W. 501; *Winter v. Kansas City Ry. Co.*, 160 Mo. 159, 61 S. W. 606; *Vinson v. Lee Jordan Co.*, 167 Mo. App. 201, 151 S. W. 199; *McIntosh v. Johnson*, 51 Neb. 33, 70 N. W. 522; *Crawford v. Darrow*, 87 Neb. 494, 127 N. W. 891; *Line v. Nelson*, 38 N. J. L. 358; *Day v. Gardner*, 42 N. J. Eq. 199, 7 Atl. 365; *Murphy v. Kastner*, 50 N. J. Eq. 214, 24 Atl. 564; *Eckert v. Wallace*, 75 N. J. L. 171, 67 Atl. 76; *Decker v. Smith*, 88 N. J. L. 630, 96 Atl. 915; *Jaffray v. Davis*, 124

N. Y. 164, 26 N. E. 351, 35 N. Y. St. 106, 11 L. R. A. 710; *Dorman v. Arkin*, 120 N. Y. S. 757; *Kleinfelter v. Granger*, 136 N. Y. S. 485; *McKenzie v. Culbreth*, 66 N. C. 534; *Harper v. Graham*, 20 Ohio, *105; *Keen v. Vaughan*, 48 Pa. 477; *Thomas v. Hill Top Section*, 260 Pa. 1, 103 Atl. 504; *Rose v. Daniels*, 8 R. I. 381; *Clark v. Summerfield Co.*, 40 R. I. 254, 100 Atl. 499; *Ex parte Zeigler*, 83 S. C. 78, 64 S. E. 513; *Hagen v. Townsend*, 27 S. D. 457, 131 N. W. 512; *Miller v. Fox*, 111 Tenn. 336, 76 S. W. 893; *Simmons Hardware Co. v. Adams* (Tex. Civ. App.), 147 S. W. 1196; *Bergman Produce Co. v. Brown* (Tex. Civ. App.), 156 S. W. 1102; *Goodwin v. Follett*, 25 Vt. 386; *Smith v. Phillips*, 77 Va. 548; *Nixon v. Kiddy*, 66 W. Va. 355, 66 S. E. 500; *Rettinghouse v. Ashland*, 106 Wis. 595, 82 N. W. 555; *Weidner v. Standard Ins. Co.*, 120 Wis. 10, 110 N. W. 246.

⁴² *Bowman v. Wright*, 65 Neb. 661, 91 N. W. 580; *McKenzie v. Harrison*, 120 N. Y. 260, 24 N. E. 458, 8 L. R. A. 257, 17 Am. St. Rep. 638; *Ossowski v. Wiesner*, 101 Wis. 238, 77 N. W. 134. *Cf. Doherty v. Doe*, 18 Colo. 456, 33 Pac. 165.

⁴³ *Chicago, etc., R. Co. v. Clark*, 92 Fed. 968, 35 C. C. A. 120 (rev'd in 178 U. S. 353, 44 L. Ed. 1099, on the ground that the claim in question was unliquidated); *Woodbury v. United States Casualty Co.*, 284 Ill. 227, 120 N. E. 8; *St. Louis, etc., R. Co. v. Davis*,

tion issued on a judgment for the debt.⁴⁴ The application of the law of consideration to attempted discharge of liquidated claims has not infrequently been criticised by courts and law writers;⁴⁵ and in a few jurisdictions the law has been changed by decision,⁴⁶ or statute.⁴⁷ But the rule of the common law

35 Kans. 464, 11 Pac. 421; *Jones v. Ricketts*, 7 Md. 108; *Harriman v. Harriman*, 12 Gray, 341; *Riley v. Kershaw*, 52 Mo. 224; *Murphy v. Kastner*, 50 N. J. Eq. 214, 24 Atl. 564; *Galowitz v. Hendlin* (App. Term.) 150 N. Y. S. 641; *Smoot v. Checketts*, 41 Utah, 211, 125 Pac. 412. See also *Harms v. Fidelity & Casualty Co.*, 172 Mo. App. 241, 157 S. W. 1046. See, however, the contrary decisions (based frequently on statutes), at the end of the next note.

A receipt in full under seal is a discharge of the unpaid balance of a debt, where seals still have their common-law efficacy. *Jackson v. Security Mut. Ins. Co.*, 233 Ill. 161, 84 N. E. 198.

⁴⁴ *Smith v. Johnson*, 224 Mass. 50, 112 N. E. 644.

⁴⁵ Some of the secriticisms are quoted by Professor Ames, 12 Harv. L. Rev. 525.

⁴⁶ *Clayton v. Clark*, 74 Miss. 499, 22 So. 189, 37 L. R. A. 771, 60 Am. St. Rep. 521; *Frye v. Hubbell*, 74 N. H. 358, 68 Atl. 325, 17 L. R. A. (N. S.) 1197; *Brown v. Kern*, 21 Wash. 211, 57 Pac. 798; *Baldwin v. Daly*, 41 Wash. 416, 417, 83 Pac. 724.

⁴⁷ In North Carolina any agreement whether executed or executory, to settle a claim by payment in part, is valid. *Jones v. Coffey*, 109 N. C. 515, 14 S. E. 84; *York v. Westall*, 143 N. C. 276, 55 S. E. 724; *Pruden v. Railroad Co.*, 121 N. C. 509, 28 S. E. 349; *Ramsey v. Browder*, 136 N. C. 251, 48 S. E. 651. The Indian Contract Act, § 63, is equally broad, as is British Columbia Supreme Court Act, Sec. 19, Sub. sec. 25. In Georgia (Code, § 4329), Maine (Rev. Stat. § 59), Virginia (Code, § 2858), and perhaps California (Civ.

Code, § 1698), an agreement actually executed by the payment of part of a debt discharges the debt in accordance with the intention of the parties. But an executory agreement to pay part is insufficient consideration. *Molyneux v. Collier*, 13 Ga. 406; *Stovall v. Hairston*, 55 Ga. 9; *English v. Reid*, 55 Ga. 240; *Blalock v. Jackson*, 94 Ga. 469, 20 S. E. 346; *Burgess v. Denison Paper Mfg. Co.*, 79 Me. 266, 9 Atl. 726; *Fuller v. Smith*, 107 Me. 161, 77 Atl. 706. See also *Standard Sewing Mach. Co. v. Gunter*, 102 Va. 568, 46 S. E. 690; *In re Turpin Hotel Co.*, 248 Fed. 25, 160 C. C. A. 165 (Cal.). In Alabama (Code, § 3973), California (Civil Code, § 1524), North Dakota (Comp. Laws of 1913, § 5828), Oregon (Lord's Or. Laws, § 778), South Dakota (Comp. Laws, § 1180), Tennessee (Code, 1918, § 5571), are statutes which give to a written receipt or written agreement to accept a part payment in full the same effect which the common law gave to a release under seal. See *Stegall v. Wright*, 143 Ala. 204, 38 So. 844; *Dobinson v. McDonald*, 92 Cal. 33, 36, 27 Pac. 1098; *Coopey v. Keady*, 73 Ore. 66, 144 Pac. 99; *Eggland v. South*, 22 S. Dak. 467, 118 N. W. 719; *Hagen v. Townsend*, 27 S. D. 457, 131 N. W. 512. In these States it will be noticed a seal has generally been deprived of its common-law efficacy. See *infra*, § 218. The same effect is given without the aid of statute to a receipt in full in a few States, most of which have modified by statute the common-law rules as to sealed instruments. *Dreyfus v. Roberts*, 75 Ark. 354, 87 S. W. 641, 69 L. R. A. 823; *Aborn v. Rathbone*, 54 Conn. 444, 8 Atl. 677; *Johnson v.*

has at least the merit of consistency with the general rule of consideration governing the formation and discharge of contracts. It follows also from the same rule that payment of the whole or part of a debt is equally ineffectual to support any other promise than a promise to discharge the balance of a claim. Thus a promise of temporary forbearance in consideration of part payment of a debt is invalid.⁴⁸ So an agreement to release a claim for personal injuries,⁴⁹ or for a wrongful discharge,⁵⁰ or illegal removal from office,⁵¹ or any other claim,⁵² is not supported sufficiently by payment of an admitted debt; nor will such consideration support a promise to surrender a lien,⁵³ or to give a power of attorney,⁵⁴ or to

Cooke, 85 Conn. 679, 84 Atl. 97; Green v. Langdon, 28 Mich. 221 (but see statement in Cunningham v. Irwin, 182 Mich. 629, 148 N. W. 786, that the payment "though accepted and receipted for as in full satisfaction," is only valid as a payment *pro tanto*). Gray v. Barton, 55 N. Y. 68, 14 Am. Rep. 181; Ferry v. Stephens, 66 N. Y. 321; Carpenter v. Soule, 88 N. Y. 251, 42 Am. Rep. 248; McKensie v. Harrison, 120 N. Y. 260, 24 N. E. 458, 8 L. R. A. 257, 17 Am. St. Rep. 638. So far, however, as these New York decisions hold that a liquidated debt, the amount of which is undisputed may be discharged by part payment, accompanied by a receipt in full, they are overruled. Fuller v. Kemp, 138 N. Y. 231, 237, 33 N. E. 1034, 1035, 20 L. R. A. 785; Larse v. Sugar Loaf Dairy Co., 180 N. Y. 367, 73 N. E. 61; Galowitz v. Hendlin, 150 N. Y. S. 641.

⁴⁸ Barron v. Vandvert, 13 Ala. 232; Liening v. Gould, 13 Cal. 598; Benedict v. Greer-Robbins Co., 26 Cal. App. 468, 147 Pac. 486; Solary v. Stultz, 22 Fla. 263; Holliday v. Poole, 77 Ga. 159; Bush v. Rawlins, 89 Ga. 117; Phoenix Co. v. Rink, 110 Ill. 538; Shook v. Board of Commissioners, 6 Ind. 461; Dare v. Hall, 70 Ind. 545; Davis v. Stout, 126 Ind. 12, 22 Am. St. Rep. 565; Tudor v. Security Trust Co., 163 Ky.

514, 173 S. W. 1118; Potter v. Green, 6 Allen, 442; Warren v. Hodge, 121 Mass. 106; Keirn v. Andrews, 59 Miss. 39; Price v. Cannon, 3 Mo. * 453; Tucker v. Bartle, 85 Mo. 114; Rogers v. Union Iron Co., 167 Mo. App. 228, 150 S. W. 100; Russ v. Hobbs, 61 N. H. 93; Parmelee v. Thompson, 45 N. Y. 58, 6 Am. Rep. 33; Bloomingdale v. Braun, 80 N. Y. Misc. 527, 141 N. Y. Supp. 590; Sands v. Gilleran, 159 N. Y. App. Div. 37, 144 N. Y. S. 337; Turnbull v. Brock, 31 Oh. St. 649; Hartman v. Danner, 74 Pa. 36; Yearly v. Smith, 45 Tex. 56, 72.

⁴⁹ Carlton v. Western, etc., R. Co., 81 Ga. 531, 7 S. E. 623.

⁵⁰ Walston v. F. D. Calkins Co., 119 Iowa, 150, 93 N. W. 49. Otherwise by statute in Maine, Fuller v. Smith, 107 Me. 161, 77 Atl. 706.

⁵¹ Gracey v. St. Louis, 213 Mo. 384, 111 S. W. 1159.

⁵² Eastman v. Miller, 113 Iowa, 404, 85 N. W. 635; Ness v. Minnesota & Colorado Co., 87 Minn. 413, 92 N. W. 333; Manse v. Hossington, 205 N. Y. 33, 98 N. E. 203. Cf. with these decisions *infra*, § 129.

⁵³ Watts v. Parks, 25 Ky. Law Rep. 1908, 78 S. W. 1125.

⁵⁴ Dixon v. Adams, Croke Elis. 538.

enter into a contract with a third person,⁵⁵ or to pay a commission.⁵⁶ Since the actual payment of a debt or the performance or partial performance of any existing obligation is insufficient consideration, a promise to pay a debt or to perform such a previous obligation in whole or in part is equally insufficient.⁵⁷

There has been considerable difference of opinion as to whether the payment of a debt constituted good consideration when the debtor was insolvent. There seems no proper ground for making such a distinction. An insolvent debtor is bound to pay his debts, as much as a solvent one, in the absence of bankruptcy legislation; and under the existing national bankruptcy law a bargain with an insolvent debtor, involving payment of a greater part of a debt than other creditors would receive would be a violation of the bankruptcy law in regard to preferences and would be voidable if the debtor's insolvency was known. Even if the transaction is not illegal, the debtor certainly is not going beyond his legal duty in paying the debt. This view has been taken in some decisions.⁵⁸ But the contrary view also has been taken, on the ground that by bankruptcy or otherwise the debtor might legally evade full payment.⁵⁹ No doubt unless its preferential character makes the payment illegal, a payment of part of a debt accompanied by an agree-

⁵⁵ *Berdineau v. Shock*, 21 Col. App. 198, 121 Pac. 146.

⁵⁶ *Elmore v. Snow*, 102 Ark. 592, 146 S. W. 476.

⁵⁷ *Lynn v. Bruce*, 2 H. Bl. 317; *Ford v. Garner*, 15 Ind. 298; *Reynolds v. Nugent*, 25 Ind. 328, 329, 330; *Crowder v. Reed*, 80 Ind. 1, 13; *Harris v. Cassady*, 107 Ind. 158, 168, 8 N. E. 29; *Cuthbertson v. First Nat. Bank*, 158 Ia. 144, 138 N. W. 1090; *Schuler v. Myton*, 48 Kans. 282, 288, 29 Pac. 163; *Eblin v. Miller*, 78 Ky. 371; *Jennes v. Lane*, 26 Me. 475; *Vanderbilt v. Schreyer*, 91 N. Y. 392, 401; *Seybolt v. New York, L. E. & W. R.*, 95 N. Y. 562, 575, 47 Am. Rep. 75; *Bryan v. Foy*, 69 N. C. 45; *Citizens' Nat. Bank v. Marks*, 34 Pa. Super. 310, 314; *Rose v. Daniels*, 8 R. I. 381.

See also *Jones v. Waite*, 5 Bing. (N. C.) 341, 351, 356, 358-359; *Jones v. Coffey*, 109 N. C. 515, 14 S. E. 84; *Pruden v. Railroad Co.*, 121 N. C. 509, 28 S. E. 349; *Ramsey v. Browder*, 136 N. C. 251, 48 S. E. 651.

⁵⁸ *Pearson v. Thomason*, 15 Ala. 700, 50 Am. Dec. 159; *Warren v. Skinner*, 20 Conn. 559; *Molyneaus v. Collier*, 13 Ga. 406, 17 Ga. 46, 30 Ga. 731; *Beaver v. Fulp*, 136 Ind. 595, 36 N. E. 418.

⁵⁹ *Wescott v. Waller*, 47 Ala. 492, 498; *Engbretson v. Seiberling*, 122 Iowa, 522, 98 N. W. 319, 64 L. R. A. 75, 101 Am. St. Rep. 279; *Seegmiller v. Kelley* (Iowa), 99 N. W. 1131; *Shelton v. Jackson*, 20 Tex. Civ. App. 443, 49 S. W. 415. See also *Rice v. London Mortgage Co.*, 70 Minn. 77, 72 N. W. 826.

ment by the debtor to refrain from voluntary bankruptcy must be regarded as a sufficient consideration for the creditor's promise,⁶⁰ but the mere fact that the creditor fears that the debtor will go into bankruptcy, and that the debtor contemplates bankruptcy proceedings, does not prove that the creditor requested the debtor to refrain from such proceedings. If the creditor gets the part payment, he is getting all he requests, and by this payment of part of the debt the creditor receives only a benefit in fact, and the debtor suffers only a detriment in fact in return for the agreement rather than detriment or benefit in law. In many cases of part payment of a liquidated debt as full satisfaction there is doubtless a detriment in fact to the debtor and a benefit in fact to the creditor, even though bankruptcy is not imminent. It seems difficult, where the debtor is insolvent, as much as where he is not, to evade the plain fact that the debtor is merely doing what he is under a legal obligation to do. The fact that if he obtains a discharge in bankruptcy he will escape from the obligation, does not make him any less bound until he gets such a discharge. Nor does it matter that a debtor refrains from going into bankruptcy, relying upon the compromise with his creditor, if the creditor did not request him to refrain.⁶¹

§ 121. Payment or security differing in time, medium, place, from the debtor's legal obligation is valid consideration.

If a debtor does something more or different in character from that which he was legally bound to do, this is sufficient consideration for a promise. Accordingly if a debtor pays his debt or part of it before it is due,⁶² or in a medium of pay-

⁶⁰ *Hanson v. McCann*, 20 Col. App. 43, 76 Pac. 983; *Hinckley v. Arey*, 27 Me. 362; *Dawson v. Beall*, 68 Ga. 328; *Melroy v. Kemmerer*, 218 Pa. 381, 67 Atl. 699; *Rotan Grocery Co. v. Noble*, 36 Tex. Civ. App. 226, 81 S. W. 586; *Herman v. Schlesinger*, 114 Wisc. 382, 90 N. W. 460, 91 Am. St. Rep. 922.

⁶¹ See *infra*, § 139.

⁶² *Pinnel's Case*, 5 Coke, 118; *Phillips v. Preston*, 5 How. (U. S.) 278, 12

L. Ed. 152; *Rose v. Hall*, 26 Conn. 392, 68 Am. Dec. 402; *Spann v. Baltzell*, 1 Fla. 301, 46 Am. Dec. 346; *Hutton v. Stoddart*, 83 Ind. 539; *Boyd v. Moats*, 75 Ia. 151, 39 N. W. 237; *Bice v. Silver*, 170 Ia. 255, 152 N. W. 498; *Ricketts v. Hall*, 2 Bush, 249; *Chicora Fertilizer Co. v. Dunan*, 91 Md. 144, 46 Atl. 347, 50 L. R. A. 401; *Singer Sewing Machine Co. v. Lee*, 105 Md. 663, 66 Atl. 628; *Bowker v. Childs*, 3 Allen, 434; *Schwei-*

ment different from that for which he was bound,⁶³ or at a different place,⁶⁴ or to someone other than the creditor,⁶⁵ the consideration is sufficient to support a promise by the creditor. So if the debtor gives security, a promise in consideration thereof to release part of the debt is sufficiently supported.⁶⁶ The application to the debt of property exempt from execution also is going beyond the legal obligation of the debtor, and therefore is valid consideration.⁶⁷

So indeed is the giving of any security to which the creditor

der v. Lang, 29 Minn. 254, 13 N. W. 33, 43 Am. Rep. 202; *Reed v. McGregor*, 62 Minn. 94, 64 N. W. 88; *Dalrymple v. Craig*, 149 Mo. 345, 50 S. W. 884; *Jones v. Perkins*, 29 Miss. 139, 64 Am. Dec. 136; *Scofield v. Clark*, 48 Neb. 711, 67 N. W. 754; *Grant v. Hughes*, 96 N. C. 177, 2 S. E. 339; *Thurber v. Smith*, 25 R. I. 60, 54 Atl. 790; *Kirchoff v. Voss*, 67 Tex. 320, 3 S. W. 548; *Russell v. Stevenson*, 34 Wash. 166, 75 Pac. 627. But payment upon a note after maturity, but before the last day of grace is not valid consideration. *McKamy v. McNabb*, 97 Tenn. 236, 36 S. W. 1091. See also *Harms v. Fidelity & Casualty Co.*, 172 Mo. App. 241, 157 S. W. 1046; *Bandman v. Finn*, 185 N. Y. 508, 78 N. E. 175, 12 L. R. A. (N. S.) 1134. But an agreement where a contract called for daily payments, that payments should be made at the end of each week was held invalid in *Wilt v. Hammond*, 179 Mo. App. 406, 165 S. W. 362.

⁶³ *San Juan v. St. John's Gas Co.*, 195 U. S. 510, 49 L. Ed. 299, 25 S. Ct. Rep. 108; *Leeson v. Anderson*, 99 Mich. 247, 58 N. W. 72, 41 Am. St. Rep. 597. Logically perhaps this principle would sustain any promise for which the consideration was payment or part payment of a debt; for the debtor is never bound to pay the particular coins or bills with which he in fact makes payment, and in giving those coins or bills rather than others he suffers a legal detriment. Unless, however, the cred-

itor requested these coins or bills rather than others, this argument is too fine-spun for legal use. Indeed in *Saunders v. Whitcomb*, 177 Mass. 457, 59 N. E. 192, it was held that payment in United States money of a portion of a bill of exchange by its terms payable in pounds sterling would not support a promise to forego the remainder of the holder's claim; since payment was made in United States money as matter of convenience, and was not requested as the real exchange for the agreement.

⁶⁴ *Pinnel's Case*, 5 Coke, 118; *Pearson v. Thomason*, 15 Ala. 700, 50 Am. Dec. 159; *Cavaness v. Ross*, 33 Ark. 572; *Sonnenberg v. Riedel*, 16 Minn. 83; *Jones v. Perkins*, 29 Miss. 139, 64 Am. Dec. 136; *McKenzie v. Culbreth*, 66 N. C. 534; *Harper v. Graham*, 20 Ohio, 105. It should be observed, however, that after maturity a money claim is transitory, and the debtor is bound to pay at any place where he may be found. *Foster County State Bank v. Lammers* (Minn.), 134 N. W. 501.

⁶⁵ *Roberts v. Carter*, 31 Ill. App. 142; *Harper v. Graham*, 20 Ohio * 105.

⁶⁶ *Kemmerer v. Kokendifer*, 65 Ill. App. 31; *Fred v. Fred* (N. J. Eq.), 50 Atl. 776; *Brown v. Kern*, 21 Wash. 211, 57 Pac. 798. See also *Lincoln Savings Bank v. Allen*, 82 Fed. 148, 27 C. C. A. 87; *McNealey v. Baldridge*, 106 Mo. App. 11, 78 S. W. 1031.

⁶⁷ *Meeker v. Requa*, 94 N. Y. App. 300, 87 N. Y. S. 950.

was not otherwise entitled, whether the security is the property of a third person,⁶⁸ or of the debtor himself.⁶⁹

§ 122. Mutual promises to extend an interest-bearing debt, are sufficient consideration for each other.

When a debtor and creditor agree that an interest-bearing debt shall be extended for a fixed time, the promise of each is of something detrimental, as the creditor promises to forbear the collection of his claim, and the debtor gives up his right to stop the accrual of further interest by the payment of the principal at maturity. Accordingly such agreements are generally upheld.⁷⁰ If, however, the debtor neither promises to refrain from paying the debt until a fixed day in the future, nor to pay interest until that time whether the debt is paid

⁶⁸ *Post v. Springfield Bank*, 138 Ill. 559, 28 N. E. 978; *Schmidt v. Ludwig*, 26 Minn. 85, 1 N. W. 803. See also cases collected *infra*, § 124, where the personal security of a third person is given by the making or indorsing of negotiable paper.

⁶⁹ *Pulliam v. Taylor*, 50 Miss. 251; *Jaffray v. Davis*, 124 N. Y. 164, 26 N. E. 351, 11 L. R. A. 710. It is indeed said in *Keeler v. Salisbury*, 33 N. Y. 648, and *Walsh v. Curtis*, 73 Minn. 254, 76 N. W. 52, that giving security of the debtor's non-exempt property is not valid consideration for an agreement by the creditor to abate a portion of his claim. This is clearly wrong, however, since the debtor is doing something which he was not bound to do, and the creditor is receiving a benefit to which he was not previously entitled. The possibility which the creditor previously had of seizing on execution his debtor's non-exempt property is a different thing from the hold given by a mortgage or pledge.

⁷⁰ *Rees v. Berrington*, 2 Ves. 540; *Stallings v. Johnson*, 27 Ga. 564; *Reynolds v. Barnard*, 36 Ill. App. 218; *Crossman v. Wohlleben*, 90 Ill. 537; *Royal v. Lindsay*, 15 Kans. 591; *Lor-*

rimer v. Fairchild, 68 Kans. 328, 75 Pac. 124; *Shepherd v. Thompson*, 2 Bush, 176; *Robinson v. Miller*, 2 Bush, 179; *Alley v. Hopkins*, 98 Ky. 668, 34 S. W. 13, 56 Am. St. Rep. 382; *Chute v. Pattee*, 37 Me. 102; *Simpson v. Evans*, 44 Minn. 419, 46 N. W. 908; *Moore v. Redding*, 69 Miss. 841, 13 So. 849; *Davis v. Lane*, 10 N. H. 156; *Fowler v. Brooks*, 13 N. H. 240; *MoComb v. Kittridge*, 14 Ohio * 348; *Wood v. Newkirk*, 15 Oh. St. 295; *Fawcett v. Freshwater*, 31 Ohio St. 637; *Bickel v. Wessinger*, 58 Ore. 98, 113 Pac. 34; *Benson v. Phipps*, 87 Tex. 578, 29 S. W. 1061, 47 Am. St. Rep. 128. The contrary decisions cannot be supported. *Abel v. Alexander*, 45 Ind. 523, 15 Am. Rep. 270; *Hume v. Mazelin*, 84 Ind. 574; *Holmes v. Boyd*, 90 Ind. 332; *Davis v. Stout*, 126 Ind. 12, 25 N. E. 862, 22 Am. St. Rep. 565; *Wilson v. Powers*, 130 Mass. 127; *Hale v. Forbes*, 3 Mont. 395; *Grover v. Hoppock*, 2 Dutch. 191; *Kellogg v. Olmsted*, 25 N. Y. 189; *Parmelee v. Thompson*, 45 N. Y. 58, 6 Am. Rep. 33; *Olmsted v. Latimer*, 158 N. Y. 313, 53 N. E. 5, 43 L. R. A. 685; *Stickler v. Giles*, 9 Wash. 147, 37 Pac. 293. See also *Toplitz v. Bauer*, 161 N. Y. 325, 55 N. E. 1059.

or not, there is no consideration to support the creditor's promise to extend the time of payment.⁷¹

§ 123. Promise of payment or payment of part of a debt by one joint debtor as consideration.

It has been held in a number of cases that the note or promise of one joint debtor to pay the whole or part of a liquidated debt, is sufficient consideration to support an agreement by the creditor,⁷² though there are also contrary decisions.⁷³ The reason given in most of the cases upholding the bargain is that the obligation of joint debtors is regarded as a single and indivisible thing, distinct from the individual obligation of any one of the joint debtors; and, therefore, the new obligation imposes a detriment on the promisor. In these decisions, however, the joint debtors were partners, and a possible reason exists for upholding an agreement with an individual partner to accept his promise to pay a portion of a partnership debt in full satisfaction. In cases of distribution in bankruptcy or insolvency individual debts are paid primarily out of individual assets; partnership debts out of partnership assets. Accordingly the performance of an individual promise accepted in lieu of a firm debt involves both a chance of detriment to the obligor and of benefit to the creditor.⁷⁴ If the joint debtors were not partners the

⁷¹ *McManus v. Bark*, L. R. 5 Exch. 65; *Austin Real Estate & Abstract Co. v. Bahn*, 87 Tex. 582, 29 S. W. 646, 30 S. W. 430. Cf. *Bickel v. Wessinger*, 58 Ore. 98, 113 Pac. 34.

⁷² *Thompson v. Percival*, 5 B. & Ad. 925; *Lyth v. Ault*, 7 Ex. 669; *Harris v. Lindsay*, 4 Wash. C. C. 271; *First Nat. Bank v. Cheney*, 114 Ala. 536, 21 So. 1002; *Hoopce v. McCann*, 19 La. Ann. 201; *Motley v. Wickoff*, 113 Mich. 231, 71 N. W. 520; *Morris Canal & Banking Co. v. Van Vorst's Admr's*, 1 Zab. 100, 119; *Ludington v. Bell*, 77 N. Y. 138, 33 Am. Rep. 601; *Allison v. Abendroth*, 108 N. Y. 470, 15 N. E. 606; *Jaffray v. Davis*, 124 N. Y. 164, 173, 26 N. E. 351, 11 L. R. A. 710; *Collyer v. Moulton*,

9 R. I. 90, 98 Am. Dec. 370; *Lewis v. Davidson's Exec.*, 39 Tex. 660; *Frye v. Phillips*, 46 Wash. 190, 89 Pac. 559; *Burdett v. Greer*, 63 W. Va. 515, 60 S. E. 497, 15 L. R. A. (N. S.) 1019, 129 Am. St. 1014; *Grubbe v. Lahay*, 156 Wis. 29, 145 N. W. 207.

⁷³ *Early v. Burt*, 68 Ia. 716, 28 N. W. 35; *Walstrom v. Hopkins*, 103 Pa. 118; *Olive v. Morgan*, 8 Tex. Civ. App. 654, 28 S. W. 572; *Wadhams v. Page*, 1 Wash. 420, 422, 25 Pac. 462. See also *Wild v. Dean*, 3 Allen, 579; *Bowyer v. Knapp*, 15 W. Va. 277.

⁷⁴ This is pointed out in *Lyth v. Ault*, 7 Ex. 669, and in *Ludington v. Bell*, 77 N. Y. 138, 33 Am. Rep. 601.

reasoning supporting the validity of an agreement to accept the promise of one in full satisfaction can only be supported on a theory of consideration in bilateral contracts previously criticised,⁷⁵ since whether or not the new individual promise would involve a detrimental obligation, performance of the promise would involve neither any detriment to the debtor nor any benefit to the creditor to which he was not previously legally entitled. That actual payment by one joint debtor of part of the joint debt with no preceding promise will not support a promise by the creditor is generally held,⁷⁶ and his promise to pay should have no greater value than his performance.

If the original obligation was joint and several the promise of one of the debtors to pay a part will clearly support no agreement on the part of the creditor, since the debtor was by the original obligation already individually and separately bound.⁷⁷

§ 124. Payment of a portion of a debt with negotiable instrument.

Negotiable paper is for many purposes regarded as a chattel, something to which the law will no more affix a definite value than to a horse or a book. Therefore, the transfer by the debtor of a negotiable note of a third person as full satisfaction of a liquidated and admitted claim greater than the face of the note is valid consideration.⁷⁸ Similarly the debtor's note for less than the debt, if indorsed by a third person, is a sufficient consideration to support a promise to discharge

⁷⁵ *Supra*, §§ 103 *et seq.*

⁷⁶ *Eldred v. Peterson*, 80 Ia. 264, 45 N. W. 755; *Deering v. Moore*, 86 Me. 181, 29 Atl. 988, 41 Am. St. Rep. 534; *Weber v. Couch*, 134 Mass. 26, 45 Am. Rep. 274; *Line v. Nelson*, 38 N. J. L. 358; *Harrison v. Wilcox*, 2 Johns. 448; *Martin v. Frantz*, 127 Pa. 389, 18 Atl. 20, 14 Am. St. Rep. 859. The contrary decision of *Bendix v. Ayers*, 21 N. Y. App. D. 570, 48 N. Y. S. 211, cannot be supported.

⁷⁷ *Lyth v. Ault*, 7 Ex. 669, 671.

⁷⁸ *Curlewis v. Clark*, 3 Ex. 375; *Lin-*

coln Safe Deposit Co. v. Allen, 82 Fed. 148, 27 C. C. A. 87; *Brassell v. Williams*, 51 Ala. 349; *Colburn v. Gould*, 1 N. H. 279; *Conkling v. King*, 10 N. Y. 440; *Roberts v. Brandies*, 44 Hun, 468. But see *contra Mannakee v. McCloskey*, 23 Ky. L. Rep. 515, 63 S. W. 482, with which, however, compare *Woodfolk v. McDowell*, 9 Dana, 268, where the surrender by a third person of a note of the creditor was held sufficient to support an agreement by the creditor to accept it in full satisfaction of a larger claim against his debtor.

the whole debt,⁷⁹ as is a note for a smaller amount secured by mortgage.⁸⁰ And this principle has been carried so far in England that even the debtor's own note,⁸¹ or check,⁸² for part of the debt, has been held sufficient consideration for a promise to discharge the remainder. But in the United States the debtor's own unsecured note has been held no better consideration than the amount of money promised in the note,⁸³ and the debtor's own check is, *a fortiori*, regarded as if it were money, and if a payment of a certain amount of money would be insufficient consideration to support a given promise, the debtor's check for the same amount is held no better.⁸⁴ Even the check of a third person when in fact representing a payment from the debtor's money, and used merely as a means of paying that money to the creditor, is regarded in the United States as no better consideration than if the money represented by the check had been paid by the debtor.⁸⁵ There seems some difficulty in reconciling the American

⁷⁹ *Singleton v. Thomas*, 73 Ala. 205; *Pope v. Turnstall*, 2 Ark. 209; *Argall v. Cook*, 43 Conn. 160; *Bower v. Mets*, 54 Iowa, 394, 6 N. W. 551; *Varney v. Conery*, 77 Me. 527, 1 Atl. 683; *Brooks v. White*, 2 Metc. 283, 37 Am. Dec. 95; *Guild v. Butler*, 127 Mass. 386; *Mason v. Campbell*, 27 Minn. 54, 6 N. W. 405; *Fred v. Fred* (N. J. Eq.), 50 Atl. 776; *Boyd v. Hitchcock*, 20 Johns. 76, 11 Am. Dec. 247; *Keeler v. Salisbury*, 33 N. Y. 648.

⁸⁰ *Jaffray v. Davis*, 124 N. Y. 164, 26 N. E. 351, 11 L. R. A. 710.

⁸¹ *Sibree v. Tripp*, 15 M. & W. 23.

⁸² *Goddard v. O'Brien*, 9 Q. B. D. 37; *Bidder v. Bridges*, 37 Ch. D. 406 (where, however, the check was made by the debtor's solicitors).

⁸³ *Overdeer v. Wiley*, 30 Ala. 709; *Siddall v. Clark*, 89 Cal. 321, 26 Pac. 829; *Post v. Springfield Bank*, 138 Ill. 559, 28 N. E. 978; *Eldred v. Peterson*, 80 Ia. 264, 45 N. W. 755, 20 Am. St. Rep. 416; *Jenness v. Lane*, 26 Me. 475; *Russ v. Hobbs*, 61 N. H. 93; *Shanley v.*

Koehler, 80 N. Y. App. D. 566, 80 N. Y. S. 679, aff'd without opinion, 178 N. Y. 556, 70 N. E. 1109; *Frank v. Gump*, 104 Va. 306, 51 S. E. 358; *Hooker v. Hyde*, 61 Wis. 204, 21 N. W. 52.

⁸⁴ *Tucker v. Murray*, 2 Pa. Dist. Rep. 497; *Hagen v. Townsend*, 27 S. D. 457, 131 N. W. 512, and see cases in the next note. But see *contra*, *American Seeding Mach. Co. v. Bakes*, 55 Ind. App. 625, 104 N. E. 524.

⁸⁵ *Jordy v. Maxwell*, 62 Fla. 236, 56 So. 946; *Specialty Glass Co. v. Daley*, 172 Mass. 460, 52 N. E. 633; *Emerson v. Gerber*, 178 Mass. 130, 59 N. E. 666. In *Bunge v. Koop*, 48 N. Y. 225, 229, 8 Am. Rep. 546, the check was held insufficient consideration though it was not only that of a third person, but represented his own money, lent by means of the check to the debtor to enable him to pay the debt. The court relied on the fact that the check was not bargained for as such, but was used merely as a means of paying the amount of money agreed.

decisions with the well-settled principle that the debtor's negotiable note or check for the amount of his debt may be taken if so agreed in absolute payment. In a few States the acceptance of such negotiable paper is presumed to be in absolute payment; in most jurisdictions the presumption is that only conditional payment is intended—that is if the instrument is dishonored the creditor may revert to his original claim; but everywhere the creditor's agreement to take the instrument in absolute payment is effectual.⁸⁶ Yet if the debtor's note for part of what he owes is insufficient consideration for any promise, it is hard to see how his note for all that he owes can be. If in one case no detriment is suffered, this must be equally true in the other. The only distinction possible is that in questions of conditional and absolute payment, the parties are more distinctly bargaining in regard to negotiable paper as distinguished from the money which it represents, than in the cases previously considered.

§ 125. Payment of debt by a third person.

Payment of a debt, or part of a debt, by one who does not owe it, is obviously a legal detriment to him, and a legal benefit to the creditor. Therefore a partial payment by such a person is sufficient consideration for a promise to him to discharge the debt; and if it is not essential that consideration should move from the promisee,⁸⁷ sufficient consideration for a promise by the creditor to the debtor. Also, if the debtor at the creditor's request induces a third person to make part payment, this must be sufficient consideration for a promise to the debtor. The courts without much distinguishing these several possible cases, have generally held payment by a third person sufficient consideration for a promise to or for the benefit of the debtor.⁸⁸

⁸⁶ See *infra*, § 1922.

⁸⁷ See *supra*, § 114.

⁸⁸ See *Cook v. Lister*, 13 C. B. (N. S.) 543, 594; *Hirachand Punamchand v. Temple*, [1911] 2 K. B. 330; *Gordon v. Moore*, 44 Ark. 349, 51 Am. Rep. 606; *Wilks v. Slaughter*, 49 Ark. 235, 4 S. W. 766; *Marshall v. Bullard*, 114 Iowa, 462, 87 N. W. 427, 54 L. R. A. 862;

Sigler v. Sigler, 98 Kans. 524, 158 Pac. 864; *Saunders v. Whitcomb*, 177 Mass. 457, 59 N. E. 192; *Cunningham v. Irwin*, 182 Mich. 629, 148 N. W. 786; *Clark v. Abbott*, 53 Minn. 88, 55 N. W. 542, 39 Am. St. Rep. 577; *Grant v. Porter*, 63 N. H. 229; *Ebert v. Johns*, 206 Pa. 395, 55 Atl. 1064; *Seymour v. Goodrich*, 80 Va. 303.

A promise for the creditor to the person thus paying the whole or part of another's debt not only to discharge the latter, but also to confer some benefit upon the payer is equally valid, since adequacy of consideration is immaterial.⁸⁹ But where the debtor himself furnishes the money for the purpose to the third person who then makes the bargain with the creditor, the case is the same as if the money had been paid by the debtor himself, instead of by the hand of an agent.⁹⁰ There is no detriment to the promisee and no benefit to the promisor beyond that to which he was legally entitled. And if the debtor borrows money from a third person, and himself makes the payment, there is not more consideration for an agreement to discharge the balance, than if the debtor had acquired the money otherwise;⁹¹ unless indeed the borrowing was requested by the creditor as part of the consideration for his agreement.⁹²

§ 126. Composition agreements with several creditors are supported by sufficient consideration.

It is universally held that where several creditors of an insolvent or embarrassed debtor agree each to receive a percentage of his claim, the agreement is binding.⁹³ The considera-

⁸⁹ *Allen v. McNeelan*, 79 Oreg. 606, 156 Pac. 274.

⁹⁰ *Shaw v. Clark*, 6 Vt. 507, 27 Am. Dec. 578. See also *Bliss v. Shwartz*, 65 N. Y. 445.

⁹¹ *Schlessinger v. Schlessinger*, 39 Col. 44, 88 Pac. 970, 8 L. R. A. (N. S.) 863; *Specialty Glass Co. v. Daley*, 172 Mass. 460, 52 N. E. 633; *Bunge v. Koop*, 48 N. Y. 225, 8 Am. Rep. 546. But see *Dalrymple v. Craig*, 149 Mo. 345, 50 S. W. 884; *Ivy Court Realty Co. v. Knapp*, 79 N. Y. Misc. 200, 139 N. Y. S. 918; *Rotan Grocery Co. v. Noble*, 36 Tex. Civ. App. 226, 81 S. W. 586.

⁹² Even under circumstances approaching this the consideration was held insufficient in *Harriman v. Harriman*, 12 Gray, 341; *Bunge v. Koop*, 48 N. Y. 225, 8 Am. Rep. 546.

⁹³ *Steinman v. Magnus*, 11 East, 390;

Good v. Cheesman, 2 Barn. & Ad. 328; *Norman v. Thompson*, 4 Exch. 755; *Boyd v. Hind*, 1 H. & N. 938; *Slater v. Jones*, L. R. 8 Ex. 186; *Dyer v. Muhlenberg County*, 117 Fed. 586, 54 C. C. A. 172; *Wescott v. Waller*, 47 Ala. 492; *Bank of Montgomery v. Ohio Buggy Co.*, 100 Ala. 626, 13 So. 621; *Wilks v. Slaughter*, 49 Ark. 235, 4 S. W. 766; *Humiston v. Smith*, 21 Cal. 129; *Wilson v. Samuels*, 100 Cal. 514, 35 Pac. 148, 559; *Union Pac. R. Co. v. Anderson*, 11 Colo. 293, 18 Pac. 24; *Stewart v. Langston*, 103 Ga. 290, 30 S. E. 35; *Devou v. Ham*, 17 Ind. 472; *Robert v. Barnum*, 80 Ky. 28; *Parkins v. Lockwood*, 100 Mass. 249, 250, 6 Am. Dec. 158; *Martin v. Meles*, 179 Mass. 114, 119, 60 N. E. 397; *Newell v. Higgins*, 55 Minn. 82, 56 N. W. 577; *Mullin v. Martin*, 23 Mo. App. 537; *Gage v. DeCoursey*, 68 N. H. 579,

tion which is said to exist in such cases to support the agreement of each creditor is the promise of every other creditor to discharge a portion of his claim; and it has even held that in order to make a composition valid, it must appear that each creditor made such an agreement not only with the debtor but with other creditors.⁹⁴ The statement of promises between the creditors may well be inserted in a composition agreement, but without any such express promise or any evidence of mutual promises in fact between the creditors, the existence of such promises would probably be generally assumed as a necessary fiction from the mere making of a composition agreement with the debtor.⁹⁵ Moreover, even if the law makes such a requirement, and it is in fact satisfied, though the promises of the creditors with one another would be sufficiently supported, it is hard to see how that consideration supports a promise to the debtor, and any question of the validity of compositions generally arises between the debtor and one or more creditors, not between the creditors themselves. It might be urged that the debtor should be allowed to take advantage of the promises between the creditors, as being made for his benefit; but he is allowed to set up a composition in jurisdictions like England and Massachusetts where a beneficiary who is not a promisee is not allowed to enforce a contract. In truth the doctrine that promises in composition papers are supported by valid consideration must be regarded as exceptional.⁹⁶

41 Atl. 183; *Bartlett v. Woodworth-Mason Co.*, 69 N. H. 316, 41 Atl. 264; *Morris Canal & Banking Co. v. Van-Vorst*, 21 N. J. L. 100; *White v. Kuntz*, 107 N. Y. 518, 14 N. E. 423, 1 Am. St. Rep. 886; *Crawford v. Krueger*, 201 Pa. 348, 50 Atl. 931; *Cohen v. P. E. Harding Const. Co. (R. I.)*, 103 Atl. 702; *Arnold v. Bailey*, 24 S. C. 493; *Paddleford v. Thacher*, 48 Vt. 574; *Continental Nat. Bank v. McGeoch*, 92 Wis. 286, 66 N. W. 606.

⁹⁴ *Argall v. Cook*, 43 Conn. 160; *Smith v. Mechanics' Nat. Bank*, 108 Ga. 211, 216, 33 S. E. 857; *First Nat. Bank v. Ware*, 95 Me. 388, 50 Atl. 24;

Perkins v. Lockwood, 100 Mass. 249, 1 Am. Rep. 103; *Sage v. Valentine*, 23 Minn. 102; *Newell v. Higgins*, 55 Minn. 82, 56 N. W. 577.

⁹⁵ See cases *supra*, n. 93.

⁹⁶ See 12 Harv. L. Rev. 526, by Prof. Ames. Doubtless the debtor may make promises in a composition agreement which would furnish consideration for all the creditors' promises to the debtor. Thus in *Bank of Montgomery v. Ohio Buggy Co.*, 100 Ala. 626, 13 So. 621, the debtor promised to incur no new indebtedness, but such promises are not essential to the validity of a composition agreement.

§ 127. When payment of principal in full discharges interest also.

Whether a payment of the principal of a liquidated debt after maturity discharges not only the principal but also any interest which may be due, depends on whether the interest is due by the terms of the contract between the parties or merely as damages.⁸⁶ "Where interest is due because the debtor has expressly agreed to pay it, the interest is considered as an integral part of the debt, and the right to recover it may remain, even after the principal has been paid. But where interest is claimed as damages by virtue of the non-payment of a debt when due, and for that reason is allowed by law, it is then considered not an integral part of the debt, but merely as an incident to the debt, and in such cases, when the principal is paid and accepted without interest, the right to interest is extinguished."⁸⁷ A protest at the time of payment because of the non-payment of interest does not change this rule.⁸⁸

§ 128. Any payment received in full satisfaction of an unliquidated or disputed claim is valid consideration.

An unliquidated claim is one the amount of which has not been fixed by agreement or cannot be exactly determined by the application of rules of arithmetic or of law.⁸⁹ A disputed

⁸⁶ See *infra*, § 1412.

⁸⁷ *Bassick Gold Mine Co. v. Beardsley*, 49 Col. 275, 112 Pac. 770, 33 L. R. A. (N. S.) 852; and see to the same effect, *Stewart v. Barnes*, 153 U. S. 456, 38 L. Ed. 781, 14 Sup. Ct. Rep. 849; *Southern Ry. Co. v. Dunlop Mills*, 76 Fed. 505, 22 C. C. A. 302, 42 U. S. App. 169; *New York Trust Co. v. Detroit &c. Ry. Co.*, 251 Fed. 514, 163 C. C. A. 508; *Wescott v. Waller*, 47 Ala. 492; *Chandler v. People's Sav. Bank*, 61 Cal. 401; *Canfield v. Eleventh School Dist.*, 19 Conn. 529; *American Bible Soc. v. Wells*, 68 Me. 572, 28 Am. Rep. 82; *Simmons v. Almy*, 103 Mass. 33, 36; *Davis v. Harrington*, 160 Mass. 278, 35 N. E. 771; *Paul Revere Trust Co. v. Castle*, 231

Mass. 129, 120 N. E. 352 [see *quare* in *Whittaker Chain Tread Co. v. Standard Auto Supply Co.*, 216 Mass. 204, 103 N. E. 695, 51 L. R. A. (N. S.) 315, as to correctness of *Tuttle v. Tuttle*, 12 Met. 551, 46 Am. Dec. 701]; *Arnold v. Sedalia Nat. Bank*, 100 Mo. App. 474, 74 S. W. 1038; *Cutter v. Mayor, etc., of New York*, 92 N. Y. 166; *King v. Phillips*, 95 N. C. 245, 59 Am. Rep. 238; *Bennett v. Federal Coal Co.*, 70 W. Va. 456, 74 S. E. 418, 40 L. R. A. (N. S.) 588.

⁸⁸ *Graves v. Saline County*, 104 Fed. 61, 43 C. C. A. 414; *Cutter v. Mayor, etc., of New York*, 92 N. Y. 166.

⁸⁹ *Charnley v. Sibley*, 73 Fed. 980, 982, 20 C. C. A. 157; *Chicago, etc., R. Co. v. Clark*, 92 Fed. 968, 985, 35 C. C.

claim may be either liquidated or unliquidated. A claim of A against B for \$5, admittedly lent by A to B, but concerning the payment of which there is a dispute, is a disputed claim; but the amount of the claim, if it exists at all, is fixed.¹ As the amount of an unliquidated claim is unknown, and as either the existence or the amount of a disputed claim is unknown, whether a claim is unliquidated or disputed, it comes under the rule generally applicable to consideration,² that the law, where it can avoid doing so, will not attempt to put a value on a consideration agreed upon by the parties. The surrender of a disputed claim, whether unliquidated or liquidated, if the dispute is honest and not obviously frivolous, is, therefore, consideration which the law cannot attempt to value.³ Accordingly any sum given and accepted as consideration for an agreement to discharge a claim which is unliquidated or the subject of *bona fide* and reasonable dispute is valid consideration.⁴ But a frivolous dispute or disingenuous

A. 120; *Hargroves v. Cooke*, 15 Ga. 321; *Treat v. Price*, 47 Neb. 875, 66 N. W. 834, 836.

¹ The question is merely one of words, since it is unquestionably true that a disputed claim may, like an unliquidated claim, be settled for such sum as the parties may agree; but as a mere matter of words, one cannot agree with the statement, "when it is admitted that one of two specific sums is due, but there is a general dispute as to which is the proper amount, the demand is regarded as 'unliquidated' within the meaning of the term as applied to the subject of accord and satisfaction." *Lestienne v. Ernst*, 5 N. Y. App. Div. 373, 39 N. Y. S. 199, 200.

² See *supra*, § 115.

³ See *infra*, § 135.

⁴ *Read v. Gt. Eastern R. Co., L. R.*, 3 Q. B. 555; *United States v. Child & Co.*, 12 Wall. 232, 20 L. Ed. 360; *In re D. H. Bride & Co.*, 132 Fed. 285; *Hand Lumber Co. v. Hall*, 147 Ala. 561, 41 So. 78; *Bull v. Bull*, 43 Conn. 455; *Blake v. Baldwin*, 54 Conn. 5, 5 Atl. 299; *Sanford v. Abrams*, 24 Fla. 181,

2 So. 373; *Harland v. Staples*, 79 Ill. App. 72; *Bingham v. Browning*, 97 Ill. App. 442, affirmed in 197 Ill. 122, 64 N. E. 317; *Janci v. Cerny*, 287 Ill. 359, 122 N. E. 507; *Ennis v. Pullman Palace-Car Co.*, 165 Ill. 161, 46 N. E. 439, affirming 60 Ill. App. 398; *Little v. Koerner*, 28 Ind. App. 625, 63 N. E. 766; *Storch v. Dewey*, 57 Kans. 370, 46 Pac. 698; *Baugh v. Fist*, 84 Kans. 740, 115 Pac. 551; *Barber v. State*, 24 Md. 383; *Alvord v. Marsh*, 12 Allen, 603; *Pollman & Bros. Coal & S. Co. v. St. Louis*, 145 Mo. 651, 47 S. W. 563; *Maack v. Schneider*, 51 Mo. App. 92; *Brink v. Garland*, 58 Mo. App. 356; *Chamberlain v. Smith*, 110 Mo. App. 657, 85 S. W. 645; *Slade v. Swedeburg Elevator Co.*, 39 Neb. 600, 58 N. W. 191; *Palmerton v. Huxford*, 4 Denio, 166; *Bandman v. Finn*, 185 N. Y. 508, 78 N. E. 175, 12 L. R. A. (N. S.) 1134; *Laroe v. Sugar Leaf Dairy Co.*, 87 N. Y. App. D. 585, 84 N. Y. S. 609 (reversed on another ground in 180 N. Y. 367, 73 N. E. 61); *Riggs v. Home Mutual Fire Protection Asso.*, 61 S. C. 448, 39 S. E. 614; *Hussey v.*

disclaimer of liability will not help an attempt to compromise an obvious obligation.^{4a}

§ 129. Payment of so much of an unliquidated or disputed claim as is admittedly due, is valid consideration.

Not infrequently though a claim is unliquidated, or the subject of a *bona fide* and reasonable dispute, it is conceded that at least a certain amount is due. It might seem that in paying this conceded part of the claim, or any lesser amount, the debtor was merely doing what he was previously bound to do, and that, therefore, the payment could not be valid consideration. The law, however, looks at an unliquidated or disputed claim as a whole and so looking at it, does not attempt to set a value upon it, or to define the extent of the debtor's legal obligation. Accordingly such a claim is dealt with as a horse is dealt with, as something the adequacy of which as consideration will not be measured; and the payment of the amount admittedly due will support a promise to discharge the whole claim.⁵

Craas (Tenn. Ch. App.), 53 S. W. 986; *McDaniels v. Lapham*, 21 Vt. 222; *Connecticut River Lumber Co. v. Brown*, 68 Vt. 239, 35 Atl. 56.

^{4a} In *Mills v. O'Daniel*, 23 Ky. L. Rep. 73, 62 S. W. 1123, 1124, the court said: "A mere disclaimer of liability on one's note—the execution of it upon a sufficient consideration not being denied, and it not being barred by limitation or other matter of release—will not constitute a basis for a 'dispute,' the amicable settlement of which will support a promise of the payee to abate some part of the debt." So in *Harms v. Fidelity & Casualty Co.*, 172 Mo. App. 241, 157 S. W. 1046, a statement in a release which required consideration for its validity that the claim was in dispute was held ineffectual. "The controversy must be real and the issue respecting it be considered by the parties as doubtful." See also *Decker*

v. Smith, 88 N. J. L. 630, 86 Atl. 915, 917.

⁵ *Chicago, M. & St. P. R. Co. v. Clark*, 178 U. S. 353, 44 L. Ed. 1099; 20 Sup. Ct. 924; *San Juan v. St. John's Gas Co.*, 195 U. S. 510, 49 L. Ed. 299, 25 S. Ct. 108; *Ostrander v. Scott*, 161 Ill. 339, 43 N. E. 1089; *Ennis v. Pullman Palace Car Co.*, 165 Ill. 161, 46 N. E. 439; *Bingham v. Browning*, 197 Ill. 122, 64 N. E. 317; *Neely v. Thompson*, 68 Kans. 193, 75 Pac. 117; *Cunningham v. Standard Const. Co.*, 134 Ky. 198, 119 S. W. 765; *Tanner v. Merrill*, 108 Mich. 58, 65 N. W. 664, 31 L. R. A. 171, 62 Am. St. Rep. 687; *Marion v. Heimbach*, 62 Minn. 214, 64 N. W. 386; *Jordan v. Great Northern Ry. Co.*, 80 Minn. 405, 83 N. W. 391; *Pollman & Bros. Coal & S. Co. v. St. Louis*, 145 Mo. 651, 47 S. W. 563; *Treat v. Price*, 47 Neb. 875, 66 N. W. 834 (overruling *dictum* to contrary in 29 Neb. 536, 45 N. W. 790); *Nassoiy*

On principle it seems that a distinction should be taken between (1) the case of a wholly unliquidated claim which the debtor has admitted to be of a certain value, and (2) the case of a liquidated claim with an unliquidated or disputed addition to it. Where a claim is wholly unliquidated, the parties may, of course, by agreement, liquidate it and after they have made such an agreement the situation is the same as if the claim had been liquidated from the outset. But an admission or even an agreement subsequent to the creation of an unliquidated claim that at least a certain amount is owing has no binding force, since the creditor gives no consideration for such an agreement by the debtor. As the creditor is left free to assert the full value of his claim, if that exceeds the admitted amount, the debtor must be equally free. The agreement indeed amounts to the same thing as an admission in terms by the debtor, but an admission is open to explanation and need not be conclusive. Any action by the creditor would have to be brought for the whole claim, and any breach of contract alleged would have to be the failure to pay the whole claim. On the other hand, where a contract required the payment of \$50 a month for services, and the parties disputed whether the contract also provided that extra payment should be made for extra work, it seems evident that the debtor was under a distinct legal obligation to pay \$50 a month. It is true that in an action on the contract the plaintiff must state the contract accurately, and if the contract included as one of its terms an agreement to pay for extra work, this promise must be alleged in the declaration or complaint as part of the contract. But it would be an accurate and sufficient statement of a breach of the contract for the plaintiff to allege that the defendant had failed to pay the liquidated monthly sum which he agreed to pay. An entire contract may consist of several promises and may be broken by a failure to perform any one of several specific things therein undertaken.

v. Tomlinson, 148 N. Y. 326, 42 N. E. 715, 51 Am. St. Rep. 695; *Komp v. Raymond*, 175 N. Y. 102, 67 N. E. 113; *Lestienne v. Ernst*, 5 N. Y. App. Div. 373, 39 N. Y. S. 199. But see *Prudential Ins. Co. v. Cottingham*, 103 Md.

319, 63 Atl. 359; *Dameules v. Jewel Tea Co.*, 103 Minn. 150, 114 N. W. 733, 14 L. R. A. (N. S.) 954, 123 Am. St. Rep. 315; *Thayer v. Harbican*, 70 Wash. 278, 126 Pac. 625.

In the contract supposed, it is a specific thing undertaken by the defendant that \$50 a month shall be paid. If this is true, it follows that the defendant is under a legal obligation to pay \$50 a month; and the performance of that legal obligation should not be sufficient consideration.⁶ Though the courts seem to have failed to observe the distinction between a wholly unliquidated claim of at least a specified value and a claim where there is a distinct obligation to pay a liquidated amount as part of an entire contract, the distinction is clearly recognized between either of such cases on the one hand, and a case where a debtor is liable under two distinct contracts, on the other hand. If the debtor owes a liquidated amount, the fact that he owes on another contract an unliquidated or disputed amount, will not make payment of the former sufficient consideration for an agreement to discharge the latter,⁷ or indeed for any other promise.⁸ If, however, there are cross claims between the parties,⁹ if either claim is unliquidated, or the subject of *bona fide* and reasonable dispute, since the balance due on adjustment of the claims is uncertain, any payment will support an agreement to cancel both claims.¹⁰

§ 130. Performance, or promise to perform any obligation previously existing under a contract with the promisee is not valid consideration. ✓

Where A and B have entered into a bilateral agreement, it not infrequently happens that one of the parties, becoming

⁶ The contrary was however held in *Jordan v. Great Northern Ry. Co.*, 80 Minn. 405, 83 N. W. 391. See also to the same effect—*Central Pacific R. Co. v. United States*, 164 U. S. 93, 41 L. Ed. 362, 17 Sup. Ct. Rep. 35; *Ennis v. Pullman Palace-Car Co.*, 165 Ill. 161, 46 N. E. 439; *Tanner v. Merrill*, 108 Mich. 58, 65 N. W. 664, 31 L. R. A. 171, 62 Am. St. Rep. 687. But see *Seattle &c. R. v. Seattle Tacoma Power Co.*, 63 Wash. 639, 116 Pac. 289.

⁷ *Walston v. F. D. Calkins*, 119 Iowa, 150, 93 N. W. 49; *Whittaker Chain Tread Co. v. Standard Auto Supply*

Co., 216 Mass. 204, 103 N. E. 695, 51 L. R. A. (N. S.) 315; *Ness v. Minnesota, etc., Co.*, 87 Minn. 413, 92 N. W. 333; *Mintzer v. Supreme Council A. L. H.*, 41 N. Y. Misc. 512, 85 N. Y. S. 23.

⁸ *Howe v. Robinson*, 13 N. Y. Misc. 256, 34 N. Y. S. 85.

⁹ The nature of the claims is immaterial.

¹⁰ *Ostrander v. Scott*, 161 Ill. 339, 43 N. E. 1089; *Brewster v. Silverstein*, 78 N. Y. Misc. 123, 137 N. Y. S. 912; *Hull v. Johnson*, 22 R. I. 66, 46 Atl. 182.

dissatisfied with the contract, refuses to perform or to continue performance unless a larger compensation than that provided in the original agreement is promised him.¹¹ Especially common is the situation where a builder or contractor undertakes work in return for a promised price and afterwards finding the contract unprofitable, refuses to fulfil his agreement but is induced to fulfil it by the promise of added compensation. On principle the second agreement is invalid for the performance by the recalcitrant contractor is no legal detriment to him whether actually given or promised, since, at the time the second agreement was entered into, he was already bound to do the work; nor is the performance under the second agreement a legal benefit to the promisor since he was already entitled to have the work done. In such situations and others identical in principle, the great weight of authority supports this conclusion.¹² In a few jurisdictions a contrary view has prevailed.¹³

¹¹ The situation, though less common, would involve the same legal principle if the original contract were not bilateral, executed consideration having been given for his promise to the party who subsequently becomes dissatisfied.

¹² *Harris v. Watson*, Peake, 72; *Stilk v. Myrick*, 2 Camp. 317; *Frazer v. Hatton*, 2 C. B. N. S. 512; *Jackson*

v. Cobbin, 8 M. & W. 790; *Mallalieu v. Hodgson*, 16 Q. B. 689; *Harris v. Carter*, 3 E. & B. 559; *Alaska Packers' Assoc. v. Domenico*, 117 Fed. 99, 54 C. C. A. 485; *Ex re Riff*, 205 Fed. 406; *National Elec. Signaling Co. v. Fessenden*, 207 Fed. 915, 125 C. C. A. 363; *Frankfurt-Barnett Co. v. William Prym Co.*, 237 Fed. 21, 150 C. C. A. 223; *Shriner v. Craft*, 166 Ala. 146, 51

¹³ *Stoudenmeier v. Williamson*, 29 Ala. 558; *Bishop v. Busse*, 69 Ill. 403; *Cooke v. Murphy*, 70 Ill. 96 (but see *Moran v. Peace*, 72 Ill. App. 135); *Coyner v. Lynde*, 10 Ind. 282; *Holmes v. Doane*, 9 Cush. 135; *Rollins v. Marsh*, 128 Mass. 116; *Rogers v. Rogers*, 139 Mass. 440, 1 N. E. 122; *Thomas v. Barnes*, 156 Mass. 581, 584, 31 N. E. 683; *Brigham v. Herrick*, 173 Mass. 460, 467, 53 N. E. 906 [but see *Parrot v. Mexican C. R. Co.*, 207 Mass. 184, 93 N. E. 590, 34 L. R. A. (N. S.) 261]; *Moore v. Detroit Locomotive Works*, 14 Mich. 266; *Göbel v. Linn*, 47 Mich. 489, 11 N. W. 284, 41 Am. Rep. 723; *Conkling v. Tuttle*, 52 Mich.

630, 18 N. W. 391; *Scanlan v. Northwood*, 147 Mich. 139, 110 N. W. 493; *Osborne v. O'Reilly*, 42 N. J. Eq. 467, 9 Atl. 209; *Lattimore v. Harsen*, 14 Johns. 330; *Stewart v. Keteltas*, 36 N. Y. 388. See also *Peck v. Requa*, 13 Gray, 407; *Blodgett v. Foster*, 120 Mich. 392, 79 N. W. 625; *King v. Duluth Ry. Co.*, 61 Minn. 482, 63 N. W. 1105; *Hansen v. Gaar, Scott & Co.*, 63 Minn. 94, 65 N. W. 254; *Gaar v. Green*, 6 N. Dak. 48, 68 N. W. 318; *Dreifus v. Columbian Co.*, 194 Pa. 475, 45 Atl. 370, 75 Am. St. Rep. 704; *Evans v. Oregon, etc., R. Co.*, 58 Wash. 429, 108 Pac. 1095, 28 L. R. A. (N. S.) 455.

§ 130a. Unsoundness of arguments sustaining such agreements. ✓

Two arguments have been advanced in support of the latter view. First, it has been said that the parties to the first agree-

So. 884, 28 L. R. A. (N. S.) 450, 139 Am. St. Rep. 19; *McDonough v. Saunders* (Ala.), 78 So. 160; *Feldman v. Fox*, 112 Ark. 223, 164 S. W. 766; *Main Street Co. v. Los Angeles Co.*, 129 Cal. 301, 61 Pac. 937; *Benedict v. Greer-Robbins Co.*, 26 Cal. App. 468, 147 Pac. 486; *Benford v. Yockey* (Colo.), 164 Pac. 725; *Littlepage v. Neale Publishing Co.*, 34 App. D. C. 257; *Bush v. Rawlins*, 89 Ga. 117, 14 S. E. 886; *Davis v. Morgan*, 117 Ga. 504, 43 S. E. 732, 61 L. R. A. 148, 97 Am. St. Rep. 171; *Willingham Sash Co. v. Drew*, 117 Ga. 850, 45 S. E. 237 (*cf.* *Poland Paper Co. v. Foote*, 118 Ga. 458, 45 S. E. 374); *Nelson v. Pickwick Associated Co.*, 30 Ill. App. 333; *Goldsborough v. Gable*, 140 Ill. 269, 29 N. E. 722, 15 L. R. A. 294; *Moran v. Peace*, 72 Ill. App. 135, 139; *Allen v. Rouse*, 78 Ill. App. 69; *Mader v. Cool*, 14 Ind. App. 299, 42 N. E. 945, 56 Am. St. Rep. 304; *Ayres v. Chicago, etc., R. Co.*, 52 Iowa, 478, 3 N. W. 522; *McCarty v. Hampton Bldg. Assoc.*, 61 Iowa, 287, 16 N. W. 114; *Awe v. Gadd*, 179 Ia. 520, 161 N. W. 671; *Howard v. McNeil*, 25 Ky. L. Rep. 1394, 78 S. W. 142; *Wescott v. Mitchell*, 95 Me. 377, 50 Atl. 21; *Parrot v. Mexican C. R. Co.*, 207 Mass. 184, 93 N. E. 590, 34 L. R. A. (N. S.) 261; *Bell v. Oates*, 97 Miss. 790, 53 So. 491; *Lingenfelder v. Wainwright Brewing Co.*, 103 Mo. 578, 15 S. W. 844; *Storck v. Meaker*, 55 Mo. App. 26; *Wear v. Schmelzer*, 92 Mo. App. 314; *Smith v. Sickenger* (Mo. App.) 202, 8 S. W. 262; *Easterly v. Jackson*, 29 Mont. 496, 75 Pac. 357; *Esterly Harvesting Machine Co. v. Pringle*, 41 Neb. 265, 59 N. W. 804; *Voorhees v. Woodhull's Exr's*, 33 N. J. L. 494; *Natalizio v. Valentino*, 71 N. J. L. 500, 502, 59 Atl. 8; *Bartlett*

v. Wyman, 14 Johns. 260; *Vanderbilt v. Schreyer*, 91 N. Y. 392; *Carpenter v. Taylor*, 164 N. Y. 171, 58 N. E. 53; *Weed v. Spears*, 193 N. Y. 289, 86 N. E. 10; *Schneider v. Heinsheimer*, 55 N. Y. Supp. 630, 26 N. Y. Misc. 11; *Jughardt v. Reynolds*, 68 N. Y. App. D. 171, 74 N. Y. Supp. 152; *Moore v. Bloomingdale*, 126 N. Y. Supp. 125; *Galway v. Prignano*, 134 N. Y. Supp. 571; *United Merchants' Press v. Corn Products Refining Co.* (N. Y. App. Div.), 134 N. Y. S. 578; *Kuhmarker Mfg. Co. v. Hills*, 146 N. Y. S. 1013; *Seneca Falls v. Botsch*, 86 N. Y. Misc. 481, 149 N. Y. S. 320; *Festerman v. Perker*, 10 Ired. 474; *Muir v. Morris*, 80 Ore. 378, 154 Pac. 117; *Erb v. Brown*, 69 Pa. 216; *Jones v. Risley*, 91 Tex. 1, 32 S. W. 1027; *Whitsett v. Carney* (Tex. Civ. App.), 124 S. W. 443; *Creamery Package Mfg. Co. v. Russell*, 84 Vt. 80, 78 Atl. 718; *Tolmie v. Dean*, 1 Wash. Ter. 46; *Vance v. Ellison*, 76 W. Va. 592, 85 S. E. 776; *Magoon v. Marks*, 11 Hawaii, 764. *See also* *Hartley v. Ponsonby*, 7 E. & B. 872; *Eastman v. Miller*, 113 Ia. 404, 85 N. W. 635; *Proctor v. Keith*, 12 B. Mon. 252; *Eblin v. Miller's Exec'r*, 78 Ky. 371; *Endriss v. Belle Isle Ice Co.*, 49 Mich. 279, 13 N. W. 590; *Conover v. Stillwell*, 34 N. J. L. 54, 57; *Hanks v. Barron*, 95 Tenn. 275, 32 S. W. 195; *Boerger v. Vandegrift* (Tex. Civ. App.), 188 S. W. 948; *Smith v. Brown* (Utah), 165 Pac. 468; *Thomas v. Mott*, 74 W. Va. 493, 82 S. E. 325. A promise by a contractor to do work beyond what the contract required in consideration of the contract being carried out by the other party is equally invalid. *Jughardt v. Reynolds*, 68 N. Y. App. Div. 171, 74 N. Y. Supp. 152; *Gaar v. Green*, 6 N. Dak. 48, 68 N. W. 318.

ment had either of them a right to subject himself to liability in damages if he preferred to pay damages rather than to perform the contract; and, therefore, it is contended, the surrender of the right to pay damages constituted a sufficient consideration.¹⁴ The argument is, however, unsound. It is doubtless true that a promisor can always refuse to perform his promises, and in most cases the only liability he incurs thereby is to pay damages, but this is far from saying that when one enters into a contract he in effect agrees to perform or pay damages at his option. Under ordinary contracts his duty is to perform the contract, and his co-contractor is entitled to the performance.^{14a} Unless, therefore, he has reserved as an alternative in the contract the choice of making a money payment to the promisee, he does not perform his legal duty by paying damages.¹⁵ Moreover, even if it could be conceded (as it cannot be) that the original promise is to be regarded as merely an alternative undertaking either to perform or pay damages, the situation here under discussion would not be helped at least if the second agreement were bilateral; for the same construction would have to be put upon the second undertaking as upon the first. One who was previously bound to do certain work or pay damages based on its value, is promising nothing detrimental to himself or beneficial to the promisee when he again promises to do that very

¹⁴ This reasoning was adopted in—*Lattimore v. Harsen*, 14 Johns. 330. Mr. Justice Holmes, in his early book, *The Common Law*, p. 299, seems to regard a contract in somewhat this way, and he has indicated in judicial opinions that he still holds the same view. See, e. g., *Globe Refining Co. v. Landa Cotton Oil Co.*, 190 U. S. 540, 47 L. Ed. 1171, 23 Sup. Ct. 754.

^{14a} See *supra*, § 103f, *ad fin.* See Corbin, 27 Yale L. J., at p. 363.

¹⁵ This is illustrated by the cases in equity which hold that a contract if of such a nature as to be enforceable in equity will be specifically enforced, though the contract provides that in case of breach the damages shall be liquidated at a specified amount. The

defendant has no right to pay the damages and claim exemption from his promise. See Fry on Specific Performance, Chap. III; *Srolowitz v. Roseman*, (Pa. 1919), 107 Atl. 322; *Wright v. Suydam*, 72 Wash. 587, 131 Pac. 239. Similarly where an action at law is allowed a seller for recovery of the full price from a buyer in default, a provision for liquidated damages will not prevent a seller from exercising this right. *Korman v. Trainer*, 258 Pa. 362, 101 Atl. 1051. In *The Blairmore*, [1898] A. C. 593, 607, the court laid down the rule contended for in the text that a party to a contract cannot escape obligations which he has undertaken by offering an indemnity or damages for a breach. See *infra*, § 781.

work or to pay damages necessarily identical in amount with those for which he was previously liable. The other ground suggested for supporting the second agreement is that the first agreement is rescinded by the second, and being rescinded, each party, freed from previous obligations, may enter into the new agreement. It must be conceded that the original agreement if still in part at least unperformed on each side, may be rescinded by mutual consent;¹⁶ and, if the original agreement is rescinded, a new agreement made thereafter on any terms to which the parties assent will be binding. Therefore, a rescission followed shortly afterwards by a new agreement in regard to the same subject-matter, would create the legal obligations provided in the subsequent agreement. It must further be conceded that when a second agreement is made which is intended by the parties as a substitution for the original contract, there is mutual assent to the rescission of the earlier agreement. But calling an agreement an agreement for rescission does not do away with the necessity of consideration,¹⁷ and when the agreement for rescission is coupled with a further agreement that the work provided for in the earlier agreement shall be completed and that the other party shall give more than he originally promised, the total effect of the second agreement is that one party promises to do exactly what he had previously bound himself to do, and the other party promises to give an additional compensation therefor. If for a single moment the parties were free from the earlier contract so that each of them could refuse to enter into any bargain whatever relating to the same subject-matter, a subsequent agreement on any terms would be good.¹⁸ The situation is not different from that existing where one subject to a unilateral obligation undertakes instead of merely performing that obligation to do something additional,¹⁹ nor indeed from that where one subject to no liability voluntarily agrees to assume one.²⁰ In a few cases

¹⁶ See *infra*, § 1826.

¹⁷ See *infra*, § 1829.

¹⁸ In *Noble v. Ward*, L. R. 1 Exch. 117, Bramwell, B., said: "It is attempted to say that what took place when contract C was made was twofold: first that the old contracts were given

up; secondly a new one was made. But this is not so. What was done was all done at once—was one transaction."

¹⁹ *Steele v. Syracuse University*, 174 App. D. 41, 160 N. Y. S. 39.

²⁰ *Teele v. Mayer*, 173 N. Y. App. D. 869, 160 N. Y. S. 116; *Carstens*

a distinction has been taken which, however equitable it may seem, also involves faulty reasoning. It is held in these cases ²¹ that "where the party refusing to complete his contract does so by reason of some unforeseen and substantial difficulties in the performance of the contract, which were not known or anticipated by the parties when the contract was entered into, and which cast upon him an additional burden not contemplated by the parties, and the opposite party promises him extra pay or benefits if he will complete his contract, and he so promises, the promise to pay is supported by a valid consideration." The difficulty with this suggestion is that the unknown and unanticipated difficulties do not excuse the contractor from fulfilling his original contract.²² Accordingly in acting under the second offer, the contractor is merely doing or promising to do something which at the time he was under obligation to do, and which the promisee was entitled to receive. In any case, however, if the terms of the new agreement vary the character of the work which the contractor is to do, there is sufficient consideration for the new bargain. If one party to a bilateral contract has fully performed, a promise of additional performance by him made in order to induce the other party to perform, and which does induce him to perform is even more clearly without consideration than where the new agreement is made before either party has fully performed.²³ The case is identical in principle with an agreement in consideration of the payment of a liquidated debt.²⁴ Similarly a promise by an employer or an employee

Packing Co. v. Lewis C. Troughton, Inc., 90 Wash. 196, 155 Pac. 758.

²¹ *Linz v. Schuck*, 106 Md. 220, 67 Atl. 286, 11 L. R. A. (N. S.) 789, 124 Am. St. Rep. 481; *King v. Duluth, etc., Ry. Co.*, 61 Minn. 482, 63 N. W. 1105. See also *Grant Marble Co. v. Abbot*, 142 Wis. 279, 124 N. W. 204, 11 Mich. L. Rev. 434 (Ballantine); 17 Yale L. J. 470, 27 *ib.* at p. 373 (Corbin).

²² See *Seymour v. Hughes*, 105 N. Y. S. 249, 55 N. Y. Misc. 248. If they do there is no difficulty in finding sufficient consideration, *Liston v. S. S. Carpath-*

ian, [1915] 2 K. B. 42; *John King Co. v. Louisville, etc., R. Co.*, 131 Ky. 46, 114 S. W. 308, 116 S. W. 1201, and recovery could be had on a quasi-contractual obligation without a new promise. *Howard v. Harvard Congregational Soc.*, 223 Mass. 562, 112 N. E. 233. See *infra*, § 1569.

²³ *Gaar v. Green*, 6 N. Dak. 48, 68 N. W. 318; *Schneider v. Heinsheimer*, 55 N. Y. S. 630, 26 N. Y. Misc. 11. The contrary decision of *Peck v. Requa*, 13 Gray, 407, is opposed to received doctrines of consideration.

²⁴ See *supra*, § 120.

under a subsisting contract to do more or take less than that contract requires is invalid unless the other party gives or promises to give something capable of serving as consideration.²⁵ And a promise by a landlord to do something not required by the lease is not supported by the tenant's promise to perform obligations to which he is bound by the lease.²⁶

§ 131. Whether performance or promise to perform a contractual duty previously undertaken with a third person is valid consideration.

It is clear that when one under a contractual duty to another to do a certain act performs it under an agreement that it shall be the consideration for the promise of a third person, he incurs no legal detriment since he previously was bound to perform that very act. Further, if instead of actually performing, the party previously bound promises to perform what he has already undertaken, his promise is of something which is no detriment for him to perform. It is true, however, that though such a performance or promise may not involve a detriment, or the promise of a detriment, to the one who does or promises to do the act, a benefit to which the other party to the bargain was not previously legally entitled may be thereby given or promised him. This type of case, therefore, seems squarely to raise the question whether detriment given or promised by the promisee is the sole test of consideration, or whether benefit received from the other party is equally effective. In England it has been settled that such agreements are valid contracts.²⁷ In the United States the great weight

²⁵ *Davis v. Morgan*, 117 Ga. 504, 43 S. E. 732, 61 L. R. A. 148, 97 Am. St. Rep. 171; *Carpenter v. Taylor*, 164 N. Y. 171, 58 N. E. 53; *Price v. Press Pub. Co.*, 117 N. Y. App. Div. 854, 103 N. Y. Supp. 296; *Obrechts v. Wesenfeld*, 103 N. Y. Misc. 664, 170 N. Y. S. 966; *Hillman v. Young*, 64 Or. 73, 129 Pac. 124; *Freeman v. Morrow* (Tex. Civ. App.), 156 S. W. 284. But where the employer was given a right to renew the contract, which he had not previously had, an undertaking

to give the employee higher wages for the remaining period of the subsisting contract was supported by valid consideration. *Triangle Waist Co. v. Todd*, 223 N. Y. 27, 119 N. E. 85.

²⁶ *Loth v. Harris*, 76 N. Y. Misc. 505, 135 N. Y. S. 553.

²⁷ *Shadwell v. Shadwell*, 30 L. J. C. P. (N. S.) 145; *Scotson v. Pegg*, 6 H. & N. 295; *Chichester v. Cobb*, 14 L. T. Rep. (N. S.) 433; *Skeete v. Silberberg*, 11 T. L. Rep. 491. The reasoning in *Shadwell v. Shadwell*,

of authority is opposed to the validity of such agreements, whether unilateral or bilateral in form.²⁸ Some American cases, however, follow the English decisions and hold the second agreement valid.²⁹

supra, is unsatisfactory; but in *Scotson v. Pegg*, *supra*, the court squarely rests the decision on the ground that the defendant had received a benefit. *Jones v. Waite*, 5 Bing. N. C. 341, a decision of the Exchequer Chamber (affirmed in the House of Lords, 9 Cl. & F. 101), seems not to have been cited or considered in *Shadwell v. Shadwell* and *Scotson v. Pegg*. Although that decision turned on a different point, the language and reasoning of several of the judges is clear authority that the second agreement is invalid.

²⁸ *Johnson's Adm. v. Saller's Adm.*, 33 Ala. 265 (bilateral); (cf. *Humes v. Decatur L. I. Co.*, 98 Ala. 461, 473, 13 So. 368); *Ellison v. Water Co.*, 12 Cal. 542, 553 (bilateral); *Havana Press Drill Co. v. Ashurst*, 148 Ill. 115, 35 N. E. 873 (promise to perform existing obligation to third party no valid consideration for license to use patent); *Peelman v. Peelman*, 4 Ind. 612 (unilateral); *Ford v. Garner*, 15 Ind. 298 (bilateral); *Reynolds v. Nugent*, 25 Ind. 328 (unilateral); *Ritenour v. Mathews*, 42 Ind. 7 (unilateral). In this case the promise was by a surety to the principal debtor in consideration of being relieved from liability); *Harris v. Cassady*, 107 Ind. 158, 8 N. E. 29 (bilateral); *Brownlee v. Lowe*, 117 Ind. 420, 422, 20 N. E. 301 (general dictum); *Barringer v. Ryder*, 119 Iowa, 121, 93 N. W. 56 (promise to perform obligation to a third person held insufficient consideration for a conveyance); *Ford v. Crenshaw*, 1 Litt. (Ky.) 68 (in statement of facts stated as unilateral, but in discussion stated as mutual promises); *Holloway's Assignee v. Rudy*, 22 Ky. L. Rep. 1406, 60 S. W. 650 (unilateral); *Schuler v. Myton*, 48 Kans. 282, 29 Pac. 163

(unilateral, but dictum that a bilateral contract also would be invalid); *Putnam v. Woodbury*, 68 Me. 58 (uncertain whether unilateral or bilateral); *Northwestern Nat. Bank v. Great Falls Opera House*, 23 Mont. 1, 11, 57 Pac. 440 (unilateral. Previous obligation was as a fiduciary for a third person); *Gordon v. Gordon*, 56 N. H. 170 (probably bilateral); *Vanderbilt v. Schreyer*, 91 N. Y. 392 (probably unilateral); *Seybolt v. New York, etc., R. Co.*, 95 N. Y. 562, 47 Am. Rep. 75 (bilateral); *Robinson v. Jewett*, 116 N. Y. 40, 22 N. E. 224 (bilateral); *Arend v. Smith*, 151 N. Y. 502, 45 N. E. 872 (unilateral); *Alley v. Turck*, 8 N. Y. App. Div. 50, 52, 40 N. Y. 433 (unilateral); *Petze v. Leary*, 117 N. Y. App. Div. 829, 102 N. Y. S. 960 (unilateral); *Teele v. Mayer*, 173 N. Y. App. D. 869, 160 N. Y. S. 116 (probably bilateral); *Sherwin v. Brigham*, 39 Oh. St. 137 (bilateral); *Hanks v. Barron*, 95 Tenn. 275, 32 S. W. 195 (unilateral); *Kenigsberger v. Wingate*, 31 Tex. 42 (unilateral); *Cobb v. Cowdery*, 40 Vt. 25, 28 (dictum as to both unilateral and bilateral); *Conti v. Johnson*, 91 Vt. 467, 100 Atl. 874 (unilateral); *Davenport v. First Congregational Soc.*, 33 Wis. 387 (unilateral). See also *Mack v. Mack*, 87 Neb. 819, 94 Neb. 504, 128 N. W. 527, 143 N. W. 454, 31 L. R. A. (N. S.) 441, where the promise of a wife to a third person to return to her husband was held insufficient consideration unless her absence from him had been justifiable.

²⁹ *Humes v. Decatur Land Improvement Co.*, 98 Ala. 461, 473, 13 So. 368 (bilateral. Recovery allowable only where the defendant will be benefited by plaintiff's performance); *Hirsch v. Chicago Carpet Co.*, 82 Ill. App. 234

The ground upon which the English cases are rested and that on which such American decisions as follow them are also in the main rested, is that the performance to which the plaintiff had been bound to a third person was beneficial to the defendant.³⁰ No distinction is taken in the cases, English or

(unilateral); *Donnelly v. Newbold*, 94 Md. 220, 50 Atl. 513 (unilateral); *Abbott v. Doane*, 163 Mass. 433, 40 N. E. 197, 34 L. R. A. 33, 47 Am. St. Rep. 465, (probably bilateral); *Swartzman v. Babcock*, 218 Mass. 334, 105 N. E. 1022 (unilateral); *Bradley v. Glenmary Co.*, 64 N. J. Eq. 77, 53 Atl. 49; *Avondale Marble Co. v. Wiggins*, 12 Pa. Super. 577 (bilateral); *Bond v. Treahey*, Upper Can., 37 Q. B. 360.—See also *Day v. Gardner*, 42 N. J. Eq. 199, 203, 7 Atl. 365.

* In *Shadwell v. Shadwell*, 30 L. J. C. P. (N. S.) 145, 148, 149 (1860), Erle, J., who delivered the opinion of the majority of the court after having first suggested that the plaintiff may have incurred a detriment at his uncle's request in performing his engagement to marry, by changing his position relying on the uncle's promise, added: "Secondly, do these facts show a benefit derived from the plaintiff to the uncle at his request? In answering again in the affirmative, I am at liberty to consider the relation in which the parties stood, and the interest in the *status* of the nephew which the uncle declares. The marriage primarily affects the parties thereto; but in the second degree it may be an object of interest with a near relative, and in that sense a benefit to him."

Byles, J., rested his dissent mainly on the well-founded objection that the plaintiff's marriage was not requested by his uncle as the consideration for his promise, but also said: "Now, the testator in the case before the court derived, so far as appears, no personal benefit from the marriage."

In *Scotson v. Pegg*, 6 H. & N. 295,

299, 300 (1861), Martin, B., said: [The plea] "is bad in law because the ordinary rule is, that any act done whereby the contracting party receives a benefit is a good consideration for a promise by him. . . . The defendant gets a benefit by the delivery of the coals to him, and it is immaterial that the plaintiff had previously contracted with third parties to deliver their order."

Wilde, B., the only other judge delivering an opinion, said, *ibid.* 300: "Here the defendant who was a stranger to the original contract, induced the plaintiffs to part with the cargo, which they might not otherwise have been willing to do, and the delivery of it to the defendant was a benefit to him."

In *Humes v. Decatur Land Imp. Co.*, 98 Ala. 461, 473, 13 So. 368, the court said: "In the case of *Johnson, Admr., v. Sellers*, 33 Ala. 265, it is said, 'a promise by defendant to plaintiff, made to induce the latter to comply with an existing contract between him and other persons is without consideration.' We are not disposed to depart from the rule as here stated, but we are not willing to extend it so that if the party making the second contract is directly interested in the result, and is to be benefited, he cannot employ the same party for the protection of his own interest."

In *Hirsch v. Chicago Carpet Co.*, 82 Ill. App. 234, 237, the court gave as its reasons for upholding a promise given to induce performance by the plaintiff of a contract with the Tivoli company to deliver goods to it, that they "were not outside parties having

American, between actual performance and a promise to perform an existing duty in respect to the validity of the consideration.³¹ Indeed, in many of the cases it is difficult to be certain whether the agreement in suit was bilateral or unilateral in its terms. The contention for the validity of the agreements in question is strengthened by certain decisions on novations which though they do not expressly discuss the question of consideration, nevertheless involve a decision thereof. If C conveys property to A as the consideration for A's promise to C to pay C's debt to B, and thereafter A promises B directly to pay C's debt to him in consideration of a promise by B to discharge C from debt, C is thereby

no interest in the matter. They were the principal officers of the Tivoli company."

In *Donnelly v. Newbold*, 94 Md. 220, 222, 50 Atl. 513, the same argument is used. "The fact which appears on the face of the guaranty that the appellee was interested in the land which was to be improved by the use of the bricks constituted a consideration sufficient to support the guaranty."

In *Abbott v. Doane*, 163 Mass. 433, 40 N. E. 197, 34 L. R. A. 33, 47 Am. St. Rep. 465, the court said: "If A. has refused or hesitated to perform an agreement with B. and is requested to do so by C. who will derive a benefit from such performance, and who promises to pay him a certain sum therefor, and A. thereupon undertakes to do it, the performance by A. of his agreement in consequence of such request and promise by C. is a good consideration to support C.'s promise."

In *Day v. Gardner*, 42 N. J. Eq. 199, 203, 7 Atl. 365, the court said: "A substantial benefit accrued to her from the payment of the taxes . . . [There was no personal obligation on the promisor to pay the taxes] but if a personal liability had existed, the duty which such liability would have imposed would have been a duty to the government which was entitled to the taxes,

and not to the mortgagee, and I am not prepared to say that, in such a condition of affairs, the collateral benefit resulting to a mortgagee from the payment of taxes, which were entitled to priority in payment over his mortgage, would not constitute a perfectly valid consideration for such a contract as that on which the defense in this case rests."

In *Bradley v. Glenmary Co.*, 64 N. J. Eq. 77, 83, 53 Atl. 49, the same reason is given. "The reduction of the amount due on the first mortgage by the payment on the principal of \$2,000, with all arrears of interest, thereby reducing it to \$7,000, was a direct benefit to the complainant."

In *Bond v. Treahey*, Upper Can. 37 Q. B. 360, 365, the court said: "There can be no doubt that the performance of an act which a person has agreed with another to perform is a good consideration to support a contract with a third person, if the latter derives benefit from the performance."

³¹ A single exception to this statement may be found in *Merrick v. Giddings*, 1 Mack. (D. C.) 394, where in an elaborate dictum the court relying on *Pollock on Contracts*, states that a new bilateral agreement would be valid whereas a unilateral agreement would be invalid.

discharged and A is liable to B instead.³² Yet it is clear that A's agreement with B is bilateral and must therefore be supported by consideration on each side. It is further clear that A's promise to B to pay him C's debt is a promise to do something which A had already legally bound himself to do by his contract with C.

§ 131a. The defendant should be liable if the consideration is beneficial to him.

The whole matter of promises to perform a contractual duty to a third person has been the subject of a great deal of argument by writers on the law of contracts.³³ Most of these writers have summarily assumed detriment given or promised to be the sole test of consideration, but different application of this definition has been made to the facts. Some writers find a detriment in the entering into a new obligation to a third person, and, therefore, hold the second agreement valid if bilateral in form, though invalid if unilateral.³⁴ The assumption, however, that the new promise of the old duty imposes a new obligation, is an assumption of the whole point in issue. Such an obligation is imposed if the agreement has valid consideration on both sides; otherwise, no obligation is imposed. This was pointed out by a learned writer,³⁵ who made the suggestion, however, that a promise to refrain from a mutual rescission of the agreement with the other party to the first contract was implied and validated the second. It may be granted that a promise not to rescind the earlier contract would serve as consideration for a promise. It is doubtful whether merely failing to rescind would be sufficient

³² *Bird v. Gammon*, 3 Bing. N. C. 883; *Re Times Life Assurance Co.*, 5 Ch. 381; *Re Medical Invalid, etc., Co.*, 6 Ch. 362; *Rolfe v. Flower*, L. R. 1 P. C. 27; *McLaren v. Hutchinson*, 22 Cal. 187; *Bowen v. Kurtz*, 37 Iowa, 239; *Langdon v. Hughes*, 107 Mass. 272; *Scott v. Hallock*, 16 Wash. 439, 47 Pac. 968.

³³ Pollock, *Contracts* (1st ed.), 158; (8th ed.) 195; Anson, *Contracts* (1st ed.), 80; (12th ed.) 108; Langdell,

Summ. Contracts, § 84, 14 Harv. L. Rev. 496; Professor Ames, 12 Harv. L. Rev. 515, 13 *ibid.* 29; Professor Beale, 17 Harv. L. Rev. 71; the present writer—8 Harv. L. Rev. 32, 27 *ibid.* 503. Professor Corbin, 27 Yale Law J. 362.

³⁴ This reasoning is supported by Sir Frederick Pollock and Professors Langdell and Beale.

³⁵ Sir William Anson, *Contracts* (1st ed.), 80.

without proof that the willingness to rescind of the other party to the contract made rescission possible, and, therefore, refraining from it, a detriment. But the great difficulty with the theory is that it does not fit the facts. It may well be that one of the parties to the second contract is not aware of the existence of the earlier contract, and, in any event, a rescission of the earlier contract might obviously be made without liability on the second contract if the performance promised was actually carried out. If that be done, the second promisor cares nothing whether the original contract remains in force or is abrogated.

It may, however, be argued that though performance of the prior contract be not a good consideration because unless it appears that both parties to that contract were willing to rescind, no detriment to the promisee can be found, yet a promise of such performance is a good consideration because, owing to the possibility of a rescission or other excuse for not carrying out the prior contract, performance of the second contract when the time for performance comes may be a detriment. This is the strongest argument that can be made under the theory of detriment. But it goes too far. In every case where the promisor is already bound to do the thing promised, it is possible that, before the time for performance arrives, the earlier bond may be released by change in the law or otherwise. The truth is that unless the parties themselves have in mind the possible discharge of the earlier obligation as a reason for the later agreement, the law deals with the question, and as a practical matter must deal with the question on the supposition that the obligations binding the parties to-day will continue to bind them.³⁶ Aside from questions of logic, however, there seems no practical reason for holding invalid the agreement of a contractor with a third person to do what has already been promised if there is no fraud or oppression practiced which would make the agree-

³⁶ Thus if A promise B to pay, next week, \$10 which A already owed at the time of the promise in return for a promise by B, it is clear, under the authorities, that no valid contract has been formed. See *supra*, § 120. Yet

it is possible that by next week it might have been released by the creditor or discharged by law, so that A's performance would be detrimental to him. Illustrations of this sort might be multiplied.

ment voidable in any case. A rule of consideration, therefore, which would be in conformity with definitions given by the courts and would also support such agreements is to be preferred over a rule which would not. Accordingly the test not exclusively of detriment to the promisee, but allowing benefit to the promisor as an alternative should be adopted.

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§ 131b. Analogous but distinguishable cases.

On any theory of consideration it is to be noticed that if the act, the performance of which, or the promise of which, is the consideration for the new agreement, differs in any respect from the act which the double contractor was under a previous obligation to perform, the second agreement is binding; for the difference, however trifling, is enough to make the new performance detrimental, or the new promise a promise of something detrimental. And likewise if a party to a contract is no longer bound to fulfil it because of the default of his co-contractor, a promise by the injured party to complete his contract or the actual completion of it is sufficient consideration to support a promise by a third person.⁷⁷

It is further to be noticed that though a promise of something which the promisor is under a legal duty to perform cannot be valid consideration for a counter-promise if the test of detriment is applied, there is no reason why such a promise should not itself be enforceable if supported by sufficient consideration. Thus if A is under contract to B to do a certain act, and C gives (not merely promises) A extra compensation in return for a promise by A to do that act, A has on any theory made a binding contract with C, since C has given valid consideration for A's promise, and it is not necessary that A's promise should be valid consideration. C acted under no mistake and received what he asked for. Moreover, if the agreement between A and C was bilateral, though the agreement would be invalid and unenforceable on both sides, unless benefit as an alternative to detriment be accepted as part of the

⁷⁷ *Brownlee v. Lowe*, 117 Ind. 420, 20 N. E. 301; *Lindsly v. Kansas City Ry. Co.*, 152 Mo. App. 221, 133 S. W. 389; *Sinkovitz v. Applebaum*, 56 N. Y.

Misc. 527, 107 N. Y. S. 122; *Cooper & Polak Works v. Rosing*, 85 N. Y. Misc. 409, 147 N. Y. S. 241.

definition of consideration, yet, if C nevertheless performs his promise and the performance is accepted by A, A's promise then becomes binding since his acceptance of performance involves a receipt of valid consideration for his promise.³⁸

There can be no doubt also on any theory of consideration that if two bilateral agreements are simultaneously entered into, the consideration on one side of each of which is a promise by the same person to do the same thing, the consideration is sufficient, for at the time when each of these promises is given the promisor is as yet under no legal obligation to perform the act promised.³⁹ So where the second promisor makes a promise to the earlier contractors jointly that if they will carry out their contract he will confer a benefit on one or both of them, the performance of the earlier contract is a legal detriment to the promisees as well as a benefit to the promisor. For though neither promisee singly had a right to refrain from performance of the earlier contract, both of

³⁸ In *Ward v. Goodrich*, 34 Col. 369, 82 Pac. 701, the court said: "While it is settled that the promising to do, or the doing of that which the promisor is already legally bound to do, does not as a rule constitute consideration for a reciprocal promise, or support a reciprocal undertaking given by the promisee, it by no means follows that such promise may not be enforced against such promisor by the promisee, although its enforcement compels the performance of that which was already a legal obligation."

In *Reynolds v. Jacobs*, 10 N. S. Wales L. R. 268; the plaintiff and defendant being joint judgment debtors, the defendant promised to settle the claim, the plaintiff agreeing to leave the matter to him and later to pay half the cost of settlement. The defendant failed to keep his promise and the plaintiff's property was levied on and a bailiff put in house. The defendant was held liable (though his promise it will be observed was merely to fulfil his legal obligation to the creditor) because when the "agreement was

made the plaintiff had the power and the right to pay the amount and thereby protect himself," and at the request of the defendant the plaintiff left the matter to him. See also *Bochterle v. Saunders*, 36 R. I. 39, 88 Atl. 803.

³⁹ In *Petze v. Leary*, 117 N. Y. App. Div. 829, 830, 102 N. Y. S. 960, the court said in referring to such a case: "If the making of the contract by the plaintiff with the corporation had been the consideration to the defendant for the making of the contract by him with the plaintiff, or, conversely, if the plaintiff had been induced to enter into his contract with the corporation by the contract of the defendant with him, there would be a legal consideration."

A case of the same sort is *Chaplain Construction Co. v. O'Brien*, 117 Fed. 271, where the defendant in order to induce bidders, who had not yet made a construction contract to do so, promised an additional sum if the contractors would execute the contract which was under negotiation.

them jointly had such a right and their refraining from exercising it involved a detriment.⁴⁰

§ 132. Performance or promise of a performance of a duty imposed by law is not valid consideration.

If a promisee is already bound by official duty to render a service, it is no detriment to him, and no benefit to the promisor, beyond what the law requires the promisee to suffer or to give, for him to do or agree to do the service on request. Though the previous legal duty does not run to the promisee under the later agreement, it runs to the public of which the promisee is a member, and as such he has a right, even if not one enforceable at law, to the performance in question. Therefore no contract can be based on such consideration. This principle is applicable whatever the character of the official, whether a sheriff, constable or police officer,⁴¹ an inspector,⁴² a customs officer,⁴³ or a director of a bank,⁴⁴ a district attorney,⁴⁵

* *De Cicco v. Schweizer*, 221 N. Y. 431, 117 N. E. 807, L. R. A. 1918 E, 1004. In this case the defendant agreed with his daughter and a man to whom she was engaged, that after their marriage, he would pay a certain allowance to the daughter. The court discusses the various authorities on the general question of the sufficiency of doing what the promisee is bound to a third person to do as consideration for a promise.

⁴¹ *Witty v. Southern Pac. Co.*, 76 Fed. 217; *Union Pacific R. Co. v. Belek*, 211 Fed. 699; *Morrell v. Quarles*, 35 Ala. 544, 548; *St. Louis, etc., Ry. Co. v. Grafton*, 51 Ark. 504, 11 S. W. 702; *Chambers v. Ogle*, 117 Ark. 242, 174 S. W. 532; *Lees v. Colgan*, 120 Cal. 262, 52 Pac. 502; *Matter of Russell's Application*, 51 Conn. 577, 50 Am. Rep. 55; *Hogan v. Stophlet*, 179 Ill. 150, 53 N. E. 604, 44 L. R. A. 809; *Hayden v. Souger*, 56 Ind. 42, 48, 26 Am. Rep. 1; *Taft v. Hyatt (Kans.)*, 180 Pac. 213; *Thacker v. Smith*, 103 Kans. 641, 175 Pac. 983; *Marking v. Needy*, 8 Bush, 22; *Studley v. Ballard*,

169 Mass. 295, 47 N. E. 1000, 61 Am. St. Rep. 286; *Hartley v. Granville*, 214 Mass. 38, 102 N. E. 942; *Foley v. Platt*, 105 Mich. 635, 63 N. W. 520; *Warner v. Grace*, 14 Minn. 487; *Day v. Putnam Ins. Co.*, 16 Minn. 408; *Ex parte Gore*, 57 Miss. 251; *Kick v. Merry*, 23 Mo. 72, 66 Am. Dec. 658; *Thornton v. Missouri, etc., Ry. Co.*, 42 Mo. App. 58; *Ward v. Adams*, 95 Neb. 781, 146 N. W. 950; *Hatch v. Mann*, 15 Wend. 44; *Gillmore v. Lewis*, 12 Ohio, * 281; *Smith v. Whildin*, 10 Pa. St. 39, 49 Am. Dec. 572; *Stamper v. Temple*, 6 Hump. 113, 44 Am. Dec. 296; *Brown v. Godfrey*, 33 Vt. 120.

⁴² *Brophy v. Marble*, 118 Mass. 548.

⁴³ *Davies v. Burns*, 5 Allen, 349.

⁴⁴ *Stacy v. State Bank of Illinois*, 5 Ill. 91.

⁴⁵ *McCook County v. Burstad*, 30 S. Dak. 266, 138 N. W. 303. Taking proceedings for the extradition of a criminal was held insufficient consideration for a promise to pay costs exacted from the complainant by the district attorney.

or other official.⁴⁶ But if the official upon request does, or agrees to do more than his legal duty requires, he thereby gives sufficient consideration to support a promise.⁴⁷ The return of lost articles is held sufficient consideration for a promise of reward, though doubtless a finder is under some legal duty, if not to return what he has found, at least to allow the owner to come and get it.⁴⁸ The same principles are applicable to other promises than those of rewards and where other legal duties than those of officials are involved. An agreement by a common carrier, therefore, to fulfil obligations imposed on it by law, as to carry a mail clerk,⁴⁹ or to fence its right-of-way,⁵⁰ or to allow the construction of a sewer under its track on the city streets,⁵¹ to maintain or repair its bridges and the approaches thereto,⁵² is not sufficient consideration for a promise to the carrier, when the existing law requires the carrier to do or permit these things. Similarly

⁴⁶ Writing personal letters for members of the Assembly was held to be part of the duty of Assembly stenographers and therefore writing such letters would not support a promise by an individual member to pay therefor. *Temple v. Brooks*, 165 N. Y. App. Div. 661, 151 N. Y. S. 490.

⁴⁷ *England v. Davidson*, 11 A. & E. 856; *Union Pacific R. Co. v. Belek*, 211 Fed. 699; *Morrell v. Quarles*, 35 Ala. 544; *Chambers v. Ogle*, 117 Ark. 242, 174 S. W. 532; *Harris v. More*, 70 Cal. 502, 11 Pac. 780; *Hayden v. Souger*, 56 Ind. 42, 26 Am. Rep. 1; *Bronnenberg v. Coburn*, 110 Ind. 169, 11 N. E. 29; *Marsh v. Wells, Fargo & Co.*, 88 Kan. 538, 129 Pac. 168, 43 L. R. A. (N. S.) 133; *Elkins v. Board*, 91 Kan. 518, 120 Pac. 542, 138 Pac. 578, 51 L. R. A. (N. S.) 638, Ann. Cas. 1915 D, 257; *Smith v. Fenner*, 102 Kan. 830, 172 Pac. 514, L. R. A. 1918 E, 348; *Trundle v. Riley*, 17 B. Mon. 396; *Pilie v. New Orleans*, 19 La. Ann. 274; *Studley v. Ballard*, 169 Mass. 295, 47 N. E. 1000, 61 Am. St. Rep. 286; *Hartley v. Granville*, 216 Mass. 38, 102 N. E. 942; *Forsythe v. Murnane*,

113 Minn. 181, 129 N. W. 134; *Smith v. Vernon County*, 188 Mo. 501, 87 S. W. 949, 70 L. R. A. 59; *Gregg v. Pierce*, 53 Barb. 387; *McCandless v. Allegheny, etc., Co.*, 152 Pa. 139, 25 Atl. 579; *Texas Cotton-Press, etc., Co. v. Merchants' Fire Co.*, 54 Tex. 319, 38 Am. Rep. 627; *Davis v. Munson*, 43 Vt. 676, 5 Am. Rep. 315; *Reif v. Paige*, 55 Wis. 496, 13 N. W. 473, 42 Am. Rep. 731; *Kinn v. First Nat. Bank*, 118 Wis. 537, 95 N. W. 969, 99 Am. St. Rep. 1012. See also *Bent v. Wakefield Bank*, 4 C. P. D. 1; *Long v. Neville*, 36 Cal. 455, 95 Am. Dec. 199; *Marsh v. Gold*, 2 Pick. 285; *Commonwealth v. Vanddyke*, 57 Pa. 34. Compare *Hatch v. Mann*, 15 Wend. 44; *Tobin v. McComb* (Tex. Civ. App.), 156 S. W. 237.

⁴⁸ *Berthiaume v. Doe*, 22 Cal. App. 78, 133 Pac. 515.

⁴⁹ *Seybolt v. New York, L. E. & W. R. Co.*, 95 N. Y. 562, 47 Am. Rep. 75.

⁵⁰ *Shortle v. Terre Haute & I. R. Co.*, 131 Ind. 338, 30 N. E. 1084.

⁵¹ *Kansas City, St. J., etc., Ry. Co. v. Morley*, 45 Mo. App. 304.

⁵² *Newton v. Chicago, etc., Ry. Co.*, 66 Iowa, 422.

as a common carrier is under legal obligation to carry goods tendered for transportation with full common-law liability at the legal rate of compensation for such service, a promise by the carrier to transport for that rate of compensation, is not sufficient consideration for a counter-promise by the shipper agreeing to a limitation of the carrier's common-law liability.⁵³ But it is not necessary that the consideration for an agreement limiting liability be separate and independent. A reduced rate will support the whole agreement to carry with limited liability.⁵⁴ So a promise in consideration of attendance at court by a witness bound to appear,⁵⁵ or in consideration of support of a child by its parent,⁵⁶ or of support of a pauper by a township bound to support him,⁵⁷ or of obedience by a ward to his guardian,⁵⁸ is invalid for want of sufficient consideration. A promise by an executor to comply with his legal duties,⁵⁹ the resignation of a trustee who is a defaulter and therefore bound to resign,⁶⁰ the release of a mortgage after the debt has been paid,⁶¹ are likewise insufficient to support a promise.⁶² As everybody is under a legal duty not to commit a tort, returning property to its owner, or otherwise refraining

⁵³ *Illinois Central R. Co. v. Insurance Co.*, 79 Miss. 114, 30 So. 43; *Kellerman v. Kansas City, etc., R. Co.*, 136 Mo. 177, 34 S. W. 41, 37 S. W. 828; *Ward v. Missouri Pac. Ry. Co.*, 158 Mo. 226, 58 S. W. 28; *Wilson v. Mo. Pac. Ry. Co.*, 66 Mo. App. 388; *Bissell v. New York Central R. Co.*, 25 N. Y. 442, 82 Am. Dec. 369; *Nelson v. Hudson River R. Co.*, 48 N. Y. 498; *Gardner v. Southern R. Co.*, 127 N. C. 293, 37 S. E. 328; *Louisville & N. R. Co. v. Gilbert*, 88 Tenn. 430, 12 S. W. 1018, 7 L. R. A. 162; *Missouri, etc., Ry. Co. v. Darlington (Tex. Civ. App.)*, 40 S. W. 550; *Berry v. West Virginia, etc., R. Co.*, 44 W. Va. 538, 30 S. E. 143, 67 Am. St. Rep. 781; *Schaller v. Chicago, etc., Ry. Co.*, 97 Wis. 31, 71 N. W. 1042.

⁵⁴ *Cau v. Texas & P. R. Co.*, 194 U. S. 427, 48 L. Ed. 1053; *Charnock v. Texas & P. R. Co.*, 194 U. S. 432,

48 L. Ed. 1057, and see cases in the preceding note.

⁵⁵ *Willis v. Peckham*, 1 Br. & B. 515.

⁵⁶ *Crowhurst v. Laverack*, 8 Ex. 208; *Poetker v. Lowry*, 25 Cal. App. 616, 144 Pac. 981; *Nine v. Starr*, 8 Oreg. 49.

⁵⁷ *Wimer v. Worth Township*, 104 Pa. 317.

⁵⁸ *Keith v. Miles*, 39 Miss. 442, 77 Am. Dec. 685.

⁵⁹ *Sullivan v. Sullivan*, 99 Cal. 187, 33 Pac. 862; *Orr v. Sanford*, 74 Mo. App. 187.

⁶⁰ *Withers v. Ewing*, 40 Ohio St. 400.

⁶¹ *Chilson v. Bank*, 9 No. Dak. 96, 81 N. W. 33; *Jones v. Risley*, 91 Tex. 1, 32 S. W. 1027.

⁶² In *Day v. Gardner*, 42 N. J. Eq. 199, 203, 7 Atl. 365, it is, however, held that the discharge of taxes is sufficient consideration to support a promise by one interested in having the payment made.

from a tort is not a sufficient consideration.⁶³ The only qualification that must be borne in mind in connection with this matter, is that if there is reasonable doubt and honest belief that a certain claim is not tortious, forbearance of the claim will be a sufficient consideration although in fact the exercise of the claim would have involved the commission of a tort.⁶⁴

§ 133. Performance or promise of performance of an act which the law holds the promisee bound to do, is no valid consideration though the law provides no means for the enforcement of the legal duty.

There are certain duties for the breach of which the law provides no remedy; but which it, nevertheless, recognizes so far as to invalidate any agreement in contravention of them, and perhaps so far as to regard the performance of the duty, no legal detriment to one party or benefit to the other. Many agreements are not enforced because opposed to public policy, though contemplating a violation only of a duty to which the law attaches no sanction.⁶⁵ So the performance of such a duty may be regarded by the law as no sufficient consideration. Thus the promise of a wife who had left her husband without cause, to return was held insufficient consideration for a counter-promise,⁶⁶ as was a wife's care, nursing and attendance on her husband while he was sick.⁶⁷ But since public policy does

⁶³ *Cowper v. Green*, 7 M. & W. 633; *Manigault v. Ward*, 123 Fed. 707; *Massachusetts Mut. Life Ins. Co. v. Green*, 185 Mass. 306, 70 N. E. 202; *Conover v. Stillwell*, 34 N. J. L. 54; *Crosby v. Wood*, 6 N. Y. 369; *Tolhurst v. Powers*, 133 N. Y. 460, 31 N. E. 326; *Marcus v. Mayer*, 147 N. Y. S. 873; *Fink v. Smith*, 170 Pa. 124, 32 Atl. 566, 50 Am. St. Rep. 750; *Erny v. Sauer*, 234 Pa. 330, 83 Atl. 205. Compare *Rogers Development Co. v. Southern California Investment Co.*, 159 Cal. 735, 115 Pac. 934, 35 L. R. A. (N. S.) 543, where the surrender of real estate in possession of a defaulting buyer was held valid consideration

for a promise by the seller, though the seller had the legal right to reclaim possession on account of the default.

⁶⁴ See *infra*, § 135.

⁶⁵ See *infra*, §§ 1628 *et seq.*

⁶⁶ *Miller v. Miller*, 78 Iowa, 177, 35 N. W. 464, 16 Am. St. Rep. 431. But if owing to the husband's misconduct the wife was not bound to return, her doing so is sufficient consideration. *Mack v. Mack*, 87 Neb. 819, 128 N. W. 527, 31 L. R. A. (N. S.) 441, 94 Neb. 504, 143 N. W. 454. As to the public policy of such agreements, see *infra*, § 1744.

⁶⁷ *Foxworthy v. Adams*, 136 Ky. 403, 124 S. W. 381, 27 L. R. A. (N. S.) 308.

not require such severe treatment of those who seek to make bargains based on performance of a moral duty as a consideration, as for those who enter into bargains to violate such a duty, courts have not been so strict in denying the validity of consideration where a moral duty was performed, as they have in holding agreements invalid as against public policy where they contemplated a violation of the same duty. Thus an agreement to get drunk would doubtless be against public policy, but an agreement to refrain from doing so would be sufficient consideration for a counter-promise.⁶⁸ And the same may be said of most other merely moral duties.⁶⁹

§ 134. Consideration void in part.

It is no objection to the sufficiency of consideration that much of what was requested and given as such would be insufficient to support a contract. If a legal detriment to the promisee or benefit to the promisor is given, the consideration is valid though much also was requested and given which was neither detrimental to the one, nor beneficial to the other.⁷⁰ It should be observed, however, that though a portion of the consideration requested would be in itself of no validity as consideration to support a promise, that portion must nevertheless be given in order to create a contract, otherwise mutual assent would be lacking. If A says to B, I will give you a horse if you will pay the debt you owe me and do a specified piece of work, B's payment of the debt is of no validity in itself as consideration, but mutual assent would be lacking unless the debt was paid as well as the specified work done. Consideration which is merely void or invalid must be distinguished from consideration which is positively illegal. If consideration is even partially illegal the whole agreement

⁶⁸ *Talbott v. Stemmons' Ex'r*, 89 Ky. 222, 12 S. W. 297, 25 Am. St. Rep. 531; *Lindell v. Rokes*, 60 Mo. 249, 21 Am. Rep. 395. See also *Hamer v. Sidway*, 124 N. Y. 538, 27 N. E. 256, 12 L. R. A. 463, 21 Am. St. Rep. 663.

⁶⁹ *Jamieson v. Renwick*, 17 Vic. L.

Rep. 124; *Dunton v. Dunton*, 18 Vic. L. Rep. 114, 134.

⁷⁰ *Bradburne v. Bradburne*, Cro. Eliz. 149; *King v. Sears*, 2 C. M. & R. 48; *Ensign v. Coffelt*, 102 Ark. 568, 145 S. W. 231; *Cobb v. Cowdery*, 40 Vt. 25, 94 Am. Dec. 370; *Ridlon v. Davis*, 51 Vt. 457.

is tainted unless the legal portion of the agreement is severable.⁷¹ Somewhat analogous to consideration void in part is the case of a promise based partly on moral obligation or motive of generosity, as where a sum is promised in return for past as well as present consideration; or partly in return for services and, confessedly, partly as a gift. If one undivided sum is thus promised, the promise is supported by valid consideration.⁷²

§ 135. Forbearance or promise of forbearance as consideration.

The early English law apparently made no distinction in regard to the sufficiency of a claim which the claimant forbore to prosecute, or promised to forbear to prosecute, as the consideration of a promise, other than the broad distinction between good and bad claims. The forbearance or promise to forbear to prosecute an unfounded claim was insufficient consideration.⁷³ Such decisions necessarily involve the principle that the forbearance to prosecute an unfounded claim is no legal detriment. It is obvious that a claimant whether his claim is well or ill founded, has the actual power to prosecute his claim at law, but in spite of this power he was regarded by the law as under a duty of imperfect obligation to refrain from prosecuting an action if his claim was unfounded. In the

⁷¹ In *Cobb v. Cowdery*, 40 Vt. 25, 28, 94 Am. Dec. 370, the court refers to "The general principle . . . that if part of a consideration be merely *void*, the contract may be supported by the residue of the consideration, if good *per se*; *Bradburne v. Bradburne*, Cro. Eliz. 149; *Tisdale's Case*, Cro. Eliz. 758; *Crisp v. Gamel*, Cro. Jac. 128; but if any part of a consideration be *illegal*, it vitiates the whole. *Featherston v. Hutchinson*, Cro. Eliz. 199; *Bridge v. Cage*, Cro. Jac. 103; *Scott v. Gilmore*, 3 Taunt. 226; *Woodruff v. Hinman*, 11 Vt. 592; 2 Saund. R. (Paterson & Wms. ed.), 136, n. 2." So a covenant under seal based on consideration which is illegal or opposed to pub-

lic policy is as invalid as if the promise were *parol*.

See *infra*, § 1780.

⁷² *Parke, etc., Co. v. San Francisco Bridge Co.*, 145 Cal. 534, 78 Pac. 1065; *Irwin v. Locke*, 20 Colo. 148, 36 Pac. 898; *Fisk, etc., Co. v. Reed*, 32 Colo. 506, 77 Pac. 240; *Reisler v. Silbermintz*, 99 N. Y. App. Div. 131, 90 N. Y. S. 967; *Foxworthy v. Adams*, 136 Ky. 403, 124 S. W. 381, 27 L. R. A. (N. S.) 308. See also *infra*, § 141.

⁷³ *Barnard v. Simons*, 1 Rolle's Abr. 26, pl. 39, *Loyd v. Lee*, 1 Strange, 94; *Jones v. Ashburnham*, 4 East, 455. Other early decisions holding forbearance of a groundless claim insufficient consideration are collected in 12 Harv. L. Rev. 517, n. 2.

early part of the nineteenth century an advance was made from the position of the earlier authorities, and it was held that forbearance to prosecute a suit which had been already instituted was sufficient consideration without inquiring whether the suit would have been successful or not.⁷⁴ The case is ordinarily cited for the proposition that forbearance of a doubtful claim is good consideration. Such a rule necessarily implies that a claimant whose claim is doubtful, whether in fact or law, has a right recognized by law to continue a prosecution which has been begun; and probably at the present time every court would admit this to be true, and hold further that forbearance or a promise to forbear suit upon a doubtful claim is sufficient consideration whether suit has or has not previously begun.⁷⁵ What constitutes a doubtful claim within the meaning of this rule, however, is not always easily defined. The most recent English cases have gone still further and held that if a claim is honestly asserted and is "reasonable" or is "not vexatious and frivolous," the forbearance or the promise of forbearance to prosecute the claim is valid consideration.⁷⁶ It is sometimes supposed that the test is made to depend wholly on the honesty of the claimant, but the decisions seem also to require something of reasonableness in the claim. Whether the test of reasonableness is based on the intelligence of the claimant himself, who may be an ignorant person with no knowledge of law, and little sense as to facts, is not so clear, but probably the claim forborne must be neither absurd in fact from the standpoint of a reasonable man in the position of the claimant, nor, obviously unfounded in law to one who has an elementary knowledge of legal principles.⁷⁷ Whatever the rule may be in this respect there is

⁷⁴ *Longridge v. Dorrville*, 5 B. & Ald. 117.

⁷⁵ See cases cited *infra*, n. 78, 79.

⁷⁶ *Cook v. Wright*, 1 B. & S. 559; *Callisher v. Bischoffsheim*, L. R. 5 Q. B. 449; *Miles v. New Zealand Alford Est. Co.*, 32 Ch. D. 266; *Holworthy Urban Council v. Holworthy Rural Council*, [1907] 2 Ch. 62.

⁷⁷ In *Neubacher v. Perry*, 57 Ind. App. 362, 103 N. E. 805, however, the

court in speaking of a compromise of a written contract said if the appellant in good faith was contending for a construction "which might reasonably be contended for by one not versed in the law," the surrender of his claim would be sufficient consideration. *Ockford v. Barelli*, 20 W. Rep. 116, perhaps goes farthest in sustaining forbearance or compromise as good consideration when a claim is honestly made

no difficulty in finding sufficient consideration. The fundamental question is when does the law hold that a man has not merely the power but the right to assert and attempt to enforce a claim. If he has a right to attempt to enforce a frivolous claim, provided his intelligence is so moderate that he can do so in good faith, forbearance to exercise the right is sufficient consideration. If the law here as generally imposes the standard of reasonableness and regards it as improper though not action-

in spite of the fact that the claim is obviously absurd. The plaintiff in that case had gone through a marriage ceremony with her uncle who had at the time a wife living, though this was not known to the plaintiff. The marriage, therefore, was void, both because it was bigamous and was within the forbidden degrees of relationship. After the death of the uncle a claim against his estate was made by the plaintiff. At a family conclave it was agreed that the plaintiff should have one-third in consideration of her forbearing to assert a claim. The jury found that the plaintiff when she made this agreement believed herself to be the widow of the deceased. The court sustained a verdict for the plaintiff, saying in a brief opinion that they were unable to distinguish the case from *Callisher v. Bischoffsheim*, L. R. 5 Q. B. 449. In that case, however, the facts did not show as they did in *Ockford v. Barelli*, that however honest the claim, it was wholly absurd; and the facts which made it so could not have been seriously disputed. Cf. with *Ockford v. Barelli*, *Moore v. Moore*, 255 Fed. 497 (C. C. A.).

In *Miles v. New Zealand Alford Est. Co.*, 32 Ch. D. 266, 291, Lord Bowen said: "I think, therefore, that the reality of the claim which is given up must be measured, not by the state of the law as it is ultimately discovered to be, but by the state of the knowledge of the person who at the time has to judge and make the concession." But

later, in the same opinion, he says: "When the Master of the Rolls in *Ex parte Banner*, L. R. 17 Ch. D. 480, says he doubts, if there was really and obviously no cause of action, whether the belief of the parties that there was, would be sufficient ground for a compromise, I agree if by that he means there must be a real cause of action,—that is to say, one that is *bona fide* and not frivolous or vexatious; but I do not agree if he means by a real cause of action which commends itself to the ultimate reasoning of the tribunal which has to consider and determine the case."

The latter extract apparently indicates that some degree of reasonableness besides the plaintiff's honesty is necessary. In *Blount v. Dillaway*, 199 Mass. 33, 85 N. E. 477, 17 L. R. A. (N. S.) 1036, the court held that it was not necessary for a plaintiff who had received a promise in consideration of forbearing to contest a will to show that she had reasonable cause to believe that she had some fair chance of succeeding in the contest. The court, however, considered somewhat the facts of the case, and held that the claim could not be considered vexatious or frivolous. In *Neikirk v. Williams* 81 W. Va. 558, 94 S. E. 947, L. R. A. 1918 F, 665, a promise to pay for the cancellation of a life insurance policy, when the promisor was under no liability to pay the premiums was held unenforceable.

able to attempt the enforcement of an obviously unreasonable or frivolous claim, irrespective of the claimant's good faith, surrender of such a claim will never be sufficient consideration.

In the United States many decisions were rendered, while the test applied in England was still the doubtfulness of the claim forborne. Whether all jurisdictions whose courts have made such decisions would now be disposed to follow the more liberal modern English doctrine, is not perfectly clear, but in many jurisdictions at least a disposition has been shown to do so and to make the test the honesty of the claimant, provided the invalidity of the claim in law or fact is not perfectly obvious.⁷⁸ On the other hand, many courts lay down the older rule without qualification, that the claim forborne must be

⁷⁸ *Union Bank v. Geary*, 5 Pet. 99, 9 L. Ed. 60; *Sheppey v. Stevens*, 185 Fed. 147; *Mason v. Wilson*, 43 Ark. 172, 177; *Kress v. Moscowitz*, 105 Ark. 638, 152 S. W. 298; *B. & W. Engineering Co. v. Beam*, 23 Cal. App. 164, 137 Pac. 624. (See also *Gardner v. Watson*, 170 Cal. 570, 150 Pac. 994. Cf. *Pacific Rys. Advertising Co. v. Carr*, 29 Cal. App. 722, 157 Pac. 529); *Baldwin v. Central Savings Bank*, 17 Cal. App. 7, 67 Pac. 179; *In re Thomas*, 85 Conn. 50, 81 Atl. 972; *Morris v. Munroe*, 30 Ga. 630; *Dickerson v. Dickerson*, 19 Ga. App. 269, 91 S. E. 346; *Hayes v. Massachusetts Mut. Life Ins. Co.*, 125 Ill. 626, 639, 18 N. E. 322, 1 L. R. A. 303; *Ostrander v. Scott*, 161 Ill. 339, 43 N. E. 1089; *Murphy v. Murphy*, 84 Ill. App. 292 (cf. *Herbert v. Mueller*, 83 Ill. App. 391); *Melcher v. Ins. Co.*, 97 Me. 512, 55 Atl. 411; *Prout v. Pittsfield Fire District*, 154 Mass. 450, 28 N. E. 679; *Dunbar v. Dunbar*, 180 Mass. 170, 62 N. E. 248, 94 Am. St. Rep. 623, affd. 190 U. S. 340, 47 L. Ed. 1084; *Blount v. Dillaway*, 199 Mass. 330, 85 N. E. 477, 17 L. R. A. (N. S.) 1036; *Layer v. Layer*, 184 Mich. 663, 151 N. W. 759; *Kelley v. Hopkins*, 108 Minn. 155, 117 N. W. 396; *Dailey v. King*, 79 Mich.

568, 44 N. W. 959; *Leeson v. Anderson*, 99 Mich. 247, 58 N. W. 72, 41 Am. St. Rep. 597; *Demars v. Musser-Sauntry Co.*, 37 Minn. 418; 35 N. W. 1; *Hansen v. Gaar Scott & Co.*, 63 Minn. 94, 65 N. W. 254; (cf. *Anderson v. Nystrom*, 103 Minn. 168, 114 N. W. 742, 13 L. R. A. (N. S.) 1141, 123 Am. St. Rep. 320); *Musser v. Musser*, 92 Neb. 387, 138 N. W. 599; *Majors v. Majors*, 92 Neb. 473, 138 N. W. 574; *Latulippe v. New England Investment Co.*, 77 N. H. 31, 86 Atl. 361; *Grandin v. Grandin*, 49 N. J. L. 508, 9 Atl. 756, 60 Am. Rep. 642; *Wahl v. Barnum*, 116 N. Y. 87, 22 N. E. 280, 5 L. R. A. 623; *Zoebisich v. VonMinden*, 120 N. Y. 406, 24 N. E. 795; *Sears v. Grand Lodge*, 163 N. Y. 374, 379, 57 N. E. 618, 50 L. R. A. 204; *Post v. Thomas*, 212 N. Y. 264, 106 N. E. 69 (cf. *Baillargeon v. Dumoulin*, 149 N. Y. S. 443); *Di Iorio v. Di Brasio*, 21 R. I. 208, 42 Atl. 1114; *Danheiser v. Germania Sav. Bank*, 137 Tenn. 650, 194 S. W. 1094; *Fontaine v. Davis* (Tex. Civ. App.), 164 S. W. 386 (cf. *Roberts v. Anthony* (Tex. Civ. App.), 185 S. W. 423); *Bellows v. Sowles*, 55 Vt. 391, 45 Am. Rep. 621; *Citizens' Bank v. Babbitt*, 71 Vt. 182, 44 Atl. 71; *Hewett v. Currier*, 63 Wis. 386, 23 N. W. 884.

reasonably doubtful in fact or law.⁷⁹ Even in States whose courts lay the principal stress on the honesty and good faith of the claimant, forbearance is insufficient consideration if the claim forborne is so lacking in any foundation as to make its assertion incompatible with both honesty and a reasonable degree of intelligence.⁸⁰ There has been some doubt whether it makes any difference that the claim foreborne was already in litigation and that this litigation was dropped. It was early laid down, where a suit actually begun was forborne⁸¹ that "suits are not presumed causeless"⁸² and that therefore the allegation of forbearance of such a suit stated at least a *prima facie* consideration. There seems no reason why forbearance to prosecute a suit, which is actually found to

⁷⁹ *Sheppey v. Stevens*, 177 Fed. 484, 492; *Stewart v. Bradford*, 26 Ala. 410; *Ware v. Morgan*, 67 Ala. 461; *Richardson v. Comstock*, 21 Ark. 69; *Russell v. Daniels*, 5 Col. App. 224, 37 Pac. 726; *Mulholland v. Bartlett*, 74 Ill. 58; *Bates v. Sandy*, 27 Ill. App. 552 (but see later Illinois cases in the previous note); *United States Mtge. Co. v. Henderson*, 111 Ind. 24, 12 N. E. 88; *Sweitzer v. Heasley*, 13 Ind. App. 567, 41 N. E. 1064 (cf. *Moon v. Martin*, 122 Ind. 211, 23 N. E. 668); *Tucker v. Ronk*, 43 Ia. 80; *Potts v. Polk Co.*, 80 Iowa, 401, 45 N. W. 775; *Peterson v. Breitag*, 88 Ia. 418, 55 N. W. 86 (see *Richardson Co. v. Independent Dist. of Hampton*, 70 Ia. 573, 31 N. W. 871); *Price v. First Nat. Bank*, 62 Kan. 743, 64 Pac. 639; *Cline v. Templeton*, 78 Ky. 550; *Mills v. O'Daniel*, 23 Ky. L. Rep. 73, 62 S. W. 1123; *Sellers v. Jones*, 164 Ky. 458, 175 S. W. 1002 (cf. *Waller's Adm'r v. Marks*, 100 Ky. 541, 38 S. W. 894; *Ripy Bros. Distilling Co. v. Lillard*, 149 Ky. 726, 149 S. W. 1009); *Schroeder v. Fink*, 60 Md. 436; *Emmittsburg v. Donoghue*, 67 Md. 383, 10 Atl. 233, 1 Am. Rep. 396; *Palfrey v. Portland, etc., R. Co.*, 4 Allen, 55. (But see later Massachusetts cases, in the previous note.) *Taylor v. Weeks*, 129 Mich. 233, 88 N. W. 466; *Foster v.*

Metts, 55 Miss. 77, 30 Am. Rep. 504; *Gunning v. Royal*, 59 Miss. 45, 42 Am. Rep. 350; *Long v. Towl*, 42 Mo. 545; *Corbyn v. Brokmeyer*, 84 Mo. App. 649; *Kidder v. Blake*, 45 N. H. 530 (cf. *Pitkin v. Noyes*, 48 N. H. 294, 97 Am. Dec. 615, 2 Am. Rep. 218; *Latulippe v. New England Investment Co.*, 77 N. H. 31, 86 Atl. 361); *Oregon & Cal. R. Co. v. Potter*, 5 Oreg. 228; *Fleming v. Ramsey*, 46 Pa. 252; *Sutton v. Dudley*, 193 Pa. 194, 44 Atl. 438. (See also *Moore v. Moore*, 255 Fed. 497, C. C. A.); *Warren v. Williamson*, 8 Baxter, 427 (cf. *Danheiser v. Germania Sav. Bank*, 137 Tenn. 650, 194 S. W. 1094); *McCloy v. Watkins*, 88 Vt. 457, 92 Atl. 968; *Nicholson v. Neary*, 77 Wash. 294, 137 Pac. 492; *Davissan v. Ford*, 23 W. Va. 617. (See *Billingsley v. Clelland*, 41 W. Va. 234, 23 S. E. 812.)

⁸⁰ *Montgomery v. Grenier*, 117 Minn. 416, 136 N. W. 9; *Majors v. Majors*, 92 Neb. 473, 138 N. W. 574; *Galitska v. Fields*, 137 N. Y. S. 828.

⁸¹ *Bidwell v. Catton*, Hobart, 261 (1618).

⁸² It was questioned in the case what the result would have been if the defendant had averred that there was no cause of suit.

be wholly groundless but which has been already begun, should be better consideration than a promise not to bring such a suit in the first place; and, at the present time, there is no doubt that the law makes no distinction,⁸³ except it seems probable that if proceedings have been begun, there is a presumption of fact that the claim was at least doubtful. It is immaterial whether the claim foreborne is against the promisor or is a claim against a third person; the detriment to the promisee is the same, and it is not essential that there should be benefit to the promisor.⁸⁴ The nature of the claim forborne is also immaterial. It may be a claim for a debt, for damages for tort, for contesting the probate of a will,⁸⁵ for enforcing a right to a divorce or nullity of marriage,⁸⁶ or for anything else to which the plaintiff may claim a legal right.⁸⁷ If a claim is known by the claimant to have no

⁸³ *Cook v. Wright*, 1 B. & S. 559.

⁸⁴ In the following cases the claim foreborne was against a third person. *Riddle v. Hanna*, 25 Ala. 484; *Mar- kel v. De Francesco*, (Conn. 1919), 105 Atl. 703; *Worley v. Sipe*, 111 Ind. 238, 12 N. E. 385; *Newton v. Carson*, 80 Ky. 309; *Webster v. LeCompe*, 74 Md. 249, 22 Atl. 232; *Hieston v. National City Bank*, 132 Md. 389, 104 Atl. 280; *Robinson v. Gould*, 11 Cush. 55; *Howe v. Taggart*, 133 Mass. 284; *Calkins v. Chandler*, 36 Mich. 320, 24 Am. Rep. 493; *Bank of Montreal v. Beecher*, 133 Minn. 81, 157 N. W. 1070; *Mathews v. Seaver*, 34 Neb. 592, 52 N. W. 283; *Hockenbury v. Meyers*, 34 N. J. L. 346; *Traders' Nat. Bank v. Parker*, 130 N. Y. 415, 29 N. E. 1094, 42 N. Y. St. 506 (affirming 55 Hun, 608, 8 N. Y. S. 683, 29 N. Y. St. 373); *Bank of New Hanover v. Bridges*, 98 N. C. 67, 3 S. E. 826, 2 Am. St. Rep. 317; *Giles v. Ackles*, 9 Pa. St. 147, 49 Am. Dec. 551; *Kuns' Executor v. Young*, 34 Pa. St. 60; *Whitaker v. Greene*, (R. I. 1918), 103 Atl. 779; *Cathcart v. Thomas*, 8 Baxt. 172.

⁸⁵ Cases of this latter sort are—*Sheppey v. Stevens*, 185 Fed. 147; *Gay*

v. Sanders, 101 Ga. 601, 28 S. E. 1019; *- Reichard v. Iser*, 95 Md. 451, 52 Atl. 592; *Blount v. Dillaway*, 199 Mass. 330, 85 N. E. 477, 17 L. R. A. (N. S.) 1036; *Grochowski v. Grochowaki*, 77 Neb. 506, 109 N. W. 742, 13 L. R. A. (N. S.) 484.

⁸⁶ *Wilson v. Wilson*, 1 H. L. C. 538; *Hart v. Hart*, 18 Ch. D. 670, 685; *Aldridge v. Aldridge*, 13 P. D. 210; *Sterling v. Sterling*, 12 Ga. 201, 204; *Mack v. Mack*, 87 Neb. 819, 128 N. W. 527, 31 L. R. A. (N. S.) 441; *Barbour v. Barbour*, 49 N. J. Eq. 429, 24 Atl. 227; *Adams v. Adams*, 91 N. Y. 381, 43 Am. Rep. 675. But see *Fisher v. Koontz*, 110 Ia. 498, 80 N. W. 551, 81 N. W. 702; *Merrill v. Peaslee*, 146 Mass. 460, 16 N. E. 271, 4 Am. St. Rep. 334. Also see *infra*, §§ 1741-1744.

⁸⁷ There have been several cases in England where a promise in consideration of the forbearance of a winner of a wager to publish as a "welcher" the loser who had failed to pay, has been held sufficient consideration. *Bubb v. Yelverton*, L. R. 9 Eq. 471; *In re Browne*, [1904] 2 K. B. 133; *Hyams v. Stuart-King*, [1908] 2 K. B. 696; *Goodson v. Baker*, 98 L. T. 415; *Goodson*

foundation, it is clear that the forbearance to prosecute the claim is not valid consideration.⁸⁸ The same principles seem applicable to forbearance to set up a defence as to forbearance to bring suit.⁸⁹

§ 136. Construction of agreements to forbear.

Sometimes in agreements to forbear, a fixed period for forbearance is stated, and sometimes perpetual forbearance or compromise of a claim is agreed upon. Occasionally, however, the agreement simply provides for forbearance, and it becomes essential to construe the meaning of the bargain. It is conceivable that requested forbearance, where no limit of time is fixed, may be (1) forbearance for such time as the promisor desires; or, (2) forbearance for a reasonable time; or, (3) perpetual forbearance. If an agreement to forbear is only for such time as the promisor shall choose, it is not sufficient consideration.⁹⁰ But forbearance for a reasonable time if requested is a sufficient consideration even though no promise of forbearance is made, a unilateral contract being as good as a bilateral.⁹¹ Mere forbearance without

v. Grierson, [1908] 1 K. B. 761, 14 Ann. Cas. 247; *cf. Chapman v. Franklin*, 21 Times L. R. 515, where forbearance to sue on a gambling debt itself was held insufficient consideration for a promise to pay money. The cases in this note would not be followed in the United States where a wager is considered not merely unenforceable but unlawful; see *infra*, § 1668; and even under the English theory of a wager, seem hard to reconcile with the decisions in the following note.

⁸⁸ *Ex parte Banner*, 17 Ch. D. 480; *Chapman v. Franklin*, 21 Times L. R. 515; *Union Collection Co. v. Buckman*, 150 Cal. 159, 88 Pac. 708, 119 Am. St. 164, 9 L. R. A. (N. S.) 568; *Montgomery v. Grenier*, 117 Minn. 416, 136 N. W. 9. See also *Roberts v. Anthony* (Tex. Civ. App.), 185 S. W. 423.

⁸⁹ In *Gaar v. Vanhook*, 216 Ky. 332, 172 S. W. 680, where the defendant

gave notes secured by a mortgage for the price of a threshing outfit, his agreement with the seller not to defend a suit on the notes if he was relieved of personal liability was held sufficient consideration to support an agreement to take the property in full satisfaction of its claim, though the defendant was legally liable on the notes. *Cf. Roberts v. Anthony* (Tex. Civ. App.), 185 S. W. 423.

⁹⁰ *Strong v. Sheffield*, 144 N. Y. 392, 39 N. E. 330.

⁹¹ *Morton v. Burn*, 7 A. & E. 19; *Wilby v. Elgee*, L. R. 10 C. P. 497; *Fullerton v. Provincial Bank*, [1903] A. C. 309; *Glegg v. Bromley*, [1912] 3 K. B. 474, 481; *Crears v. Hunter*, 19 Q. B. D. 341; *Edgerton v. Weaver*, 105 Ill. 43; *Newton v. Carson*, 80 Ky. 309; *King v. Upton*, 4 Me. 387; *Home Ins. Co. v. Watson*, 59 N. Y. 390; *Niles-Bement-Pond Co. v. Ury*, 53 N. Y.

request, however, is insufficient.⁹² It is generally said that a request for forbearance which does not specify the time for which forbearance is requested, will be construed as requesting forbearance for a reasonable time.⁹³ In considering the propriety of such a construction in a particular case, it is important to determine whether the agreement is unilateral or bilateral. If the offer contemplates a unilateral contract for which the consideration is forbearance, it is almost impossible to suppose that the parties can have contemplated perpetual forbearance, since an indefinite period of time would have to elapse before the consideration in such a contract would be performed and, therefore, before the promise would be performable.⁹⁴ Accordingly if an offer contemplates perpetual forbearance a court would construe it as contemplating a bilateral rather than a unilateral arrangement, and,

Misc. 305, 103 N. Y. Supp. 226; *Jamison-Semple Co. v. Richard*, 78 N. Y. Misc. 355, 138 N. Y. Supp. 401. A few decisions have held that the transaction is invalid unless the claimant not only forbears at request but promises to forbear. *Mecorney v. Stanley*, 8 Cush. 85; *Manter v. Churchill*, 127 Mass. 31 (*cf. Lascelles v. Clark*, 204 Mass. 362, 90 N. E. 875); *Perkins v. Proud*, 62 Barb. 420; *Shupe v. Galbraith*, 32 Pa. 10 (*cf. Schroyer v. Thompson*, 262 Pa. 282, 105 Atl. 274). See also *First Nat. Bank v. Nakdimen*, 111 Ark. 223, 163 S. W. 785; *Shadburne v. Daly*, 76 Cal. 355, 18 Pac. 403; *In re Thomson's Est.*, 165 Cal. 290, 131 Pac. 1045; *Markel v. De Francesco*, (Conn. 1919), 105 Atl. 703; *Lambert v. Clewley*, 80 Me. 480, 15 Atl. 61; *Saunders v. Bank of Mecklenburg*, 112 Va. 443, 71 S. E. 714. The cases last cited fail to recognize the validity of unilateral contracts, and assume the necessity of mutual obligation in every contract, whereas such mutuality never exists in a unilateral contract.

⁹² *Burnett v. Turner*, 105 Ark. 290, 151 S. W. 249; *First Nat. Bank v. Nak-*

dimen, 111 Ark. 223, 163 S. W. 785; *Rositzke v. Meyer*, 95 N. Y. Misc. 356, 159 N. Y. S. 464; *Schroyer v. Thompson*, 262 Pa. 282, 105 Atl. 274; and see cases at the end of the preceding note, where the court, in some instances at least, seems to have intended, in speaking of the necessity of an "agreement" to forbear, a request to forbear.

⁹³ *Oldershaw v. King*, 2 H. & N. 517; *Fullerton v. Provincial Bank*, [1903] A. C. 309; *Glegg v. Bromley*, [1912] 3 K. B. 474, 481; *Moore v. McKenney*, 83 Me. 80, 21 Atl. 749; *Haskell v. Tukesbury*, 92 Me. 551, 43 Atl. 500; *Howe v. Taggart*, 133 Mass. 284; *Calkins v. Chandler*, 36 Mich. 320, 24 Am. Rep. 493; *Glasscock v. Glasscock*, 66 Mo. 627; *Hockenbury v. Meyers*, 34 N. J. L. 346; *Elting v. Vanderlyn*, 4 Johns. 237; *Traders' Nat. Bank v. Parker*, 130 N. Y. 415, 29 N. E. 1094, 42 N. Y. St. 506; *Strong v. Sheffield*, 144 N. Y. 392, 39 N. E. 330; *Citizens' Bank v. Babbitt*, 71 Vt. 182, 44 Atl. 71.

⁹⁴ Possibly the giving of a release of the claim or the lapse of the period of limitation might be regarded as the equivalent of perpetual forbearance.

indeed, wherever possible a court will construe a contract for any forbearance as bilateral rather than unilateral, especially where the time of forbearance is to extend over a considerable period,⁸⁶ since otherwise, until the end of the period, there would be merely a revocable offer.⁸⁶

A bilateral contract which contemplates perpetual forbearance is in effect an agreement for the discharge of the claim, like a covenant not to sue.⁸⁷ But where a promise to forbear is asked, it seems that unless a promise of perpetual forbearance is specifically requested, the natural implication ordinarily will be that forbearance for a reasonable time only is requested. All the circumstances of the cases and especially the amount promised must be considered. If a debtor who owes an unliquidated claim worth about one hundred dollars promises to pay \$110 if the creditor will agree to forbear, the natural inference is that the sum promised is to be paid not simply for forbearance, but for the discharge of the claim. The agreement if made is indeed an accord, which under special circumstances may be shown to have been taken itself in satisfaction of the original debt,⁸⁸ or, more commonly, will be construed as an executory agreement of accord, which is not itself satisfaction, but contemplates forbearance for a reasonable time, when satisfaction is to be given by the performance of the accord.⁸⁹ If the debtor promises, however, \$10 to the creditor in return for the latter's promise to forbear, the natural inference is that the \$10 is to be paid not in satisfaction of the claim, but merely for the forbearance; and, here, too, the forbearance requested is for a reasonable time. The amount which the debtor promises to pay for the promised forbearance furnishes some basis for determining what a reasonable time may be. The larger the sum promised, as compared with the amount of the original debt, the longer the period of forbearance may be assumed to be.

⁸⁶ *Lennox v. Murphy*, 171 Mass. 370, 50 N. E. 644; *Lascelles v. Clark*, 204 Mass. 362, 90 N. E. 875.

⁸⁷ See *supra*, § 60.

⁸⁸ As to such covenants see *supra*, § 1823.

⁸⁹ This would be especially likely if the claim to be forborne was against a third person—not against the promisor himself.

⁹⁰ See *infra*, §§ 1841, 1846.

§ 137. Assignment of a supposed right as consideration.

Somewhat analogous to the surrender of a supposed claim as consideration for a promise, is the assignment of a supposed right of another kind. Certainly if the parties confessedly bargain for the assignment of such right as the grantee may have, be it small or great, or none at all, the assignment in fact is sufficient consideration for a promise though it turns out that there is no right transferred.¹ The only possible exception to such a rule is, that if no reasonable person could suppose the assigned chance was of any value, it might then be insufficient consideration. But even in such a case the execution of a quitclaim deed or other desired paper would support a promise.² If an assignment of a supposed right is made on the justifiable assumption by the assignee that he is to receive not merely such possible right as the assignor may have, but an actual right, the assignee's defence to any promise made by him in consideration of the assignment, if it turns out that no right was conveyed thereby, seems to be mistake or failure of consideration rather than lack of consideration.³ Questions of this sort have not infrequently arisen where patentees have either sold patents or licensed others to use the patented invention in return for a promise of payment. In some cases it has been laid down broadly that there is no consideration for a promise to pay money in return for a patent, which is for any reason void.⁴ But it cannot be admitted that a patent which is void, though not known to be so, may not be sufficient consideration for a promise, if the bargain was for the actual patent with such right as it might carry—much or little or none at all; and “perhaps from a disinclination to go so far as the American courts in holding that a vendor impliedly warrants his title to a

¹ *Sykes v. Chadwick*, 18 Wall. 141, 21 L. Ed. 824; *Cobb v. Heron*, 180 Ill. 49, 54 N. E. 189; *Weatherford v. Boulware*, 102 Ky. 466, 43 S. W. 729; *Palmer v. Guillow*, 224 Mass. 1, 112 N. E. 493. See also *Begbie v. Phosphate Sewage Co.*, L. R. 10 Q. B. 491, 1 Q. B. D. 679.

² See *supra*, § 115.

³ See *infra*, § 814.

⁴ *Harlow v. Putnam*, 124 Mass. 553; *Gloucester, etc., Co. v. Russia Cement Co.*, 154 Mass. 92, 95, 27 N. E. 1005, 12 L. R. A. 563, 26 Am. St. Rep. 214; *Joliffe v. Collins*, 21 Mo. 338; *Rowe v. Blanchard*, 18 Wis. 441, 86 Am. Dec. 783; 3 *Robinson on Patents*, § 1230.

chattel sold while in his possession, and perhaps in part on account of the practice there in relation to issuing patents, the courts in England hold that one who purchases a patent, or rights under a patent, in the absence of fraud and of express stipulation, must be presumed to look to the existence of the patent as a document which *prima facie* gives a right, rather than to the facts behind the patent upon which its validity depends.”⁵ In the United States, it seems clear that presumptively the bargain though technically for a specific patent must be understood to contemplate that the assigned patent will confer a valid right upon the assignee. Therefore though an assignment of a patent be strictly what was requested, yet if it does not give the assignee the exclusive privilege contemplated, there is a failure of consideration, which will be a defence to an action for the promised price⁶ even though the promise, being under seal, needed no consideration.⁷ In regard to licenses given in good faith under an invalid patent, the distinction has been taken that where the patent is on its face valid and the licensee receives the benefit of a monopoly, he cannot set up the invalidity of the patent.⁸ But if the licensee has not received the exclu-

⁵ *Chemical Electric Light, etc., Co. v. Howard*, 148 Mass. 352, 359, 20 N. E. 92, 2 L. R. A. 168, citing—*Hall v. Conder*, 2 C. B. (N. S.) 22, 53; *Smith v. Neale*, 2 C. B. (N. S.) 67; *Noton v. Brooks*, 7 H. & N. 499; *Trotman v. Wood*, 16 C. B. (N. S.) 479; *Lawes v. Purser*, 6 E. & B. 930; *Adie v. Clark*, Ch. D. 134.

⁶ *Nye v. Raymond*, 16 Ill. 153; *McClure v. Jeffrey*, 8 Ind. 79, 82; *Lester v. Palmer*, 4 Allen, 145; *Harlow v. Putnam*, 124 Mass. 553; *Keith v. Hobbs*, 69 Mo. 84; *Dunbar v. Marden*, 13 N. H. 311, 317; *Cross v. Huntly*, 13 Wend. 385; *Marston v. Swett*, 66 N. Y. 206, 212, 23 Am. Rep. 43; *Herzog v. Heyman*, 151 N. Y. 587, 45 N. E. 1127; *Darst v. Brockway*, 11 Ohio, 462, 471; *Herman v. Gray*, 79 Wis. 182, 48 N. W. 113. And a promise to pay the price of a machine is subject to a similar de-

fence if the right to use the machine can be effectively disputed by a third person. *Pratt v. Paris Gas Light Co.*, 155 Ill. 531, 40 N. E. 1032. But where the seller of a patent was himself an assignee, he was allowed to recover the agreed price in *Johnson v. Willimantic Linen Co.*, 33 Conn. 436.

⁷ *Hayne v. Maltby*, 3 T. R. 438; *Nye v. Raymond*, 16 Ill. 153.

⁸ *Kinsman v. Parkhurst*, 18 How. 289, 15 L. Ed. 385; *Wilder v. Adams*, 2 Woodb. & M. 329; *McKay v. Jackman*, 17 Fed. 641; *Milligan v. Lallance, etc., Mfg. Co.*, 21 Fed. 570; *Covell v. Bostwick*, 39 Fed. 421; *Bartlett v. Holbrook*, 1 Gray, 114; *Marston v. Swett*, 66 N. Y. 206, 23 Am. Rep. 43; *Skinner v. Wood Co.*, 140 N. Y. 217, 35 N. E. 491, 37 Am. St. Rep. 540; *Hyatt v. Dale Mfg. Co.*, 106 N. Y. 651, 12 N. E. 705; *Davis v. Gray*, 17 Oh.

sive rights which would have been his had the patent been valid, he is not bound to pay the agreed license fees.⁹ The propriety of this distinction is obvious if it is recognized that failure of consideration is the basis of decision; but if there were originally no consideration for the licensee's promise, the licensor could not recover the promised price, whatever benefit in fact might have been derived by the licensee. A license under an invalid copyright is treated in the same way as a license under an invalid patent.¹⁰

§ 138. Gratuitous undertakings.

Among the early authorities on the action of assumpsit are cases of gratuitous undertakings.¹¹ The gist of the action of assumpsit consisted in undertaking to do something and injuring the plaintiff by inducing him to rely on this undertaking. It is still the law that a voluntary undertaking may render one liable for the consequences of negligent failure to carry out the undertaking; but in most cases of the sort the cause of action is now regarded as based on a tort.¹² In one class of cases, however, the transaction is still regarded as contractual, namely, gratuitous agency, bailment, or trust. There is no technical difficulty in finding a consideration for a bargain in such cases if a bargain was intended. Allowing another to act as a gratuitous agent, bailee, or trustee, is a detriment which may support the promise of the agent, bailee, or trustee. The difficulty, however, is that the parties ordinarily in a gratuitous transaction do not in fact exchange the promise for this permission.¹³ It would have been better perhaps if a remedy in these cases had been left to the law of torts, unless a real bargain was contemplated. The leading

St. 330. See also *Bellas v. Hays*, 5 S. & R. 427, 439; *Geiger v. Cook*, 3 W. & S. 266.

⁹ *White v. Lee*, 14 Fed. 789; *Harlow v. Putnam*, 124 Mass. 553; *Marston v. Swett*, 82 N. Y. 526; *Angier v. Eaton, C. & B. Co.*, 98 Pa. St. 594. As to recovery of license fees already paid, see *Stanley Rule & Level Co. v. Bailey*, 45

Conn. 464, and 3 Robinson on Patents, § 1247.

¹⁰ *Saltus v. Belford Co.*, 133 N. Y. 499, 31 N. E. 518.

¹¹ See, e. g., 2 Hen. IV, 3, Pl. 9.

¹² See an article by Professor Beale, *Gratuitous Undertakings*, 5 Harv. L. Rev. 222; *Bailey v. Walker*, 29 Mo. 407, 408.

¹³ See *supra*, § 112.

case on the subject is *Coggs v. Bernard*,¹⁴ where a defendant was held responsible for damage to goods caused by his neglect while he was carrying them, though he was not a common carrier, and was to receive no compensation. Similarly in other cases of gratuitous bailment, a defendant has been held liable in an action of assumpsit for a failure to use care in regard to the goods bailed.¹⁵ So a gratuitous agent is liable for failure to exercise the degree of skill which he assumes to have,¹⁶ and a gratuitous trust is subject to the same rule.¹⁷ In many of the decisions the question arose upon the pleadings and raised only the point whether a gratuitous bailment, agency or trust, might be a valid consideration, if, as was stated in the declaration to be the fact, the parties had so agreed. That the consideration would be valid if bargained for, has already been said. The degree of care which one, who assumes or undertakes a certain act, is held bound to exercise depends upon the degree of skill which he professes. The ordinary gratuitous bailee is generally said to be liable only for gross negligence.¹⁸ But one who professes special skill will be liable for failure to use that skill. The discussions in regard to this question show that the true nature of the liability is not contractual, for, if it were, the only question would be—what was the defendant's promise.¹⁹ Aside from the special cases of agency, bailment, and trust, there is little modern authority for holding that a mere gratuitous undertaking creates a contractual liability.²⁰ And in any case

¹⁴ *Ld. Raymond*, 909; 1 *Smith Leading Cases*, * 199.

¹⁵ *Riches v. Briggs*, *Yelv.* 4; *Pickas v. Guile*, *Yelv.* 128; *Wheatley v. Low*, *Cro. Jas.* 668; *Hart v. Miles*, 4 *C. B. (N. S.)* 371; *Doorman v. Jenkins*, 2 *Ad. & El.* 256; *Robinson v. Threadgill*, 13 *Ired. Law*, 39.

¹⁶ *Wilson v. Brett*, 11 *M. & W.* 113. The defendant in this case rode a horse gratuitously at the request of the owner to show him off in order to induce a sale, and was held liable for an injury to the horse while he was riding him. See also *Whitehead v. Greetham*, 10 *Moore*, 183, 2 *Bing.* 464.

¹⁷ *Jenkins v. Bacon*, 111 *Mass.* 373, 15 *Am. Rep.* 33. See also *Stone v. Demarest*, 95 *N. Y. Misc.* 543, 159 *N. Y. S.* 800.

¹⁸ See *Schouler on Bailments*, §§ 35 *et seq.*

¹⁹ See, however, *Whitehead v. Greetham*, 10 *Moore*, 183, 2 *Bing.* 464, which seems to hold a gratuitous bailment a sufficient consideration for a promise, not simply to exercise care but absolutely to return safely.

²⁰ In *Hammond v. Hussey*, 51 *N. H.* 40, 12 *Am. Rep.* 41, a teacher of a high school, who undertook to examine candidates for admission, was held liable

where recovery is allowed on the theory of a contract, the limits of recovery would doubtless be similar to those fixed in actions on the case for negligence so that the error in allowing recovery, for error it must be regarded, would be merely the use of a contractual remedy instead of a remedy in tort for redressing a legal wrong.²¹

§ 139. Estoppel as a substitute for consideration.

It is generally true that one who has led another to act in reasonable reliance on his representations of fact cannot afterwards in litigation between the two deny the truth of the representations, and some courts have sought to apply this principle to the formation of contracts, where, relying on a gratuitous promise, the promisee has suffered detriment.²² It is to be noticed, however, that such a case does not come within the ordinary definition of estoppel. If there is any representation of an existing fact, it is only that the promisor

for wrongfully reporting the plaintiff unqualified for admission, and the court quoted, on page 50, from the note to *Coggs v. Bernard*, in Smith's *Leading Cases*, a statement which can hardly be accepted. "The confidence induced by undertaking any service for another, is a sufficient legal consideration to create a duty in the performance of it." When such a person is liable, his liability is not contractual.

²¹ In *Wilkinson v. Coverdale*, 1 Esp. 75, the defendant undertook gratuitously to get a renewal of a policy of insurance, and failed to observe conditions requisite for the validity of the new policy. He was held liable. This seems perhaps to go farther than any other decision in holding a defendant liable for failing to secure to the plaintiff a promised advantage, as distinguished from injuring what the plaintiff had possessed before the undertaking.

²² *Beatty v. Western College*, 177 Ill. 280, 52 N. E. 432, 42 L. R. A. 797, 69 Am. St. Rep. 242; *Switzer v. Gerstenbach*, 122 Ill. App. 26 (cf. *South*

Park Commissioners v. Chicago City Ry. Co., 286 Ill. 504, 122 N. E. 89, 92); *Simpson College v. Tuttle*, 71 Iowa, 596, 33 N. W. 74; *School District v. Sheidley*, 138 Mo. 672, 40 S. W. 656, 37 L. R. A. 406, 60 Am. St. Rep. 576; *Ricketts v. Scotchborn*, 57 Neb. 51, 77 N. W. 365, 42 L. R. A. 794, 73 Am. St. Rep. 491; *Reimensnyder v. Gans*, 110 Pa. 17, 4 Atl. 425. In *Alliance Bank v. Broom*, 2 Dr. & Sm. 289, a promise was enforced because the effect of the promise was to induce some degree of forbearance, though it seems apparent from the facts that such forbearance was not asked for in exchange for the promise. This decision, however, is inconsistent with the doctrine stated in the later case of *Miles v. New Zealand Alford Est. Co.*, 32 Ch. D. 266, and has been explained away in later English decisions. *Fullerton v. Provincial Bank*, [1903] A. C. 309; *Glegg v. Bromley*, [1912] 3 K. B. 474, 481. See also *In re Hudson*, 54 L. J. Ch. 811; *Burnett v. Turner*, 105 Ark. 290, 151 S. W. 249.

at the time of making the promise intends to fulfil it. As to such intention there is usually no misrepresentation and if there is, it is not that which has injured the promisee. In other words, he relies on a promise and not on a misstatement of fact;²³ and the term "promissory" estoppel or something equivalent should be used to mark the distinction.²⁴ In the United States, the decisions which have enforced promises, confessedly because of the promisee's action in reliance thereon have generally been cases of charitable subscriptions where courts dissatisfied with the prevailing theories by which consideration is found for such agreements, but nevertheless disposed to follow the weight of American authority in sustaining the subscriber's promise, have explained the liability on the ground of estoppel. In a few cases, however, courts have applied the same doctrine to a promise, between individuals, for the payment of money.²⁵ Opposed in principle to such decisions are those which have held that performance of a detrimental condition attached to a gratuitous promise is not a substitute for consideration, and does not make the promisor liable if he breaks his promise;²⁶ and many other decisions which hold that a detriment incurred in reliance on a promise is not valid consideration unless the detriment was requested as consideration.²⁷ "The promise and

²³ The "doctrine of estoppel seems scarcely applicable. The representation relied on . . . was more like a contract or promise than the statement of an existing fact." Per Kay, L. J., *Low v. Bouverie*, [1891] 3 Ch. 82, 109.

²⁴ See further, Bigelow on Estoppel (4th ed.), 555.

²⁵ *Switzer v. Gertenbach*, 122 Ill. App. 26; *Ricketts v. Scothorn*, 57 Neb. 51, 77 N. W. 365, 42 L. R. A. 794, 73 Am. St. Rep. 491. In both of these cases the plaintiff was the donee of a promissory note made by the donor. In the latter case the maker, the defendant, had given his note to the plaintiff with the expectation that she might thereupon give up working. Relying on the note, the plaintiff gave

up a good position and was held entitled to recover on the note. Not infrequently, no doubt also courts allow juries to find an intent to make a bargain in cases where it is difficult to believe there was more than detrimental reliance on a gratuitous promise. See, e. g., *Wood v. Danas*, 230 Mass. 587, 120 N. E. 159.

²⁶ See *supra*, § 112.

²⁷ *Whitechurch v. Cavanagh*, [1902] A. C. 117; *Maddison v. Alderson*, 8 App. Cas. 467, 473; *Union Mut. L. Ins. Co. v. Mowry*, 96 U. S. 544, 24 L. Ed. 674; *Ellis v. Dodge*, 237 Fed. 860; *Jelks v. McRae*, 25 Ala. 440; *Weaver v. Bell*, 87 Ala. 385, 387, 6 So. 298; *Germania Ins. Co. v. Bromwell*, 62 Ark. 43, 49, 34 S. W. 83; *Allen v. Rundle*, 50 Conn. 9, 47 Am. Rep. 599;

the consideration must purport to be the motive each for the other, in whole or at least in part. It is not enough that the promise induces the detriment, or that the detriment induces the promise if the other half is wanting."²⁸ Promises of future action, it is generally held, if they can furnish the basis for an estoppel at all, can do so only where they relate to an intended abandonment of an existing right, and are made to influence others who in fact are induced to act thereby.²⁹ The commonest illustration of this doctrine is where one who has induced his creditor to forbear to bring action upon an enforceable claim by promise of payment or by a promise not to plead the Statute of Limitations as a defence, even though such forbearance was not requested as consideration for the promise, and though the new promise (because not in writing or for other reasons) was not binding as such, has not been allowed later to set up the Statute after the creditor relying upon the debtor's promise has refrained from bringing action until the statutory period has expired.³⁰ Another

Marsh v. Bridgeport, 75 Conn. 495, 54 Atl. 196; *Morris v. Orient Ins. Co.*, 106 Ga. 472, 475, 33 S. E. 430; *Starry v. Korab*, 65 Iowa, 267, 21 N. W. 600; *Travis v. Davis' Ex's*, 12 Ky. L. Rep. 825, 15 S. W. 525; *Gerrish v. Proprietors Union Wharf*, 26 Me. 384, 46 Am. Dec. 568; *Langdon v. Doud*, 10 Allen, 433; *Tracy v. Union Iron Works*, 29 Mo. App. 342; *Precott v. Jones*, 69 N. H. 305, 41 Atl. 352; *White v. Ashton*, 51 N. Y. 280; *Vick v. Vick*, 126 N. C. 123, 35 S. E. 257; *Keating v. Orne*, 77 Pa. St. 89; *Maxwell v. Urban*, 22 Tex. Civ. App. 565, 55 S. W. 1124; *Elliot v. Whitmore*, 23 Utah, 342, 65 Pac. 70, 90 Am. St. Rep. 700. See also *Elsee v. Gatward*, 5 T. R. 143; *Balfe v. West*, 13 C. B. 466; *Thorne v. Deas*, 4 Johns. 84; *Strong v. Sheffield*, 144 N. Y. 392, 39 N. E. 330.

²⁸ *Wisconsin & Mich. R. v. Powers*, 191 U. S. 379, 386, 48 L. Ed. 229, 24 Sup. Ct. 107, per Holmes, J., quoted with approval by McKenna, J., in *Banning Co. v. California*, 240 U. S.

142, 153, 60 L. Ed. 569, 36 S. Ct. 338.

²⁹ *Union Mut. L. Ins. Co. v. Mowry*, 96 U. S. 544, 24 L. Ed. 674; *Edison Co. v. Buckeye Co.*, 59 Fed. 691, 699; *Johnson v. Blair*, 132 Ala. 128, 31 So. 92; *Shields v. Smith*, 37 Ark. 47, 53; *Johnson v. Longley*, 142 Ga. 814, 83 S. E. 952; *Wire v. Wyman*, 93 Ind. 392; *Faxton v. Faxton*, 28 Mich. 159; *Stayton v. Graham*, 139 Pa. St. 1, 21 Atl. 2.

³⁰ *Holman v. Omaha, etc., Ry. & Bridge Co.*, 117 Ia. 268, 90 N. W. 833, 62 L. R. A. 395, 94 Am. St. Rep. 293. *Renackowsky v. Board of Water Commissioners*, 122 Mich. 613, 81 N. W. 581; *Crawford v. Winterbottom*, 88 N. J. L. 588, 96 Atl. 497; *Utica Insurance Co. v. Bloodgood*, 4 Wend. 652; *Joyner v. Massey*, 97 N. C. 148, 1 S. E. 702; *Ceal v. Henderson*, 121 N. C. 244, 28 S. E. 481; *Armstrong v. Levan*, 109 Pa. 177, 1 Atl. 204; *Burton v. Stevens*, 24 Vt. 131, 58 Am. Dec. 153. See also *State Loan & Trust Co. v. Cochran*, 130 Cal. 245, 252, 62 Pac. 466, 600; *Phillips v. Phillips*, 163 Cal. 530, 127

illustration is where a statutory period for the redemption of property sold by judicial process has been allowed to expire on the faith of statements made by the purchaser that the statutory limitation would not be insisted upon: "Under such circumstances the courts have held with great unanimity that the purchaser is estopped to insist upon the statutory period, notwithstanding the assurances were not in writing and were made without consideration, upon the ground that the debtor was lulled into a false security."³¹ In these cases, however, no new right is created. The court does not sustain an action on the promise; it reaches the desired result by allowing a defence to an action or allowing an original right to be enforced by merely prohibiting the interposition of a defence. They properly fall under the head of waiver, giving that word the narrow significance hereafter ascribed to it.³² Moreover in such cases though the estoppel prevents an insistence on strict compliance with statutory requirements it by no means necessarily follows that the promise is binding according to its terms, permitting a delay, either indefinite or until a new statutory period has elapsed.³³

A similar basis is to be found for the doctrine of an early

Pac. 346; *Webber v. Williams College*, 23 Pick. 302; *Gaylord v. Van Loan*, 15 Wend. 308. But see *contra*,—*Andrew v. Redfield*, 98 U. S. 225, 239, 25 L. Ed. 158; *Green v. Coos Bay Wagon Road Co.*, 23 Fed. 67; *Mann v. Cooper*, 2 D. C. App. 226, 238; *Langdon v. Doud*, 10 Allen, 433; *Shapley v. Abbott*, 42 N. Y. 443, 1 Am. Rep. 548. See also *Gray v. Day*, 109 Me. 492, 84 Atl. 1073, 43 L. R. A. (N. S.) 535.

³¹ *Schröder v. Young*, 161 U. S. 334, 344, 40 L. Ed. 721, 16 S. Ct. 512, citing; *Guinn v. Locke*, 1 Head, 110; *Combs v. Little*, 4 N. J. Eq. 310, 40 Am. Dec. 207; *Griffin v. Coffey*, 9 B. Mon. 452, 50 Am. Dec. 519; *Martin v. Martin*, 16 B. Mon. 8; *Butt v. Butt*, 91 Ind. 305; *Turner v. King*, 2 Ired. Eq. 132, 38 Am. Dec. 679; *Lucas v. Nichols*, 66 Ill. 41; *McMakin v. Schenck*, 98 Ind. 264. In *Schröder v. Young*, *supra*, at

p. 345, the court added: "Probably, if a motion had been made in the original case to set aside the sale upon the ground of mere irregularities, such motion would have to be made before the statutory period for redemption had passed; but in this class of cases, where fraudulent conduct is imputed to the parties conducting the sale, there is a concurrent jurisdiction of a court of equity, founded upon its general right to relieve from the consequences of fraud, accident or mistake, which may be exercised, notwithstanding the statutory period for redemption has expired." See also *De Lucia v. Witz*, 92 Conn. 416, 103 Atl. 117, 118; *Dow v. Bradley*, 110 Me. 249, 85 Atl. 896, 44 L. R. A. (N. S.) 1041; *Thomas v. Hall*, 116 Me. 140, 100 Atl. 502.

³² See *infra*, §§ 679, 689.

³³ See *infra*, § 186.

Pennsylvania decision,³⁴ which held that a license, in terms permanent, to divert a watercourse could not be revoked after the licensee had made improvements and invested capital in consequence of it. This decision has been followed by other cases holding that a license cannot be revoked in violation of its terms after the licensee has seriously changed his position on the faith of it.³⁵ It should be noticed that no slight acts or merely technical reliance will serve.³⁶ The weight of authority, moreover, is opposed to these decisions and holds a gratuitous license revocable though action has been taken in reliance upon it.³⁷ In connection with the subject of enforcement of promises because of a promissory estoppel, a doctrine of equity in regard to certain gratuitous promises should be mentioned. Where land has been gratu-

³⁴ *Rerick v. Kern*, 14 S. & R. 267.

³⁵ *Wynn v. Garland*, 19 Ark. 23, 68 Am. Dec. 190 (*cf.* *Plunkett v. Meredith*, 72 Ark. 3, 77 S. W. 600); *Miller v. Kern*, 154 Cal. 785, 99 Pac. 179; *Albrecht v. Drake Lumber Co.*, 67 Fla. 310, 65 So. 98; *Hiers v. Mill Haven Co.*, 113 Ga. 1002, 39 S. E. 444; *McReynolds v. Harrigfeld*, 26 Idaho, 26, 140 Pac. 1096; *Joseph v. Wild*, 146 Ind. 249, 45 N. E. 467; *Patterson v. Burlington*, 141 Iowa, 291, 119 N. W. 593; *Lee v. McLeod*, 12 Nev. 280; *Bowman v. Bowman*, 35 Oreg. 279, 57 Pac. 546; *Shaw v. Proffitt*, 57 Oreg. 192, 109 Pac. 584, 110 Pac. 1092, Ann. Cas. 1913 A. 63; *Risien v. Brown*, 73 Tex. 135, 10 S. W. 661; *Barre v. Perry*, 82 Vt. 301.

³⁶ See cases in the preceding note.

³⁷ *Hicks Bros. v. Swift Creek Mill Co.*, 133 Ala. 411, 31 So. 947, 57 L. R. A. 720, 91 Am. St. Rep. 38; *Profile Cotton Mills v. Calhoun Water Co.*, 189 Ala. 181, 66 So. 50; *Foot v. New Haven, etc., R. Co.*, 23 Conn. 214; *Jackson & Sharp Co. v. Philadelphia R. Co.*, 4 Del. Ch. 180; *Howes v. Barmon*, 11 Idaho, 64, 81 Pac. 48, 69 L. R. A. 568; *Entwhistle v. Henke*, 211 Ill. 273, 71 N. E. 990 (but see *Girard v. Lehigh Stone Co.*, 280 Ill. 479, 484, 117 N. E.

698); *Stevens v. Stevens*, 11 Mete. (Mass.) 251; *Nowlin Lumber Co. v. Wilson*, 119 Mich. 406, 78 N. W. 338; *Minneapolis Mill Co. v. Minneapolis Ry. Co.*, 51 Minn. 304, 53 N. W. 639; *Belzoni Oil Co. v. Yazoo R. Co.*, 94 Miss. 58, 47 So. 468; *Pitzman v. Boyce*, 111 Mo. 387, 19 S. W. 1104, 33 Am. St. Rep. 536 (*cf.* *Cape Girardeau R. Co. v. St. Louis Ry. Co.*, 222 Mo. 461, 484, 121 S. W. 300); *Archer v. Chicago Ry. Co.*, 41 Mont. 56, 108 Pac. 571; *Houston v. Laffee*, 46 N. H. 505; *Lawrence v. Springer*, 49 N. J. Eq. 289, 24 Atl. 933; *Crosdale v. Lanigan*, 129 N. Y. 604, 29 N. E. 824; *Richmond R. Co. v. Durham R. Co.*, 104 N. C. 658, 10 S. E. 659; *Rodefer v. Pittsburg R. Co.*, 72 Oh. 272, 74 N. E. 183; *Foster v. Browning*, 4 R. I. 47, 67 Am. Dec. 505; *Yeager v. Woodruff*, 17 Utah, 361, 53 Pac. 1045; *Hathaway v. Yakima Water Co.*, 14 Wash. 469, 44 Pac. 896; *Pifer v. Brown*, 43 W. Va. 412, 27 S. E. 399, 49 L. R. A. 497; *Thoenke v. Fiedler*, 91 Wis. 386, 64 N. W. 1030. In *Girard v. Lehigh Stone Co.*, 280 Ill. 479, 484, 117 N. E. 698, it was held that a gratuitous license thus relied on would be protected in equity, though invalid at law.

itously promised to one who, relying upon the promise, has entered upon the land and made improvements, it has been held that equity will specifically enforce the promise to convey the land.³⁸ A promise not to enforce or foreclose a mortgage, in reliance upon which the promisee has made improvements, has been similarly held binding.³⁹ It is to be noticed that in enforcing conveyances in such cases, equity regards only possession of the land and improvements upon it. No other detriment would suffice.⁴⁰ It is probable that the actual delivery of possession of the land has been regarded as analogous to completing a gift.

Another class of cases which seem to rest on the ground of promissory estoppel are promised marriage settlements. It is said to be the policy of the law to favor such settlements and in accordance with this policy promises which often seem to have been intended as gratuitous have been enforced when a marriage has taken place in reliance upon them.⁽⁴¹⁾ Doubt-

³⁸ *Neale v. Neale*, 9 Wall. 1, 9, 19 L. Ed. 590; *Guyann v. McCauley*, 32 Ark. 97; *Bakersfield Assoc. v. Chester*, 55 Cal. 98; *Beall v. Clark*, 71 Ga. 818; *Irwin v. Dyke*, 114 Ill. 302, 1 N. E. 913; *Clancy v. Flusky*, 187 Ill. 605, 58 N. E. 594; *Hughes v. Lindsey*, 31 Ia. 329; *Pranger v. Pranger*, 182 Ia. 639, 164 N. W. 607; *Bigelow v. Bigelow*, 93 Me. 439, 45 Atl. 513; *Hardesty v. Richardson*, 44 Md. 617, 22 Am. Rep. 57; *Potter v. Smith*, 68 Mich. 212, 35 N. W. 916; *Dozier v. Matson*, 94 Mo. 328, 7 S. W. 268, 4 Am. St. Rep. 388; *Story v. Black*, 5 Mont. 26, 1 Pac. 1, 51 Am. Rep. 37; *Seavey v. Drake*, 62 N. H. 393; *Young v. Overbaugh*, 145 N. Y. 158, 39 N. E. 712; *Messiah Home v. Rogers*, 212 N. Y. 315, 106 N. E. 59; *Schroder v. Wansor*, 36 Hun. 423; *Pugh v. Spicknall*, 43 Ore. 489, 73 Pac. 1020; *Scott v. Lewis*, 40 Ore. 37, 66 Pac. 299; *Royer v. Ephrata Borough*, 171 Pa. 429, 33 Atl. 361; *Johnson v. Townsend*, 77 Tex. 639, 14 S. W. 233; *Grigsby v. Osborn*, 82 Va. 371; *Harrison v. Harrison*, 36 W. Va. 556, 15 S. E. 87. See also *Crosbie v. McDoual*, 13 Ves.

148; *Mereness v. DeLemos*, 91 Conn. 651, 101 Atl. 8. But see the contrary decisions of *Tolleson v. Blackstock*, 95 Ala. 510, 513, 11 So. 284; *Usher's Ex's v. Flood*, 83 Ky. 552; *Ridley v. McNairy*, 2 Hump. 174. The matter is discussed by Pound in 13 Ill. L. Rev. 435, 440.

³⁹ *Faxton v. Faxon*, 28 Mich. 159; *Roe v. Fleming*, 32 Okl. 259, 122 Pac. 496.

⁴⁰ In this connection should be considered the doctrines of equity in regard to the enforcement of oral contracts for the sale of land, because of part performance. See *infra*, § 494.

⁴¹ *Ayliffe v. Tracy*, 2 P. Wms. 65; *Shadwell v. Shadwell*, 9 C. B. (N. S.) 159; *Bold v. Hutchinson*, 20 Beav. 250; *Laver v. Fielder*, 32 Beav. 1; *Coverdale v. Eastwood*, L. R. 15 Eq. 121; *Keays v. Gilmore*, Ir. Rep. 8 Eq. 290; *Phalen v. United States Trust Co.*, 186 N. Y. 178, 186, 78 N. E. 943, 7 L. R. A. (N. S.) 734. In *Laver v. Fielder*, 32 Beav. 1, Romilly, M. R., said: "It is of great importance that all persons should understand that when a man makes a

less there are reasons of justice for enforcing promises which have led the promisee to incur any detriment on the faith of them, not only when the promisor intended, but also when he should reasonably have expected such detriment would be incurred, though he did not request it as an exchange for his promise. Students of the Civil Law usually select the technicalities of the English and American law requiring consideration to validate a simple contract, for particular animadversion; and there is not infrequently observable in the decisions of American courts in cases of hardship an impatience with the requirement and an effort to enlarge the boundaries of enforceable promises. If this sentiment should find general expression, it may fairly be argued that the fundamental basis of simple contracts historically was action in justifiable reliance on a promise—rather than the more modern notion of purchase of a promise for a price, and that it is a consistent development from this early basis to define valid consideration as any legal benefit to the promisor or legal detriment to the promisee given or suffered by the latter in reasonable reliance on the promise. Such a definition eliminates the necessity of a request by the promisor for the consideration. The proposition is by no means without intrinsic merit, but it should be recognized that if generally applied it would much extend liability on promises, and that at present it is opposed to the great weight of authority. A class of cases where a genuine estoppel exists must be distinguished from those discussed in this section. Where a note has been executed to a bank to make an appearance of assets to deceive the bank examiners and enable the bank to continue business, a receiver of the bank can maintain an action on the note, although as between the bank and the maker there was no consideration.⁴² Here there is a misstatement of fact made to

solemn engagement upon an important occasion, such as the marriage of his daughter, he is bound by the promise he then makes. If he induce a person to act upon a particular promise, with the particular view, which affects the interests in life of his own children and of the persons who become united to

them, this court will not permit him afterwards to forego his own words and say that he was not bound by what he then promised." See also *De Cicco v. Schweizer*, 221 N. Y. 431, 117 N. E. 807.

⁴² *Golden v. Cervenka*, 278 Ill. 409, 427, 116 N. E. 273; *Niblack v. Farley*,

a third person representing the creditors, and action is taken relying thereon.

§ 140. Mutuality.

It is often stated as if it were a requisite in the formation of contracts, that there must be mutuality.⁴³ This form of statement is likely to cause confusion and however limited is at best an unnecessary way of stating that there must be valid consideration. In unilateral contracts there is never mutuality of obligation; ⁴⁴ and in bilateral agreements though it is necessary that there shall be such a promise on each side as will furnish valid consideration, to express the idea by saying that mutuality is necessary is sure to cause confusion with the use of the same word by courts of equity.⁴⁵ Lack of mutuality, as that phrase is used by courts of equity, is not necessarily any objection to the existence of a contract. It is said that equity will not give specific performance to a contract unless there is mutuality; that is, unless the plaintiff's own promise so far as it is still unperformed is capable of specific enforcement. It may not be thus capable for various reasons which will not invalidate the contract.⁴⁶ Sometimes the question involved where

286 Ill. 536, 122 N. E. 160; *Best v. Thiel*, 79 N. Y. 15; *Lyons v. Benney*, 230 Pa. 117, 79 Atl. 250, 34 L. R. A. (N. S.) 105; *Dominion Trust Co. v. Ridall*, 249 Pa. 122, 94 Atl. 464.

⁴³ A few illustrations of this use from recent cases may be found in *Hazelhurst Lumber Co. v. Mercantile &c. Co.*, 166 Fed. 191; *Jenkins v. Anaheim Sugar Co.*, 237 Fed. 278; *Ellis v. Dodge*, 237 Fed. 860; *Marin Water &c. Co. v. Sausalito*, 168 Cal. 587, 143 Pac. 767; *Ayer & Lord Tie Co. v. O'Bannon*, 164 Ky. 34, 174 S. W. 783; *Killebrew v. Murray*, 151 Ky. 345, 151 S. W. 662; *Hudson v. Browning*, 264 Mo. 58, 174 S. W. 393; *Grossman v. Schenker*, 206 N. Y. 466, 100 N. E. 39; *Great Northern R. Co. v. Sheyenne Tel. Co.*, 27 N. Dak. 256, 263, 145 N. W. 1062; *Texas Produce Exchange v. Sorrell* (Tex. Civ. App.), 168 S. W. 74.

⁴⁴ In *Whittle v. Frankland*, 2 B. & S. 49, 55, *Crompton, J.*, said:—"I never could understand that mutuality doctrine. Take the case of a contract of guarantee; the only question there is, was there any consideration to support the contract?" See discussion of the matter in *Rague v. Publishing Co.*, 164 N. Y. App. D. 126, 149 N. Y. S. 668; *Western Newspaper Union v. Kitchel*, 201 Mich. 121, 166 N. W. 1021. Nevertheless mutuality is not infrequently stated to be a "cardinal requirement" of contracts, as it was in the opinion of the court in *Oakland Motor Car Co. v. Indiana Automobile Co.*, 201 Fed. 499, 504, 121 C. C. A. 319.

⁴⁵ Various shades of meaning given to the word are noted by Professor Gilbert in 4 Calif. L. Rev. 122.

⁴⁶ See *infra*, §§ 1433 *et seq.*

mutuality is discussed is whether one party to the transaction can by fair implication be regarded as making any promise;⁴⁷ but this is simply an inquiry whether there is consideration for the other party's promise. The particular error which is traceable to the misleading use of the word mutuality as a requirement for the formation of contracts, is a tendency observable in some cases to hold a contract invalid because the obligation undertaken on one side is not commensurate with that undertaken on the other. Especially where one party is given an option, not accorded to the other, of discontinuing or extending performance or of cancelling or renewing the contract or of determining the extent of performance, confusion has arisen. If the option goes so far as to render illusory the promise of the party given the option,⁴⁸ there is indeed no valid consideration, and therefore no contract, but the mere fact that the option prevents the mutual promises from being coextensive does not prevent both promises from being binding according to their terms.⁴⁹ A court of equity might indeed refuse to enforce spe-

⁴⁷ See *supra*, § 90.

⁴⁸ See *supra*, §§ 43, 104.

⁴⁹ Such contracts were therefore enforced in *Pilkington v. Scott*, 15 M. & W. 657 (employment for seven years with right in employer to discharge on notice of a month or wages for that period). *Central Trust Co. v. Chicago Auditorium Assoc.*, 240 U. S. 581, 36 S. Ct. 412, 415, 60 L. Ed. 811 (contract with a hotel for baggage and livery privileges for five years with the right reserved to the hotel to cancel on six months' notice); *McCall Co. v. Wright*, 133 N. Y. App. D. 62, 117 N. Y. S. 775, 198 N. Y. 143, 91 N. E. 516, 31 L. R. A. (N. S.) 249 (employment for six years with right in employer to discharge on notice of thirty days); *Realty Advertising & Co. v. Englebert Tyre Co.*, 151 N. Y. S. 885, 89 N. Y. Misc. 371 (advertising contract with right in plaintiff to cancel on five days' notice); *Tebeau v. Ridge*, 261 Mo. 547, 170 S. W. 871, L. R. A. 1915 C, 367 (option in lease

giving lessee right to purchase; citing other cases to the same effect). See also *Marin Water & Co. v. Sausalito*, 168 Cal. 587, 143 Pac. 767; *United States Expansion Bolt Co. v. Marmerstein*, 181 N. Y. App. D. 790, 169 N. Y. S. 244. On the other hand, in *Tweedie Trading Co. v. Parlin & Orendorff Co.*, 204 Fed. 50, 122 C. C. A. 364, in a suit in admiralty, a shipping contract was held invalid which gave the carrier an option as to when and what it would carry during most, but not all, of the year, during which the contract was to be in force. See also *Killebrew v. Murray*, 151 Ky. 345, 151 S. W. 663; *Owens v. Corsicana Petroleum Co.* (Tex. Civ. App.), 169 S. W. 192.

Some courts, too, owing to a mistaken view as to the requirement of mutuality, have been led to hold that a promise to buy from the promisee all goods of a certain kind which the promisor needed or should buy from any one, is not a sufficient consideration because there is no engagement to buy

cifically such a contract if it seemed oppressive, but to deny its legal validity is to contradict directly the numerous cases which hold adequacy of consideration is a matter exclusively for the decision of the parties.⁵⁰ The large class of cases where one party to a contract may reject performance which is not satisfactory to him,⁵¹ or to his architect or engineer,⁵² while no corresponding privilege is given to the other party, is itself enough to establish what should need no argument, that the obligations of the parties to a contract need not be correlative or coextensive.

§ 141. One consideration may support several promises.

In many contracts there are more promises than one on a side. If each promise on one side is supported by a promise or performance allotted to it exclusively as its consideration, the contract is divisible.⁵³ But frequently all promises or performances on one side are indiscriminately made consideration for all promises or performances on the other. And if the performances or promises on one side fulfil the legal requirements of consideration they will support any number of counter-promises on the other.⁵⁴ A common illustration

some specific quantity, though it is clear that the performance of such a promise involves detriment in refraining from dealing with any other person than the promisee; See *supra*, § 104.

⁵⁰ See *supra*, § 115.

⁵¹ See *supra*, § 44.

⁵² See *infra*, §§ 794 *et seq.*, and especially *Boston Store v. Schleuter*, 88 Ark. 213, 114 S. W. 242; *Young v. Stein*, 152 Mich. 310, 116 N. W. 195, 17 L. R. A. (N. S.) 231, 125 Am. St. 412, *Elliott Contracting Co. v. Portland*, 88 Oreg. 150, 171 Pac. 760.

⁵³ See *infra*, § 861.

⁵⁴ *Franklin Telegraph Co. v. Harrison*, 145 U. S. 459, 36 L. Ed. 776, 12 S. Ct. 900; *Philadelphia Ball Club v. Lajoie*, 202 Pa. 210, 51 Atl. 973, 58 L. R. A. 227, 90 Am. St. Rep. 627. *Sixta v. Ontonagon Valley Land Co.*, 148 Wis. 186, 134 N. W. 341. In *Pfeif-*

fer v. Adler, 37 N. Y. 164, it was held that an oral promise to sell goods to a responsible person on the usual terms, would not support an independent engagement to pay the antecedent debt of a third person. See also *Luing v. Peterson*, (Minn. 1919), 172 N. W. 692; and in *Belknap v. Bender*, 75 N. Y. 446, 31 Am. Rep. 476, it was held that a promise to work at what appeared to be full compensation would not support a promise to pay such a debt. In both of the New York cases the primary question was whether the promise was to answer for the debt of another and, therefore, within the Statute of Frauds; but in so far as they hold that aside from the necessity of a writing, the agreements were invalid because the consideration was insufficient, they are indefensible. (A contrary decision is *Davies v. Carey*, 72 Wash. 537, 130

of this principle is found in a sale with a warranty. The consideration for the promise to warrant is the making of the sale for the agreed price.⁵⁶ A promise to a buyer in consideration of his agreement to buy, that the seller will on a certain contingency repurchase is also valid,⁵⁶ or that he will repay a commission on a certain contingency.⁵⁷ Another common illustration is where a business is sold for an agreed price paid, or promised, and the seller further promises not to engage in competition with the buyer. This promise is supported by sufficient consideration.^{57a} In this connection may also be considered a lease, in which is included an option to the lessee.⁵⁸

§ 142. Past or executed consideration.

The term, past consideration, or executed consideration, is self-contradictory. Consideration, by its very definition, must be given in exchange for the promise, or at least in reliance upon the promise. Accordingly, something which has been given before the promise was made and, therefore, without reference to it, cannot, properly speaking, be legal consideration. As a general principle this is well recognized and illustrations might easily be multiplied to show it. Thus a warranty made after a sale has been completed is invalid.⁵⁹

Pac. 1137.) The circumstances might afford ground to question whether the promises to pay antecedent debts were in fact made for the consideration alleged, but this is a question of fact, and if the bargains were actually made as stated, the law cannot inquire into the adequacy of the consideration. See *infra*, § 115. The cases criticised must be distinguished from *Wood v. Benson*, 2 Cr. & Jervis, 94, and *Rand v. Mather*, 11 Cush. 1, where the decisions related wholly to the enforceability of such agreements under the Statute of Frauds.

⁵⁶ *Williston on Sales*, § 608; *Standard Cable Co. v. Denver Electric Co.*, 76 Fed. 422, 22 C. C. A. 258, 39 U. S. App. 340; *McCauley v. Ridgewood Trust Co.*, 81 N. J. L. 86, 79 Atl. 327.

⁵⁷ *Lynch v. Murphy*, 81 N. Y. Misc. 190, 142 N. Y. S. 373.

⁵⁷ *Turner v. Frasier*, 157 Ky. 388, 163 S. W. 245.

^{57a} *Weickgenant v. Eccles*, 173 Mich. 695, 140 N. W. 513.

⁵⁸ *Turman v. Smarr*, 145 Ga. 312, 89 S. E. 214. And see cases cited *infra*, § 1441.

⁵⁹ *Roscorla v. Thomas*, 3 Q. B. 234; *Dilworth v. Holmes Furniture Co.*, 183 Ala. 608, 62 So. 812; *Kimbro v. Wells*, 112 Ark. 126, 165 S. W. 645; *Baldwin v. Daniel*, 69 Ga. 782; *Summers v. Vaughan*, 35 Ind. 323, 9 Am. Rep. 741; *Farmers' Assoc. v. Scott*, 53 Kans. 534, 36 Pac. 978; *White v. Oakes*, 88 Me. 367, 34 Atl. 175, 32 L. R. A. 592; *Cady v. Walker*, 62 Mich. 157, 28 N. W. 805, 4 Am. St. Rep. 834; *In re*

Similarly a guaranty made after the obligation guaranteed has been entered into is invalid without new consideration.⁶⁰

A promise made, after a sale or a contract of service to pay a larger price than had been originally agreed upon,⁶¹ a promise by a lessor, after a lease has been entered into, to make repairs,⁶² or to abate a portion of the rent,⁶³ a promise by a vendor to pay for a deficiency in the acreage of land sold as compared with what it was supposed to contain,⁶⁴ are similarly invalid; and generally the doctrine that past consideration is no consideration is well recognized and universally enforced.⁶⁵ This has been law from a very early day.⁶⁶

Rohrig, 176 Mich. 407, 142 N. W. 561; *Fletcher v. Nelson*, 6 N. Dak. 94, 69 N. W. 53; *Morehouse v. Comstock*, 42 Wis. 626. So a warranty which has lapsed because of the failure of the buyer to comply with its terms cannot be subsequently renewed without new consideration. *Walters v. Akers*, 31 Ky. L. Rep. 259, 101 S. W. 1179. It is sometimes said that a warranty given before the property in the goods has passed is binding. *Douglass v. Moses*, 89 Iowa, 40, 56 N. W. 271, 48 Am. St. 353; *Bowen v. Zaccanti*, (Mo. App. 1919), 208 S. W. 277; or if given before delivery of the goods. *Webster v. Hodgkins*, 25 N. H. 128. But such statements are erroneous. The question is whether the warranty was given before the seller was bound to accept title and delivery. See 17 Mich. L. Rev. 519.

⁶⁰ *Richardson v. Fields*, 124 Ala. 535, 26 So. 981; *Summers v. Heard*, 66 Ark. 550, 50 S. W. 78, 51 S. W. 1057; *Grob v. Gross*, 83 N. J. L. 430, 84 Atl. 1064; *Teale v. Mayer*, 173 N. Y. App. D. 689, 160 N. Y. S. 116; *In re Goddard's Estate*, 66 Vt. 415, 29 Atl. 634.

⁶¹ *Howard v. McNeil*, 25 Ky. L. Rep. 1394, 78 S. W. 142; *Hill v. Granat*, 134 N. Y. S. 529.

⁶² *Roehrs v. Timmons*, 28 Ind. App. 578, 63 N. E. 481; *King v. Cassell*, 150 Ky. 537, 150 S. W. 682; *Clyne v. Helmes*, 61 N. J. L. 358, 39 Atl. 767. See also *Avery v. Sawyer*, 62 Conn. 560.

⁶³ *Goldsborough v. Gable*, 140 Ill. 269, 29 N. E. 722, 15 L. R. A. 294.

⁶⁴ *Williams v. Hathaway*, 19 Pick. 387; *Smith v. Ware*, 13 Johns. 257. But see *Spear v. Griffith*, 86 Ill. 552.

⁶⁵ *Hopkins v. Logan*, 5 M. & W. 241; *Roscorla v. Thomas*, 3 Q. B. 234; *Robinson v. Iron R. Co.*, 135 U. S. 522, 34 L. Ed. 276, 10 S. Ct. 907; *Leverone v. Hildreth*, 80 Cal. 139, 22 Pac. 72; *Martin v. Stubbings*, 20 Ill. App. 381; *Davidson v. King*, 51 Ind. 224; *Griffin v. Hoag*, 105 Ia. 499, 75 N. W. 372; *Caldwell v. Felton (Ky.)*, 51 S. W. 575; *Stevens v. Mayberry*, 82 Me. 65, 19 Atl. 92; *Moore v. Elmer*, 180 Mass. 15, 61 N. E. 259; *Massachusetts Mutual Life Ins. Co. v. Green*, 185 Mass. 306, 70 N. E. 202; *Widman v. Brown*, 83 Mich. 241, 47 N. W. 231; *Turle v. Sargent*, 63 Minn. 211, 65 N. W. 349, 56 Am. St. Rep. 475; *Pike v. Van Riper*, 57 N. J. L. 290, 30 Atl. 529; *Guillaume v. General Transportation Co.*, 100 N. Y. 491, 3 N. E. 489; *Randall v. Simmons*, 134 N. Y. S. 523; *Roberts v. First Nat. Bank*, 8 N. D. 474, 504, 79

⁶⁶ *Jeremy v. Goochman*, Cro. Eliz. 442; *Barker v. Halifax*, 2 Cro. Eliz. 741; *Docket v. Voyel*, 2 Cro. Eliz. 885.

In several classes of cases, however anomalously, a past consideration has been regarded formerly by the law as sufficient consideration, and at the present time in some of these classes at least, the early law still persists. These classes may be stated as follows, though the boundaries between the groups are not always distinctly marked:

- (1) Promises to pay a precedent debt;—
- (2) Promises in consideration of some act previously done by the promisee at the request of the promisor;
- (3) Promises where past circumstances create a moral obligation on the part of the promisor to perform his promise. Under this head may be included cases of ratification and adoption of promises previously made for sufficient consideration but invalid when made for lack of authority or capacity. These groups may be separately considered.

§ 143. Promises to pay precedent debts.

According to modern notions there is almost always either a contract implied in fact or an express contract in any situation where the early common law recognized the creation of a debt; but such was not the doctrine formerly held. Debt as a remedy long antedates any recognition of simple contracts, and when the action of assumpsit first arose, even though there was an express contemporaneous promise to pay the price of goods or of services, assumpsit would not lie for the price because a debt had been created, and the action of debt was regarded as higher in its nature than the action on the case. Therefore, debt was the exclusive remedy.⁶⁷

N. W. 993, 1049; *Hess's Estate*, 150 Pa. 346, 24 Atl. 676; *Gourdin v. Trenholm*, 25 S. Car. 362; *Shugart v. Shugart*, 111 Tenn. 179, 76 S. W. 821. 102 Am. St. Rep. 777; *M. T. Jones Lumber Co. v. Villegas*, 8 Tex. Civ. App. 669, 28 S. W. 558; *Stoneburner v. Motley*, 95 Va. 784, 30 S. E. 364. *In re Goddard's Estate*, 66 Vt. 415, 29 Atl. 634; *Carstens Packing Co. v. Lewis C. Troughton, Inc.*, 90 Wash. 196, 155 Pac. 758; *Bank of Commerce v. Ross*, 91 Wis. 320, 1 W. 993.

⁶⁷ *Maylard v. Keater*, Moore, 711; *Edgecomb v. Dee, Vaugh.* 89, 101; Ames, *Hist. of Assumpsit*, 2 Harv. L. Rev. 54. The same sort of notion prevailed till a much later day in regard to the actions of assumpsit and covenant. Even though the facts afforded proof of a promise for good consideration upon which assumpsit would lie, were it not for the fact that a covenant had also been entered into, that fact made covenant the exclusive remedy. *Leland v. Barry*, 69 Ill. 348.

It was not until Slade's Case ⁶⁸ in 1602, that it was decided that assumpsit would lie upon a contract which also created a debt. Nevertheless the courts had allowed, even before Slade's Case, an action of assumpsit to be brought upon a simple contract debt, provided the defendant made an express promise to pay the debt subsequent to its creation. The existence of the debt was regarded as a sufficient consideration to support the promise, on which the action was based.⁶⁹

The object of the court in stretching the theory of consideration so as to allow redress in assumpsit upon a promise the only consideration of which was past, was chiefly to permit the plaintiff to sue in an action where trial by jury was the prescribed method of trial instead of compelling him to sue on the antecedent debt in an action where wager of law was allowed to the defendant.⁷⁰ Also, in assumpsit the plaintiff was allowed a simpler method of pleading his right to recover a promised debt than was permitted in the action of debt. The common counts in indebitatus assumpsit seem to have become recognized early in the seventeenth century.⁷¹ At first, in order to support the action of assumpsit to recover a debt it was essential that the defendant should make an express promise to pay the debt, either subsequently to its creation or, after Slade's Case, at the time it was created. Later, a step in advance was taken by the recognition of promises implied in fact, not only for debts of specific amounts but also for unliquidated claims, when the elements of a contract could be found in the acts of the parties though not in their words.⁷²

⁶⁸ 4 Coke, 92 (b).

⁶⁹ *Sidenham v. Worlington*, 2 Leon. 224; *Field v. Dale*, 1 Rolle Abr. 11, pl. 8; *Janson v. Collomore*, 1 Rolle, 396; *Hodge v. Vavisor*, 1 Rolle, 413; *Barton v. Shurley*, 1 Rolle Abr. 16, pl. 12; Ames, *Hist. of Assumpsit*, 2 Harv. L. Rev. 54. But a promise by a husband to pay an antenuptial debt of his wife was held not sufficiently supported by the liability imposed by law upon him as husband, to be enforceable. *Drue v. Thorne*, Aleyn, 72; *Mitchinson v. Hewson*, 7 T. R. 348.

⁷⁰ *Slade's Case*, 4 Coke, 92 (b); Ames,

Hist. of Assumpsit, 2 Harv. L. R. 57. As to the nature of trial by wager of law see Thayer's *Preliminary Treatise on Evidence*, p. 24.

⁷¹ Ames, *Hist. of Assumpsit*, 2 Harv. L. Rev. 57.

⁷² This implication was first made in favor of the innkeeper to allow him to recover from the guests all charges incurred in his entertainment. *Warbroke v. Griffith*, 2 Brownl. 255, s. c. Moore, 876. The tailor was also allowed similarly to sue on an implied promise, *The Six Carpenters' Case*, 146 (a), 147 (a); and before the middle of the seven-

A still further step was taken when quasi-contractual obligations were enforced in the action of *indebitatus assumpsit* under the guise of promises implied in law. This step was taken by the end of the seventeenth century.⁷³ At the present day there seems no longer any necessity for recognizing the validity of a subsequent promise to pay a debt, unless the subsequent promise is under seal or is a negotiable instrument.⁷⁴ Where common-law forms of action still prevail, the fact that there is a simple contract debt justifies the creditor in suing for it in *assumpsit*. He is, therefore, amply protected both as matter of substantive law and matter of procedure, and this without imposing the strain upon the doctrine of consideration of maintaining the exception to the general definition, involved in holding that a subsequent promise to pay the debt creates a new contract; and save as applied to a few exceptional cases, such as promises to pay debts barred by the Statute of Limitations or Bankruptcy,⁷⁵ the old doctrine might be considered wholly outgrown and be allowed to drop out of sight. There can be no doubt that this result has been reached in England. Before the end of the 18th century it was held by the House of Lords that a precedent debt was not sufficient consideration for any promise other than that which the law would imply.⁷⁶ And so far as concerns express promises which are

teenth century a similar right was permitted to any one who had rendered services without an express promise being made to pay for them. *Sheppard, Actions on the Case* (2d ed.), 50; *Sheppard, Faithful Counsellor* (2d ed.), 125.

⁷³ The earlier cases seem to have been for the enforcement of customary duties. *City of London v. Gorry*, 2 Lev. 174, s. c. 1 Vent. 208, 3 Keb. 677, *Freeman*, 433; *Barber Surgeons v. Pelson*, 2 Lev. 252; *Mayor v. Hunt*, 2 Lev. 37; *Duppa v. Gerard*, 1 Show. 78. But see *York v. Toun*, 5 Mod. 444. The remedy was extended to other debts imposed by law on quasi-contractual principles. *Bonnel v. Drake*, 2 S. 1. 4; *Martin v. Sitwell*, 1 S. w. 156 s. c. Holt, 25; *Holmes v. H. A.* 6 M. 161, s. c.

Holt, 36; *Woodward v. Aston*, 2 Mod. 95; *Arris v. Stukely*, 2 Mod. 260; *Jacob v. Allen*, 1 Salk. 27; *Lamine v. Dorrell*, 2 Ld. Ray. 1216. See further Ames, *Hist. of Assumpsit*, 2 Harv. L. Rev. 64-68.

⁷⁴ In such cases the formal instrument cancels the original debt. So far as consideration is necessary, it is not the existence, but the satisfaction of the precedent debt which furnishes it. See *supra*, § 108.

⁷⁵ See *infra*, §§ 157 *et seq.*

⁷⁶ *Rann v. Hughes*, 7 T. R. 350, note (a). It was therefore held that a promise by an administratrix to pay personally the debt of her intestate was not binding. Lord Chief Baron Skynner delivering the opinion of the judges said: "The being indebted is of itself a

mere repetitions of the obligation of the debt, though the practice of declaring upon such a promise or as if there had been such a promise continued as long as common-law pleading in *indebitatus assumpsit* lasted,⁷⁷ nevertheless, the promise if made added nothing to the obligation created by the debt except to start afresh the running of the Statute of Limitations;⁷⁸ and not only there are no modern precedents in special *assumpsit*, of a declaration based on a new express promise to pay a precedent debt, but there is express authority for the statement that a new promise creates no new obligation.⁷⁹ That the real basis of the plaintiff's right in *indebitatus assumpsit* in modern times has been the debt and not the alleged promise, whether that promise was in fact real or fictitious, is shown by the circumstance that though in form the defendant in the action pleaded non *assumpsit*, in substance that traverse put in issue the existence of the debt.⁸⁰

sufficient consideration to ground a promise; but the promise must be coextensive with the consideration, unless some particular consideration of fact can be found here to warrant the extension of it against the defendant in her own capacity." So in *Hopkins v. Logan*, 5 M. & W. 241, a precedent debt was held insufficient to support a promise to pay the debt at a fixed future day.

⁷⁷ The declaration in *indebitatus assumpsit* alleged a debt, and further that the defendant "being indebted promised to pay." As this alleged promise was said to be implied by law in any case where there was a debt, such as the count described, it was impossible to tell from the declaration whether an actual promise had been made or whether the plaintiff relied merely on a promise implied by law; and at the trial the only essential fact to be proved was the debt. A promise to pay it, if made, was immaterial.

⁷⁸ See *infra*, § 160.

⁷⁹ In *Deacon v. Gridley*, 15 C. B. 295, 309, Maule, J., said: "When the Stat-

ute [of Limitations] does not come in question, assuming that the letter does contain an acknowledgment, or even a promise, it amounts to no more than this,—that a man, being liable to pay a debt, promises to pay it. Such a promise, which leaves the legal rights of the parties just where they were, creates no new cause of action." In *Leake on Contracts* (8th ed.), 444, the author says: "A promise to perform an existing obligation, without some new consideration to support it, is a voluntary promise, which, unless made under seal, does not create any new obligation." In a case not of debt but of a contractual obligation of another sort the Supreme Court of Maine held that a contract to marry, though evidenced by promises at different times, is but a single contract, and a breach thereof is but one breach of one contract. *Garmon v. Henderson*, 112 Me. 383, 92 A. 322.

⁸⁰ Langdell, *Summ. Contracts*, § 95. The danger of maintaining the old mode of reasoning is that it furnishes an apparent basis for conclusions at variance with both ancient and modern law.

§ 144. Promises in consideration of an act previously done at the request of the promisor.

It was natural that the early courts should be even more desirous of affording a remedy in assumpsit for cases now covered by promises implied in fact than in cases where the plaintiff could maintain an action of debt, for in the former class of cases the plaintiff had no remedy at all until the action of assumpsit was permitted. Debt would not lie since the claim was unliquidated,⁸¹ and promises implied in fact were not recognized. In allowing assumpsit on a subsequent promise not unnaturally the courts did not confine the remedy to cases where a *quid pro quo* had been given, sufficient to create a debt if a definite price had been agreed upon, but also allowed the remedy where any consideration had been given at the request of the defendant which would have supported a promise had the promise been given contemporaneously with the consideration. In both classes of cases there is the same reason, in justice, for allowing relief, and in both classes at the present day the plaintiff can unquestionably recover on the theory of a promise implied in fact. Relief was granted if a subsequent express promise was made in such cases before the end of the sixteenth century.⁸² The

Thus in *Webster v. LeCompte*, 74 Md. 249, 257, 22 Atl. 232, in a dictum unnecessary for the decision, the court says that if a debtor's own debt is sufficient consideration for a promise to pay it, another person's debt must be equally good, and that therefore a gratuitous promise to pay the debt of another which has been discharged by bankruptcy proceedings is binding.

⁸¹ See *supra*, § 11.

⁸² In *Hunt v. Bate, Dyer*, 272 [1568], the plaintiff who had become surety for the defendant's servant was promised indemnity by the defendant and the court arrested judgment because "the master did never make request to the plaintiff for his service, nor so much, but he did it out of his own head." In *Sidenham v. Worlton*, 2 Leon. 224 [1585], the plaintiff declared that at the

defendant's request he became surety and was obliged to pay, after which the defendant promised the plaintiff to repay him and judgment was given for the plaintiff. Rhodes, J., said: "If one serve me for a year, and hath nothing for his service, and afterwards, at the end of the year, I promise him 20 l. for his good and faithful service ended, he may have and maintain an action upon the case upon the same promise, for it is made upon a good consideration; but if a servant hath wages given him, and his master *ex abundanti* doth promise him 10 l. more after his service ended, he shall not maintain an action for that 10 l. upon the said promise; for there is not any new cause or consideration preceding the promise; which difference was agreed by all the justices." See also *Riggs v. Bull-*

action was on the promise, which was said to be supported by the previous act of the plaintiff requested by the defendant. In order to reconcile these decisions with the accepted theory of consideration, the courts by a fictitious doctrine of relation said either that the consideration continued until the promise or that the promise related back to the consideration.⁵³ With the recognition of promises implied in fact, the necessity of resorting to such a fiction ceased. Though it is still occasionally stated as representing the English law,⁵⁴ this is only to explain certain anomalous cases of revival of past liability. That a subsequent promise to do anything beyond what the law would imply is ineffectual except in those cases seems clear. Indeed in the nineteenth century it was squarely held that a consideration furnished at request would not support a subsequent express promise, which went beyond those boundaries.⁵⁵ The value of a subsequent express promise in the modern English law has been thus expressed: "Probably at the present day, such service on such request would have raised a promise by implication to pay what it was worth; and the subsequent promise of a sum certain would have been evidence for the jury to fix the amount."⁵⁶ But if the amount subsequently promised were so extravagant as to appear to be based on affection rather than on an estimate of the value of the service, the evidence might be of little worth.⁵⁷

§ 145. Some jurisdictions in the United States deny validity to a promise in consideration of an act previously requested.

In the United States some jurisdictions, following the modernizing, *Cro. Eliz.* 715; *Bosden v. Thinne*, *Yelv.* 40; *Field v. Dale*, 1 *Rolle's Ab.* 11, pl 8; *Townsend v. Hunt*, *Cro. Car.* 408; *Oliverson v. Wood*, 3 *Lev.* 386; *Lampleigh v. Brathwait*, *Hob.* 105.

⁵³ See *Langdell, Summ. of Contracts*, § 92; *Stuht v. Sweesy*, 48 *Neb.* 767, 67 *N. W.* 748.

⁵⁴ *E. g.*, in *Evans v. Heathcote*, [1918] 1 *K. B.* 418, 435.

⁵⁵ *Roscorla v. Thomas*, 3 *Q. B.* 234. In this case, in consideration of a pre-

cedent sale, the defendant made a subsequent warranty, but was not allowed to recover. See also *Kaye v. Dutton*, 7 *M. & G.* 807; *Hopkins v. Logan*, 5 *M. & W.* 241; *Harris v. Carter*, 3 *E. & B.* 559. But see the Irish case of *Bradford v. Roulston*, 8 *Irish. C. L.* 468.

⁵⁶ *Erle, C. J.*, *Kennedy v. Broun*, 13 *C. B. (N. S.)* 677, 740. See also *Stewart v. Casey*, [1892] 1 *Ch.* 104, 115; *Wald's Pollock Cont.* (3d ed.) 200.

⁵⁷ See *Quirk v. Bank of Commerce*, 244 *Fed.* 682, 157 *C. C. A.* 130.

ern English law, have reached the same conclusions, "Where a legal obligation exists," it has been said, "a cumulative promise to perform it, unless upon new consideration, is a nullity."⁸⁸ And, similarly it has been held that an express promise by a city to pay for land for the value of which the city could have been made liable only under statutory proceedings, could not be enforced.⁸⁹ A promise also to pay for services previously rendered at the promisor's request, but where no enforceable implied obligation arose at the time of the request and of the rendition of the services, because a statute required the transaction to be in writing as a condition of its validity, has been held without consideration and unenforceable.⁹⁰ Courts which hold that an express promise based on a past consideration can be enforced only where the scope of the promise is no greater than that of such a promise as would have been implied in fact at the time the consideration was furnished, in effect also deny validity to the subsequent promise for most purposes,⁹¹ since the existence and extent of the promise implied in fact contemporaneously with the giving of consideration is made the conclusive test and limit of the plaintiff's right. In no State has it been more clearly laid down than in Massachusetts, that a promise cannot be enforced without contemporaneous consideration merely because of a previously existing obligation, or because of services rendered

⁸⁸ *Cleaver v. Lenhart*, 182 Pa. 285, 37 Atl. 811, citing *Wimer v. Worth Township*, 104 Pa. 317. So in *Valentine v. Bell*, 66 Vt. 280, 283, 29 Atl. 251, it is said: "It amounts to no more than this, that being liable she promised to pay. Such a promise without more, is null, and affords no ground of action." Where, however, a debtor's bill or note is given in satisfaction of an antecedent debt, the bill or note would everywhere be held supported by a sufficient consideration. Neg. Inst. Law, Sec. 25, *infra*, § 1146; *Powell v. McCord*, 121 Ill. 330, 12 N. E. 262. See also *supra*, § 124, and *infra*, § 1922.

⁸⁹ *Smith v. Tripp*, 14 R. I. 112. See also *Brule County v. King*, 111 Da. 294, 77 N. W. 107.

⁹⁰ *Stout v. Humphrey*, 69 N. J. L. 436, 55 Atl. 281; *Kent v. Phenix Art Metal Co.*, 69 N. J. L. 532, 55 Atl. 256.

⁹¹ This result is reached in Connecticut in *Bailey v. Bussing*, 29 Conn. 1, 5. In speaking of a declaration alleging a promise to pay on request a previous liability, the court in approving the declaration said of the alleged promise to pay upon request, "that is the only promise which the law would imply from such a liability, or which if express, it would uphold in consideration of it; it being well settled that an executed consideration will not support any other promise than that which the law implies, namely, to pay upon request." See also *Murtha v. Donohoo*, 133 N. W. 158.

at request;⁹² though, of course, it is law in Massachusetts, as elsewhere,⁹³ that a subsequent promise given and accepted in satisfaction of a previous unliquidated liability arising from an implied obligation to pay for requested services, is supported by sufficient consideration; but an agreement to receive the new promise in satisfaction must be proved as matter of fact.⁹⁴ It is also law everywhere that a payment made or act done on behalf of a person without his authority, may subsequently be ratified by him and he will thereby become liable.⁹⁵

§ 146. Other jurisdictions in the United States allow validity to a promise in consideration of an act previously requested.

Probably more jurisdictions in the United States have followed the early English authorities which hold a promise enforceable if supported by past consideration rendered at the promisor's request than have denied it. A certain ambiguity lurks in the word request; so far as the natural English meaning of the word is concerned, it may mean request as a favor as well as request as a matter of business in return for compensation.⁹⁶ Most jurisdictions do indeed deny validity to a promise made in consideration of past services,⁹⁷ or pay-

⁹² *Moore v. Elmer*, 180 Mass. 15, 61 N. E. 259. See also *Massachusetts Mutual Life Ins. Co. v. Green*, 185 Mass. 306, 70 N. E. 202; *Conant v. Evans*, 202 Mass. 34, 88 N. E. 438.

⁹³ *Clemens v. Mayor, etc., of Baltimore*, 16 Md. 208.

⁹⁴ In *Moore v. Elmer*, 180 Mass. 15, 61 N. E. 259, it is said: "It may be added that even if Elmer was under a previous liability to the plaintiff, it is not alleged that the agreement sued upon was received in satisfaction of it, either absolutely or conditionally, and this again cannot be implied in favor of the plaintiff's bill."

⁹⁵ See *Massachusetts Mutual Life Ins. Co. v. Green*, 185 Mass. 306, 308, 70 N. E. 202, also *infra*, § 278.

⁹⁶ See *supra*, § 112.

⁹⁷ *Murdock v. Murdock*, 7 Cal. 511, 513; *Bailey v. Bussing*, 29 Conn. 1, 5; *Walker v. Brown*, 104 Ga. 357, 30 S. E. 867; *Allen v. Bryson*, 67 Ia. 591, 25 N. W. 820, 56 Am. Rep. 358; *Gooch v. Gooch*, 178 Ia. 902, 160 N. W. 433; *Viley v. Pettit*, 96 Ky. 576, 29 S. W. 438; *Graf v. Graf*, 150 Ky. 226, 150 S. W. 58; *Sanderson v. Brown*, 57 Me. 308; *Moore v. Elmer*, 180 Mass. 15, 61 N. E. 259; *Osgood v. Conway*, 67 N. H. 100, 36 Atl. 608; *Gardner v. Schooley*, 25 N. J. Eq. 150; *Sharp v. Hoopes*, 74 N. J. L. 191, 64 Atl. 989; *Strevall v. Jones Estate*, 106 N. Y. App. Div. 334, 94 N. Y. S. 627; *Blanshan v. Russell*, 32 N. Y. App. Div. 103, 52 N. Y. S. 963, *affd.* 161 N. Y. 629, 55 N. E. 1093; *Stoneburner v. Motley*, 95 Va. 784, 30 S. E. 364.

ments⁸⁸ intended to be gratuitous when rendered or made. But even on so plain a matter as this, a few courts under the fiction of an implied request where a benefit has been given, or under the doctrine of moral consideration, have enforced such promises to pay for a past consideration though it was intended at the time when it was given to be gratuitous.⁸⁹ Where, however, services are rendered because requested as a matter of business and where consequently there is a contemporaneous promise implied in fact to pay for them, the weight of authority in the United States supports the validity of a subsequent promise defining the extent of the promisor's undertaking.¹

§ 147. Promises in consideration of moral obligation.

About the middle of the eighteenth century the term moral obligation as a kind of past consideration giving validity to a subsequent promise to fulfil the obligation gained currency. This seems to have been due to the influence of Lord Mansfield. He was trained in the doctrines of the Civil Law and

⁸⁸ *Marsh v. Chown*, 104 Ia. 556, 73 N. W. 1046; *Beaty v. Carr*, 109 Ia. 183, 80 N. W. 326.

⁸⁹ *Wilson v. Edmonds*, 24 N. H. 517 (but see *Osgood v. Conway*, 67 N. H. 100, 36 Atl. 608); *Hicks v. Burhans*, 10 Johns. 243; *Oatfield v. Waring*, 14 Johns. 188; *Nixon v. Jenkins*, 1 Hilton, 318 (but see *Streval v. Jones Estate*, 106 N. Y. App. Div. 334, 94 N. Y. S. 627; *Landis v. Royer*, 59 Pa. 95; *Sutch's Estate*, 201 Pa. 305, 50 Atl. 943; *Olsen v. Hagan*, 102 Wash. 321, 172 Pac. 1173. There is more reason in justice for enforcing a subsequent promise to repay money paid under a mistake, for then there is at least no intent to make a gift. Such recovery was allowed in *Packard v. Tisdale*, 50 Me. 376, 377.

¹ *Lonsdale v. Brown*, 4 Wash. C. C. 148, 150; *Friedman v. Suttle*, 10 Ariz. 57, 85 Pac. 726, 9 L. R. A. (N. S.) 933; *Winefield v. Feder*, 169 Ill. App. 480; *Walker v. Irwin*, 94 Ia. 448, 62 N. W. 785; *Daily v. Minnick*, 117 Ia. 563, 91

N. W. 913, 60 L. R. A. 840; *Montgomery v. Downey*, 116 Ia. 632, 88 N. W. 810; *Viley v. Pettit*, 96 Ky. 576, 578, 29 S. W. 438; *Pool v. Horner*, 64 Md. 131, 20 Atl. 1036; *Stuht v. Sweezy*, 48 Neb. 767, 67 N. W. 748; *Wilson v. Edmonds*, 24 N. H. 517; *Yarwood v. Trusts & Guarantee Co.*, 94 N. Y. App. Div. 47, 87 N. Y. S. 947; *In re Todd*, 47 N. Y. Misc. 35, 95 N. Y. S. 211; *Sutch's Estate*, 201 Pa. 305, 50 Atl. 943; *Edson v. Poppe*, 24 S. D. 466, 124 N. W. 441, 26 L. R. A. (N. S.) 534; *Boothe v. Fitzpatrick*, 36 Vt. 681; *Seymour v. Marlboro*, 40 Vt. 171; *Spencer v. Potter's Estate*, 85 Vt. 1, 80 Atl. 821; *Silverthorn v. Wylie*, 96 Wis. 69, 71 N. W. 107; *Raipe v. Gorrell*, 105 Wis. 636, 81 N. W. 1009 (cf. *Murtha v. Donohoo*, 149 Wis. 481, 136 N. W. 158). In *Harman v. Harman's Est.*, 167 Ia. 106, 149 N. W. 72, the promise was enforced though all liability for the services for which the promise was made had already been discharged.

undoubtedly disliked the common-law doctrine of consideration.² The theory of moral consideration was applied in various cases during Lord Mansfield's life, and shortly after his death, as in case of a promise by overseers of the poor to pay for expenses incurred in curing a pauper,³ a promise by an executor, having assets sufficient for the purpose, to pay a pecuniary legacy;⁴ a promise to pay the legal portion of a usurious debt;⁵ a promise by a widow to indemnify a surety who had become such at her request during her coverture when she was incapable of contracting.⁶ But about the beginning of the nineteenth century a disposition became evident to restrict the doctrine of moral consideration,⁷ and in 1840, the Queen's Bench expressed its dissent from the doctrine⁸ and adopted as an accurate statement of the law the summary made in the reporter's note to an earlier decision:⁹ "an express promise . . . can only revive a precedent good consideration, which might have been enforced at law through the medium of an implied promise, had it not been suspended by some positive rule of law; but can give no original right of action if the obligation on which it is founded never could have been enforced at

² This dislike appears not simply in his attempted extension of the common-law doctrine by the introduction of an antecedent moral obligation as a substitute for technical consideration, but also by his ruling in *Pillans v. Van Mierop*, 3 Burr. *1663. See *supra*, § 107.

³ *Watson v. Turner*, Buller's N. P. 129. Cf. *Warren v. Weaver*, 78 N. H. 108, 97 Atl. 748.

⁴ *Atkins v. Hill*, Cowp. 284; *Hawkes v. Saunders*, Cowp. 289.

⁵ *Barnes v. Hedley*, 2 Taunt. 184.

⁶ *Lee v. Muggeridge*, 5 Taunt. *36.

⁷ In *Littlefield v. Sheg*, 2 B. & Ad. 811, the action was brought against a widow for provisions furnished her personally during her coverture, but while her husband was abroad. The court denied recovery, and Lord Tenterden said: "I must also observe that the doctrine that a moral obligation is a sufficient consideration for a

subsequent promise is one which should be received with some limitation." See also *Meyer v. Haworth*, 8 A. & E. 467; *Mitchinson v. Hewson*, 7 T. R. 348.

⁸ *Eastwood v. Kenyon*, 11 A. & E. 438, 450. The court said: "The enforcement of such promises by law, however plausibly reconciled by the desire to effect all conscientious engagements, might be attended with mischievous consequences to society, one of which would be the frequent preference of voluntary undertakings to claims for just debts. Suits would thereby be multiplied, and voluntary undertakings would also be multiplied, to the prejudice of real creditors. The temptations of executors would be much increased by the prevalence of such a doctrine, and the faithful discharge of their duty be rendered more difficult."

⁹ *Wennall v. Adney*, 3 B. & P. 247, 249. The note was published in 1804.

law, though not barred by any legal maxim or statute provision." At the present day there can be no doubt that the doctrine of moral consideration is wholly discredited in England,¹⁰ though in England, as in the United States, certain exceptional cases hereafter referred to, such as a ratification of an infant's obligation, and promises to pay debts barred by the Statute of Limitations or bankruptcy still impose liability.¹¹

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§ 148. A previous moral obligation is generally held an insufficient consideration in the United States.

The law in most of the United States, as in England, has rejected the principle of moral consideration, even though some exceptional cases of liability on promises made without present consideration may still exist as in the case of promises to pay debts barred by the Statute of Limitations, or by a discharge in bankruptcy. Such cases are now rested on other grounds and moral consideration as such is held insufficient to support a promise.¹² There can be no question that in most States a plaintiff would invite disaster if he endeavored to support an action on a promise on the theory that the promise was supported by moral consideration without more. And that this result is desirable seems equally clear. However much one may wish to extend the number of promises which are enforceable by law, it is essential that the classes

¹⁰ In *Leake on Contracts* (8th ed.), 443, the author says: "A doctrine formerly prevailed that an express promise moved by a previously existing moral obligation furnished sufficient consideration to create a valid contract. But it is obvious that a promise moved by a sense of moral obligation only is simply voluntary; and it is now settled, in accordance with the general rule, that no valid contract arises from it."

¹¹ See *infra*, §§ 151, *et seq.*

¹² *Morris v. Norton*, 75 Fed. 912, 21 C. C. A. 553; *Kenan v. Holloway*, 16 Ala. 53, 50 Am. Dec. 162; *Cook v. Bradley*, 7 Conn. 57, 18 Am. Dec. 79; *Finch v. Green*, 225 Ill. 304, 80 N. E.

318; *Eakin v. Fenton*, 15 Ind. 59; *Schnell v. Nell*, 17 Ind. 29, 79 Am. Dec. 453; *Wills v. Ross*, 77 Ind. 1; *Farnham v. O'Brien*, 22 Me. 475; *Mills v. Wyman*, 3 Pick. 207; *Valentine v. Foster*, 1 Met. 520; *Hendricks v. Robinson*, 56 Miss. 694, 31 Am. Rep. 382; *Ehle v. Judson*, 24 Wend. *97; *Thomson v. Thomson*, 76 N. Y. App. Div. 178, 78 N. Y. S. 389; *Parsons v. Teller*, 188 N. Y. 318, 80 N. E. 930; *McGuire v. Hughes*, 207 N. Y. 516, 101 N. E. 460, 46 L. R. A. (N. S.) 577; *Sternbergh v. Provost*, 13 Barb. 365; *Nine v. Starr*, 8 Ore. 49; *Shepard v. Rhodes*, 7 R. I. 470, 84 Am. Dec. 573; *Davis v. Anderson*, 99 Va. 620, 39 S. E. 588. And see cases cited *infra*, § 156.

of promises which are so enforceable shall be clearly defined. The test of moral consideration must vary with the opinion of every individual. Indeed, as has been said, since there is a moral obligation to perform every promise, it would seem that if morality was to be the guide, every promise would be enforced and if the existence of a past moral obligation is to be the test, every promise which repeats or restates a prior gratuitous promise would be binding. So it is held that a promise to pay a woman on account of cohabitation which has ceased,¹³ even though the defendant had seduced the plaintiff;¹⁴ a promise to pay for board or support previously furnished a needy relative to whom the promisor morally but not legally owes a duty of support;¹⁵ or to pay the debts of a father,¹⁶ or husband;¹⁷ or to make a payment desired by the deceased previous owner of property inherited by the promisor;¹⁸ or to indemnify one who has in fact suffered an injury though not a legal wrong from the promisor;¹⁹ or to increase the compensation or contractual benefit to which the

¹³ *Binnington v. Wallis*, 4 B. & Ald. 650; *Jennings v. Brown*, 9 M. & W. 496, 501; *Beaumont v. Reeve*, 8 Q. B. 483; *Wallace v. Rappelye*, 103 Ill. 229, 249. But such a promise (unlike a promise in consideration of continuing cohabitation) is not illegal and, therefore, in a jurisdiction where seals still have their same effect as at common law, a bond given in consideration of a cohabitation which has ceased is enforceable. *Turner v. Vaughan*, 2 Wils. 339; *Annandale v. Harris*, 2 P. Wms. 432. See *infra*, § 1745.

¹⁴ *Beaumont v. Reeve*, 8 Q. B. 483.

¹⁵ *Mortimore v. Wright*, 6 M. & W. 482; *Cook v. Bradley*, 7 Conn. 57, 18 Am. Dec. 79; *Wiggins v. Keiser*, 6 Ind. 252; *Dawson v. Dawson*, 12 Ia. 512; *Mercer v. Mercer*, 87 Ky. 30, 7 S. W. 401; *Freeman v. Dodge*, 98 Me. 531, 57 Atl. 884, 66 L. R. A. 395; *Ellicott v. Peterson's Ex'rs*, 4 Md. 476, 493; *Miller v. Wyman*, 3 Pick. 207; *Dodge v. Adams*, 19 Pick. 429; *Kelley v. Davis*, 49 N. H. 187, 6 Am. Rep. 499;

Freeman v. Robinson, 38 N. J. L. 383, 20 Am. Rep. 399; *Chilcott v. Trimble*, 13 Barb. 502; *Valentine v. Bell*, 66 Vt. 280, 29 Atl. 251; *Davis v. Anderson*, 99 Va. 620, 39 S. E. 588. See also *Nine v. Starr*, 8 Oreg. 49; *Shugart v. Shugart*, 111 Tenn. 179, 102 Am. St. Rep. 777.

¹⁶ *McElven v. Sloan*, 56 Ga. 208; *Schroeder v. Fink*, 60 Md. 436; *Parker v. Carter*, 4 Munf. 273, 6 Am. Dec. 513.

¹⁷ *Royer v. Kelly*, 174 Cal. 70, 161 Pac. 1148; *Stevens v. Mayberry*, 82 Me. 65, 19 Atl. 92.

¹⁸ *Schnell v. Nell*, 17 Ind. 29, 79 Am. Dec. 453; *Gay v. Botta*, 13 Bush, 299; *Murphy's Est.*, 11 Phila. 2.

¹⁹ As from advice in regard to investment—*Morris v. Norton*, 75 Fed. 912, 21 C. C. A. 553; *Johnson v. Johnson*, 3 Hawks, 556; *Martin's Estate*, 131 Pa. 638, 18 Atl. 987. See also *Tucker v. Haughton*, 9 Cush. 350; *Hawley v. Far-rar*, 1 Vt. 420.

promisee has become entitled beyond that fixed by law,²⁰ is invalid. Under the same heading belong all cases of promises to pay for a benefit rendered in the past without a request by the promisor. Even though such benefits were not intended when rendered to be gratuitous the better authority denies recovery.²¹ Decisions denying recovery on promises to pay for improvement to the defendant's real estate rest on the same principle;²² as do those denying recovery on a promise to repay the plaintiff money paid in discharging a debt of the defendant.²³

§ 149. In a few states the doctrine of moral obligation is still recognized.

Though the doctrine of moral obligation is generally discredited, it still survives in a few States. In Georgia the Code²⁴ provides that a "strong moral obligation" is sufficient consideration to support a promise.²⁵ In Illinois,²⁶ Mary-

²⁰ *Steele v. Syracuse University*, 174 N. Y. App. D. 41, 160 N. Y. S. 39; and see cases cited *supra*, § 142.

²¹ *Pourtales Gorgier v. Morris*, 7 C. B. (N. S.) 588; *Wulff v. Lindsay*, 8 Ariz. 168, 71 Pac. 963 (promise to pay for services rendered by a real estate broker); *Dearborn v. Bowman*, 3 Met. 155 (promise by election candidate to pay for services); *Chamberlain v. Whitford*, 102 Mass. 448; *Sharp v. Hoopes*, 74 N. J. L. 191, 64 Atl. 989 (promises to pay for services rendered by a real estate broker); *Fulton v. Varney*, 117 N. Y. App. Div. 572, 102 N. Y. S. 608 (a promise to pay money on account of a recommendation for certain employment made by the defendant).

²² *Duncan v. Hall*, 9 Ala. 128; *McFarland v. Mathis*, 10 Ark. 560; *Carson v. Clark*, 2 Ill. 113, 25 Am. Dec. 79; *Carr v. Allison*, 5 Blackf. 63; *Welch v. Bryan*, 28 Mo. 30; *Frear v. Hardenbergh*, 5 Johns. 272, 4 Am. Dec. 356; *Majory v. Shubert*, 82 N. Y. App. Div. 633, 81 N. Y. S. 703; *Bailey v. Rutjes*, 86 N. C. 517; *Critcher v. Watson*, 146

N. C. 150, 59 S. E. 544, 18 L. R. A. (N. S.) 270, 125 Am. St. Rep. 570. But see cases cited *infra*, § 150 *ad fin.*

²³ *Massachusetts Mut. L. I. Co. v. Green*, 185 Mass. 306, 70 N. E. 202; *Thomson v. Thomson*, 76 N. Y. App. Div. 178, 78 N. Y. S. 389.

²⁴ Sec. 2,741.

²⁵ See *McElven v. Sloan*, 56 Ga. 208, 209; *Gray v. Hamil*, 82 Ga. 375, 10 S. E. 205, 6 L. R. A. 72; *Brown v. Lathan*, 92 Ga. 280, 18 S. E. 421. The Georgia court, however, in its latest pronouncements on the subject seems inclined to restrict rather than to enlarge the doctrine. In *Davis v. Morgan*, 107 Ga. 504, 43 S. E. 732, 61 L. R. A. 148, 97 Am. St. Rep. 171, the court held a moral obligation sufficient only where there was "some antecedent legal obligation or present equitable duty."

²⁶ *Spear v. Griffith*, 86 Ill. 552; *Lawrence v. Oglesby*, 178 Ill. 122, 52 N. E. 945. But see *Thompson v. Minnich*, 227 Ill. 430, 81 N. E. 336; *Hobbs v. Greifenhagen*, 91 Ill. App. 400.

land,²⁷ Michigan,²⁸ and especially in Pennsylvania²⁹ the doctrine still persists to a limited extent.³⁰

§ 150. Promises to rectify mistakes, or previous illegal transactions.

In every jurisdiction whether or not it professes to accept the doctrine of moral consideration, there are certain promises which are enforceable without present consideration, however difficult it may be to explain the reason for their enforcement. In some jurisdictions promises of this sort are more numerous than in others but in every jurisdiction there are some promises of this sort. These cases will now be separately considered, and first may be mentioned, promises intended to rectify a previous mistake or illegality. A promise to rebate to a judgment debtor so much of a judgment as is based on a plain error, for the correction of which no legal remedy remains open, has been enforced in several jurisdictions.³¹ Such decisions can be supported only on the ground of moral consideration. And in a number of cases it is held that where a benefit of pecuniary value is furnished with no intention to make a gift, though with no previous request, a subsequent promise by one who receives the benefit may be enforced.³²

²⁷ *Pool v. Horner*, 64 Md. 131, 20 Atl. 1036; *Robinson v. Hurst*, 78 Md. 59, 26 Atl. 956, 20 L. R. A. 761, 44 Am. St. Rep. 266. But see *Linz v. Schuck*, 106 Md. 220, 67 Atl. 286, 124 Am. St. Rep. 481, 11 L. R. A. (N. S.) 789; *Lyell v. Walbach*, 113 Md. 574, 77 Atl. 1111, 33 L. R. A. (N. S.) 741.

²⁸ *Edwards v. Nelson*, 51 Mich. 121, 16 N. W. 261.

²⁹ *Hemphill v. McClimans*, 24 Pa. 367; *Landis v. Royer*, 59 Pa. 95; *Stebbins v. Crawford County*, 92 Pa. 289, 37 Am. Rep. 687; *Holden v. Banes*, 140 Pa. 63, 21 Atl. 239; *Anderson v. Best*, 176 Pa. 498, 35 Atl. 194; *Sutch's Estate*, 201 Pa. 305, 50 Atl. 943. See an article on Moral Consideration in Pennsylvania by J. P. McKeehan, 9 The Forum, page 1.

³⁰ See also *Montgomery v. Downey*, 116 Ia. 632, 88 N. W. 810; *Weihing v.*

Kurfes, 12 Ky. L. Rep. 893; *Taylor v. Hotchkiss*, 81 N. Y. App. Div. 470, 80 N. Y. S. 1042, *affd.* 179 N. Y. 546, 71 N. E. 1140; *Ferguson v. Harris*, 39 S. Car. 323, 17 S. E. 782, 39 Am. St. Rep. 731; *Willoughby v. Willoughby*, 70 S. Car. 516, 50 S. E. 208; *State v. Butler*, 11 Lea, 418 (cp. *Shugart v. Shugart*, 111 Tenn. 179, 76 S. W. 821); *Muir v. Kane*, 55 Wash. 131, 104 Pac. 153, 26 L. R. A. (N. S.) 519; *Olsen v. Hagan*, 102 Wash. 321, 172 Pac. 1173; *De Voin v. De Voin*, 76 Wis. 66, 44 N. W. 839.

³¹ *Turlington v. Slaughter*, 54 Ala. 195; *Doyle v. Reilly*, 18 Ia. 108, 85 Am. Dec. 582; *Cameron v. Fowler*, 5 Hill, 306, 309. See also *Stebbins v. Crawford County*, 92 Pa. 289, 37 Am. Rep. 687.

³² *Drake v. Bell*, 26 N. Y. Misc. 237, 55 N. Y. S. 945: (*cf.* s. c. 46 N. Y.

In some cases also new promises to pay an obligation morally owing but unenforceable because of the illegality of the transaction out of which the moral obligation arose, have been enforced. This doctrine has been applied especially in regard to Sunday contracts, and usurious contracts. Such cases demand first, an inquiry whether public policy permits enforcement of the new promise and, second, whether lack of consideration forbids recovery even though public policy permits it. The distinction between a transaction which is *malum prohibitum* and one which is *malum in se* is not much favored by modern authorities, but it is obvious that no new promise arising out of a seriously criminal transaction could be enforced.³³ It is because usurious contracts and contracts made on Sunday do not seem to many courts morally offensive, that subsequent promises to perform them have not been held against public policy; and in a number of jurisdictions it has been held that by a new promise or by ratification the obligation of a contract made on Sunday can be made enforceable or a new contract created.³⁴ In some of the jurisdictions which thus enforce the new obligation arising on a secular day subsequent to the Sunday on which the contract was made, it is essential that there shall be an express new promise; ratifica-

App. Div. 275, 61 N. Y. S. 657, a promise to pay a mechanic for repairs made by mistake on the defendant's house); *Glenn v. Savage*, 14 Oreg. 567, 577, 13 Pac. 442; *Edson v. Poppe*, 24 S. Dak. 466, 124 N. W. 441, 26 L. R. A. (N. S.) 534 (a promise to pay a tenant for driving a well); *Booth v. Fitzpatrick*, 36 Vt. 681 (promise to pay for keeping a bull). See also *Viley v. Pettit*, 96 Ky. 576, 29 S. W. 438; *Oakes v. Cushing*, 24 Me. 313; *Silverthorn v. Wylie*, 96 Wis. 69, 71 N. W. 107, and cases cited *supra*, § 146. But see *contra* cases *supra*, § 145, *ad fin.*

³³ See *infra*, §§ 1630, 1754, 1758. In *James v. Haven*, 185 Fed. 692, 107 C. C. A. 640, the court refused to enforce a promise to pay losses growing out of wagering contracts in cotton.

³⁴ *McKinney v. Demby*, 44 Ark. 74;

Orr v. Kenworthy, 143 Iowa, 6, 121 N. W. 539, 136 Am. St. Rep. 728; *Campbell v. Young*, 9 Bush, 240; *Gwinn v. Simes*, 61 Mo. 335; *Wilson v. Milligan*, 75 Mo. 41; *Reeves v. Butcher*, 31 N. J. L. 224; *Brewster v. Banta*, 66 N. J. L. 367, 49 Atl. 718; *Telfer v. Lambert*, 79 N. J. L. 299, 75 Atl. 779; *Rosenblum v. Schachner*, 84 N. J. L. 525, 87 Atl. 99; *St. Louis, etc., R. Co. v. Swearingen*, 31 Okla. 785, 123 Pac. 1122; *Smith v. Case*, 2 Ore. 190; *Cook v. Forker*, 193 Pa. 461, 44 Atl. 560, 74 Am. St. Rep. 699; *Sayles v. Wellman*, 10 R. I. 465; *Flynn v. Columbus Club*, 21 R. I. 534, 45 Atl. 551; *Goss v. Whitney*, 27 Vt. 272; *Corey v. Boynton*, 82 Vt. 257, 72 Atl. 987; *Melchoir v. McCarty*, 31 Wis. 252, 11 Am. Rep. 605; *Williams v. Lane*, 87 Wis. 152, 158, 58 N. W. 77; *Ainsworth v. Williams*, 111 Wis. 17,

tion by conduct being regarded as insufficient.³⁵ In others of the jurisdictions in question, any subsequent recognition of the illegal Sunday contracts amounts to a ratification or adoption which will render the contract enforceable.³⁶ It would seem, however leniently a Sunday contract may be regarded, that if it is forbidden by law no ratification is possible which relates back to the original transaction and makes it valid as of that time. To permit such a doctrine is to disregard the statute which prohibits Sunday contracts. But as to the creation of contracts on a subsequent secular day, it should be of no importance whether the renewal of a transaction entered into on Sunday is called an adoption of the old contract, or the creation of an independent new one. Under either mode of expression the transaction dates from the secular day and not from Sunday. The distinction between an express new promise and conduct indicating an intention to adopt the Sunday contract also seems unimportant. A promise implied in fact should in any case be as good as an express promise if the facts actually show an intent to be bound. The difficulty with enforcing either an express promise or one implied in fact is with regard to consideration if the facts do not show that there was sufficient consideration at the time of the adoption, or new promise. If the agreement was bilateral, and remains at the later secular day at least partly executory on each side, a fresh indication of assent by both parties will suffice unless the promise on one side or the other fails to fulfil the requirements for consideration in a bilateral contract.³⁷ If the promise to be adopted is unilateral a consideration given on Sunday is insufficient. When there is no new consideration it is only on the ground of moral consideration that the transaction can be regarded as binding. For these reasons most jurisdictions which are opposed to the doctrine of moral consideration deny effect to a new promise

86 N. W. 551. See *infra*, §§ 1707, 1708.

³⁵ *Heller v. Crawford*, 37 Ind. 279; *Reeves v. Butcher*, 31 N. J. L. 224; *Riddle v. Keller*, 61 N. J. Eq. 513, 48 Atl. 818; *Rosenblum v. Schachner*, 84 N. J. L. 525, 87 Atl. 99; *Troewert v.*

Decker, 51 Wis. 46, 8 N. W. 26, 37 Am. Rep. 808; *Williams v. Lane*, 87 Wis. 152, 158, 58 N. W. 77.

³⁶ See cases cited *supra*, n. 34, other than those cited *supra*, n. 35.

³⁷ See *supra*, §§ 103 *et seq.*

in any form, express or implied, to carry out the Sunday contract unless circumstances are such as to show a new consideration.³⁸ For reasons somewhat similar to those influencing decisions allowing the adoption of Sunday contracts, new promises to pay so much of an usurious indebtedness as is not tainted with usury, have been held enforceable; even though apart from a new promise no liability would have existed.³⁹

§ 151. Ratification by an adult of a contract made during infancy.

It is everywhere the rule of the common law that a promise by an adult to fulfil an obligation entered into during infancy makes the obligation binding, or (as perhaps the matter should more accurately be stated) deprives him of his privilege to avoid the transaction.⁴⁰ In England, by Lord Tenterden's Act⁴¹ the ratification of the infant in order to be binding was required to be in writing. This statute has been copied in several American States.⁴² By a later English statute⁴³ all

³⁸ See further as to Sunday contracts, *infra*, §§ 1700 *et seq.*

³⁹ *Barnes v. Hedley*, 2 Taunt. 184; *Flight v. Reed*, 1 H. & C. 703; *Garvin v. Linton*, 62 Ark. 370, 35 S. W. 430, 37 S. W. 569; *Kilbourn v. Bradley*, 3 Day, 356, 3 Am. Dec. 273; *Houser v. Planters' Bank*, 57 Ga. 95; *Sanford v. Kunz*, 9 Idaho, 29, 71 Pac. 612; *Kassing v. Ordway*, 100 Iowa, 611, 69 N. W. 1013; *Vermeule v. Vermeule*, 95 Me. 138, 49 Atl. 608; *Peters Shoe Co. v. Arnold*, 82 Mo. App. 1; *Early v. Mahon*, 19 Johns. 147, 10 Am. Dec. 204; *Hammond v. Hopping*, 13 Wend. 505; *Sheldon v. Haxtun*, 91 N. Y. 124, and see cases cited *infra*, § 1683. Cf. *Austin v. Burgess*, 36 Wis. 186.

⁴⁰ *Edmond's Case*, 3 Leon. 164, s. c. Godb. 138; *Keane v. Boycott*, 2 H. Bl. 511; *Allen v. Allen*, 2 Dr. & W. 307; *Edwards v. Carter*, [1893] A. C. 360; *In re Hunttenberg*, 153 Fed. 768; *Walker v. Arkansas Nat. Bank*, 256 Fed. 1, 5 (C. C. A.); *Flexner v. Dickerson*, 72 Ala. 318; *Vaughan v. Parr*, 20 Ark. 600; *Wall v. Mines*, 130 Cal. 27,

62 Pac. 386; *Fetrow v. Wiseman*, 40 Ind. 148; *Ward v. Ward*, 143 Ky. 91, 136 S. W. 137; *Monumental Bldg. Assoc. No. 2 v. Herman*, 33 Md. 128; *Owen v. Long*, 112 Mass. 403; *Edmunds v. Mister*, 58 Miss. 765; *Highley v. Barron*, 49 Mo. 103; *New Hampshire Mut. F. Ins. Co. v. Noyes*, 32 N. H. 345; *Harner v. Dipple*, 31 Oh. St. 72, 27 Am. Rep. 496; *State v. Satterwhite*, 20 S. C. 536; *Means v. Robinson*, 7 Tex. 502; *Person v. Chase*, 37 Vt. 647, 88 Am. Dec. 630; *Stokes v. Brown*, 3 Pinn. 311. See also *infra*, § 239.

⁴¹ 9 George IV, Ch. 14, § 5 (1828).

⁴² Arkansas, Kentucky, Maine, Mississippi, Missouri, New Jersey, South Carolina, Virginia, and West Virginia. See *Stern v. Freeman*, 4 Metc. (Ky.) 309; *Lamkin v. LeDoux*, 101 Me. 581, 64 Atl. 1048.

⁴³ The Infant's Relief Act of 1874. See *Fellows v. Wood*, 59 L. T. (N. S.) 513; *Nottingham Bldg. Soc. v. Thurstan*, [1903] A. C. 6.

contracts for the repayment of money lent or for goods sold other than necessities, and all accounts stated with infants were made absolutely void and incapable of ratification.⁴⁴ So drastic a statute as this, has not been enacted in any of the United States.

§ 152. What amounts to ratification.

What action on the part of the former infant is requisite to deprive him of his privilege or is sufficient permanently to avoid his contract is elsewhere considered.⁴⁵ It is enough here to observe that whatever be the nature of the infant's privilege—whether merely to disaffirm what would otherwise be good, or to validate what would otherwise be bad—a new promise made after he reaches maturity, though made without consideration, deprives him of that privilege. Nor is this a case merely of election,⁴⁶ for a new promise may impose liability upon the former infant though the consideration for his obligation has been wholly enjoyed^{46a} so that his acceptance of liability or surrender of a defence gives no correlative right. Nor is it properly speaking waiver,⁴⁷ since its validity is not dependent on action by the promisee in reliance on the promise.

§ 153. Admission of liability or part payment are insufficient to terminate the right to avoid an obligation for infancy.

Such admission or part payment of a debt as is generally held sufficient to avoid the bar of the Statute of Limitations ought more clearly to determine the right of an infant to avoid an obligation, since it is only the continuance of the original obligation, not the creation of a new one, which the plaintiff seeks to show. But the weight of authority is otherwise,⁴⁸ though many of the decisions are early ones, made at

⁴⁴ Contracts of an infant not within the prohibited classes and which aside from statute were good unless avoided and therefore required no formal ratification, still have their common-law force in England. See *Edwards v. Carter*, [1893] A. C. 360; *Viditz v. O'Hagan*, [1900] 2 Ch. 87.

⁴⁵ See *infra*, §§ 234, 239.

⁴⁶ See *infra*, § 683.

^{46a} See *infra*, § 154.

⁴⁷ See *infra*, § 689.

⁴⁸ *Thrupp v. Fielder*, 2 Esp. 628; *Kendrick v. Neisz*, 17 Colo. 506, 30 Pac. 245; *Catlin v. Haddox*, 49 Conn. 492, 44 Am. Rep. 249; *Ford v. Phillips*,

a time when the legal nature of an infant's contract had not yet been clearly formulated. If there are surrounding circumstances which, taken in connection with the payment, justify the inference of a promise implied in fact to pay the whole, it is probable that the original liability would be held to have been ratified.⁴⁹

§ 154. Ratification of an infant's contract may be conditional or partial.

A ratification may be conditional and, if so, on the happening of the condition, but not before, a liability will arise.⁵⁰ It is also possible to ratify part of a unilateral liability incurred in infancy without ratifying the whole obligation;⁵¹ but where a contract involves mutual obligations, the former infant cannot by partial ratification bind the other party to accept partial performance in return for all or part of the performance

1 Pick. 202; *Whitney v. Dutch*, 14 Miss. 457; *Baker v. Kennett*, 54 Mo. 82; *Hale v. Gerrish*, 8 N. H. 374; *Robbons v. Eaton*, 10 N. H. 561; *Goodsell v. Myers*, 3 Wend. 479; *International Text Book Co. v. Connelly*, 205 N. Y. 188, 99 N. E. 722, 42 L. R. A. (N. S.) 1115; *Hurely v. Margaritz*, 3 Pa. St. 428; *Rapid Transit Land Co. v. Sanford* (Tex. Civ. App.), 24 S. W. 587; *Hatch v. Hatch's Estate*, 60 Vt. 160, 13 Atl. 791. See also *Healy v. Kellogg*, 145 N. Y. S. 943.

⁴⁹ See *American Mortgage Co. v. Wright*, 101 Ala. 658, 14 So. 399; *Philpot v. Sandwich Mfg. Co.*, 18 Neb. 54, 24 N. W. 428; *Parsons v. Teller*, 111 N. Y. App. Div. 637, 97 N. Y. Supp. 808 (but see the reversal of this decision, on changed findings of fact in 188 N. Y. 318, 80 N. E. 930); *Little v. Duncan*, 9 Rich. (S. C.) 55, 64 Am. Dec. 760. By statute in Missouri a part payment is an effective ratification. See *infra*, § 239, also *Koerner v. Wilkinson*, 96 Mo. App. 510, 70 S. W. 509; *Snyder v. Gericke*, 101 Mo. App. 647, 74 S. W. 377. Where a payment was made after her majority by an infant, but it ap-

peared to be made as a matter of bounty, not in pursuance of an obligation, it was rightly held no ratification in *Parsons v. Teller*, 188 N. Y. 318, 80 N. E. 930.

⁵⁰ *Kendrick v. Neisz*, 17 Colo. 506, 30 Pac. 245; *Procter v. Sears*, 4 Allen, 95; *Thompson v. Lay*, 4 Pick. 48, 16 Am. Dec. 325. See also *Minock v. Shortridge*, 21 Mich. 304; *Peacock v. Binder*, 57 N. J. L. 374, 31 Atl. 215; *Everson v. Carpenter*, 17 Wend. 419; *Chandler v. Glover*, 32 Pa. 509; *Bobo v. Hansell*, 2 Bailey (S. C.), 114.

⁵¹ *Edgerly v. Shaw*, 25 N. H. 514, 57 Am. Dec. 349. The court said further: "A new promise may be qualified in various ways. It may bind the promisor to pay the debt at a different time or place from those originally stipulated. It may be a promise to pay, not in money, but in specific articles, or in personal services. These cases cannot be distinguished, in principle, from that last stated. They are new contracts, not ratifications of the old ones." See also *Tolar v. Marion County Lumber Co.*, 93 S. Car. 274, 75 S. E. 545.

which the latter undertook to give.⁵² A promise or admission of liability made by the former infant to a third person creates no liability.⁵³

§ 155. Ratification of a contract made during insanity.

The effect of a lunatic's bargain is the subject of considerable difference of judicial opinion, and this question has been elsewhere considered;⁵⁴ but in all jurisdictions except the few which may hold the contract of an insane person absolutely void, a subsequent promise made after the lunatic has become sane is an effective ratification.⁵⁵

§ 156. Promise by a widow to perform an agreement made during coverture.

At common law a married woman could not bind herself by contract.⁵⁶ Any attempt to do so was absolutely void of legal effect. It was held, however, in England while the doctrine of moral consideration was still accepted that a new promise by the married woman, after the death of her husband, to perform an agreement which she entered into during coverture was binding.⁵⁷ At the present day it might seem that this question had become unimportant on account of the removal of the disability of married woman to contract, but it is still law in many jurisdictions that married women cannot enter into certain contracts, especially that they cannot bind themselves as sureties for their husbands.⁵⁸ Therefore, the question of the effect of a new promise after discovery still arises. In a few jurisdictions it is held that a subsequent promise of the married woman is binding;⁵⁹ but the great weight

⁵² *Biederman v. O'Conner*, 117 Ill. 493, 7 N. E. 463, 57 Am. Rep. 876; *Lowry v. Drake*, 1 Dana, 46; *State v. New Orleans*, 105 La. 768, 30 So. 97; *Robinson v. Berry*, 93 Me. 320, 45 Atl. 34; *Philpot v. Sandwich Mfg. Co.*, 18 Neb. 54, 24 N. W. 428; *Pecararo v. Pecararo*, 84 N. Y. S. 581; *Morrill v. Aden*, 19 Vt. 505.

⁵³ *Mayer v. McLure*, 36 Miss. 389, 72 Am. Dec. 190; *Bigelow v. Grannis*, 2

Hill, 120; *Chandler v. Glover*, 32 Pa. 509.

⁵⁴ See *infra*, §§ 249 *et seq.*

⁵⁵ See *infra*, § 253.

⁵⁶ See *infra*, § 265.

⁵⁷ *Lee v. Muggerridge*, 5 Taunt. 36 [1813].

⁵⁸ See *infra*, § 269.

⁵⁹ *Walker v. Arkansas Nat. Bank*, 256 Fed. 1 (C. C. A.); *Lafitte v. Delogny*, 33 La. Ann. 659; *Brownson v.*

of authority denies validity to such a promise.⁶⁰ If, however, the original agreement bound the married woman's separate estate in equity, a subsequent promise by her after discovery is held enforceable at law by many courts, most if not all of which would hold the later promise ineffectual had the original agreement been void.⁶¹ The correctness of this distinction must depend upon the general question, previously discussed,⁶² of the validity of a preëxisting obligation to support a new promise.

§ 157. Promise by a discharged surety.

In some jurisdictions notice of acceptance of a guaranty is required.⁶³ In such jurisdictions, if notice is not given, the guarantor, nevertheless, becomes liable, if he promises, in spite of failure to give him notice, to fulfil his guaranty.⁶⁴ So a

Weeks, 47 La. Ann. 1042, 17 So. 489; *Wilson v. Burr*, 25 Wend. * 386; *Goulding v. Davidson*, 26 N. Y. 604; *Hemphill v. McClimans*, 24 Pa. 367; *Leonard v. Duffin*, 94 Pa. 218; *Brooks v. Merchants' Nat. Bank*, 125 Pa. 394, 17 Atl. 418; *Holden v. Banes*, 140 Pa. 63, 21 Atl. 239; *Rathfon v. Locher*, 215 Pa. 571, 64 Atl. 790.

⁶⁰ *Watson v. Dunlap*, 2 Cranch C. C. 14; *Ezell v. King*, 93 Ala. 470, 9 So. 534; *Thompson v. Hudgins*, 116 Ala. 93, 22 So. 632; *Horton v. Hill*, 138 Ala. 625, 36 So. 465; *Waters v. Bean*, 15 Ga. 358; *Howard v. Simpkins*, 70 Ga. 322; *Thompson v. Minnich*, 227 Ill. 430, 81 N. E. 336; *Maier v. Martin*, 43 Ind. 314; *Putnam v. Tennyson*, 50 Ind. 456; *Long v. Brown*, 66 Ind. 160; *Anstin v. Davis*, 128 Ind. 472, 26 N. E. 890, 12 L. R. A. 120; *Holloway's Assignee v. Rudy*, 22 Ky. L. Rep. 1406, 60 S. W. Rep. 650, 53 L. R. A. 353; *Gilbert v. Brown*, 29 Ky. L. Rep. 1248, 97 S. W. 40; *Lyell v. Walbach*, 113 Md. 574, 77 Atl. 1111, 33 L. R. A. (N. S.) 741; *Porterfield v. Butler*, 47 Miss. 165, 12 Am. Rep. 329; *Musick v. Dodson*, 76 Mo. 624, 43 Am. Rep. 780; *Bragg v. Israel*, 86 Mo. App. 338; *Kent v. Rand*,

64 N. H. 45, 5 Atl. 760; *Condon v. Barr*, 49 N. J. L. 53, 6 Atl. 614; *Long v. Rankin*, 108 N. C. 333, 12 S. E. 987; *Wilcox v. Arnold*, 116 N. C. 708, 21 S. E. 434; *Hayward v. Barker*, 52 Vt. 429, 36 Am. Rep. 762; *Valentine v. Bell*, 66 Vt. 280, 29 Atl. 251; *Dixie v. Worthy*, 11 U. C. Q. B. 328. See also *Parker v. Cowan*, 1 Heisk. 518. Still more clearly a promise by a widow to pay a debt of her deceased husband is unenforceable. *Royer v. Kelly*, 174 Cal. 70, 161 Pac. 1148.

⁶¹ *Doss v. Peterson*, 82 Ala. 253, 2 So. 644; *Viser v. Bertrand*, 14 Ark. 267; *Craft v. Rolland*, 37 Conn. 491; *Cleland v. Low*, 32 Ga. 458; *Condon v. Barr*, 49 N. J. L. 53, 6 Atl. 614; *Felton v. Reid*, 7 Jones L. 269; *Long v. Rankin*, 108 N. C. 333, 12 S. E. 987; *Wilcox v. Arnold*, 116 N. C. 708, 21 S. E. 434; *Hubbard v. Bugbee*, 55 Vt. 506, 45 Am. Rep. 637, 58 Vt. 172, 2 Atl. 594; *Sherwin v. Sanders*, 59 Vt. 499, 9 Atl. 239, 59 Am. Rep. 750.

⁶² *Supra*, § 143.

⁶³ See *supra*, § 69.

⁶⁴ *Gamage v. Hutchins*, 23 Me. 565; *Signourney v. Wetherell*, 6 Met. 553; *Ashford v. Robinson*, 8 Ired. L. 114.

surety who has been discharged by an agreement made between the principal debtor and the creditor to give time to the principal debtor, will revive his own liability if he makes a new promise to perform his obligation with knowledge of the creditor's agreement with the principal debtor.⁶⁵ Similarly the promise of a party secondarily liable on a bill or note to pay the same in spite of having been discharged by lack of diligence on the part of the holder in making presentment to a party primarily liable, or in giving notice of his default, operates in the same way as if presentment and notice had been originally waived.⁶⁶ And it has been held that such a

⁶⁵ *Stevens v. Lynch*, 12 East. 38; *Mayhew v. Crickett*, 2 Swanston, 185, 192 (per Eldon); *Smith v. Winter*, 4 M. & W. 454; *Ellis v. Bibb*, 2 Stew. (Ala.) 63, 70; *First Natl. Bank v. Whitman*, 66 Ill. 331; *Williams v. Boyd*, 75 Ind. 286; *Matchett v. Winona Assembly*, 185 Ind. 128, 113 N. E. 1; *Crutcher v. Trabu*, 5 Dana, 80; *Young v. New Farmers' Bank's Trustee*, 102 Ky. 257, 43 S. W. 473; *Bishop v. Eaton*, 161 Mass. 496, 37 N. E. 665, 42 Am. St. Rep. 437; *Porter v. Hodenpuy*, 9 Mich. 11; *Hooper v. Pike*, 70 Minn. 84, 72 N. W. 829, 68 Am. Rep. St. 512; *Merrimack Bank v. Brown*, 12 N. H. 320; *Rochester Bank v. Chick*, 64 N. H. 410, 13 Atl. 872; *Bramble v. Ward*, 40 Oh. St. 267; *Dey v. Martin*, 78 Va. 1; *Parsons v. Harrold*, 46 W. Va. 122, 32 S. E. 1002; *Fay v. Tower*, 58 Wis. 286, 16 N. W. 558. But see *contra*, *Walters v. Swallow*, 6 Whart. 446. And in *Cruse v. Gau* (Tex. Civ. App.), 193 S. W. 405, the court held that liability could not be revived unless the creditor acted on the surety's promise and that, therefore, a letter of the surety mailed but never received could have no effect.

⁶⁶ Uniform Neg. Inst. Law, Sec. 109, *infra*, § 1186; *Rogers v. Stephens*, 2 T. R. 713; *Hopes v. Alder*, 6 East, 16 n.; *Lundie v. Robertson*, 7 East, 231; *Rabey v. Gilbert*, 6 H. & N. 536; *Cordery*

v. Colvin, 14 C. B. (N. S.) 374; *Killby v. Rochussen*, 18 C. B. (N. S.) 357; *Woods v. Dean*, 3 B. & S. 101; *Bartholomew v. Hill*, 5 L. T. Rep. (N. S.) 756; *Reynolds v. Douglass*, 12 Pef. 497, 505, 9 L. Ed. 1171; *Sigerson v. Mathews*, 20 How. 496, 15 L. Ed. 989; *Yeager v. Farwell*, 13 Wall. 6, 20 L. Ed. 476; *Hasard v. White*, 26 Ark. 155; *Leonard v. Hastings*, 9 Cal. 236; *Breed v. Hillhouse*, 7 Conn. 523; *Hayes v. Werner*, 45 Conn. 246; *Tobey v. Berly*, 26 Ill. 426; *Smith v. Curlee*, 59 Ill. 221; *First Nat'l Bank v. Day*, 52 Iowa, 680, 3 N. W. 728; *Higgins v. Morrison's Ex'r*, 4 Dana, 100 (but see *Lawrence v. Ralston*, 3 Bibb, 102); *Hart v. Long*, 1 Rob. (La.) 83; *Turnbull v. Maddux*, 68 Md. 579; *Schwartz v. Wilmer*, 90 Md. 136, 44 Atl. 1059; *Thomas v. Mayo*, 56 Me. 40 (in Maine by statute the promise must be in writing. *Parshley v. Heath*, 69 Me. 90, 31 Am. Rep. 246); *Harrison v. Bailey*, 99 Mass. 620, 97 Am. Dec. 63; *Rindge v. Kimball*, 124 Mass. 209; *Hobbs v. Straine*, 149 Mass. 212, 21 N. E. 365; *Parsons v. Dickinson*, 23 Mich. 56; *State Bank v. McCabe*, 135 Mich. 479, 98 N. W. 20; *Robbins v. Pinckard*, 13 Miss. 51; *Salisbury v. Renick*, 44 Mo. 554; *Long v. Dismar*, 71 Mo. 452; *Faulkner v. Faulkner*, 73 Mo. 327, 337; *Rogers v. Hackett*, 21 N. H. 100; *Richardson v. Kulp*, 81 N. J. L. 123, 78 Atl. 1062;

new promise made to the holder of the bill or note enures to the benefit of a subsequent holder;⁶⁷ and likewise enures to the benefit of a prior holder who has taken up the instrument.⁶⁸ A promise made to one who is not a holder or party to the instrument is ineffectual;⁶⁹ and so is a promise made in ignorance of the failure to exercise due diligence.⁷⁰ But it is not invalidated by ignorance of the legal effect of the holder's failure to exercise due diligence.⁷¹ The new promise must

Barkalow v. Johnson, 1 Harr. 397; *Glendening v. Canary*, 5 Daly, 489; *Meyer v. Hibsher*, 47 N. Y. 265; *Leary v. Miller*, 61 N. Y. 488; *Ross v. Hurd*, 71 N. Y. 14, 27 Am. Rep. 1; *Baer v. Hoffman*, 150 N. Y. App. D. 473, 135 N. Y. S. 28; *Moore v. Tucker*, 3 Ired. L. 347; *Johnson v. Arrigoni*, 5 Oreg. 485; *Smith v. Lowndsdales*, 6 Oreg. 78; *Sherer v. Easton Bank*, 33 Pa. 134; *Moyer's Appeal*, 87 Pa. 129; *Burgetts-town Nat. Bank v. Nill*, 213 Pa. 456, 63 Atl. 186, 3 L. R. A. (N. S.) 1079, 110 Am. St. 554; *Hall v. Freeman*, 2 N. & McC. 479, 10 Am. Dec. 621; *Stone v. Smith*, 30 Tex. 138, 94 Am. Dec. 299; *Blodgett v. Durgin*, 32 Vt. 361; *Bundy v. Buzzell*, 51 Vt. 128; *Thompson v. Curry*, 79 W. Va. 771, 91 S. E. 801; *Knapp v. Runals*, 37 Wis. 135. A contrary decision is the Irish case of *Donnelly v. Howie*, *Hayes & Jones*, 436, and also *Sebree Deposit Bank v. Moreland*, 96 Ky. 150, 28 S. W. 153, 29 L. R. A. 305.

⁶⁷ *Gunson v. Metz*, 1 B. & C. 193; *Rogers v. Hackett*, 21 N. H. 100.

⁶⁸ *Potter v. Rayworth*, 13 East, 417; *Rabey v. Gilbert*, 6 H. & N. 536; *Kennon v. McRae*, 7 Porter, 175.

⁶⁹ *Olendorf v. Swartz*, 5 Cal. 480, 63 Am. Dec. 141; *Miller v. Hackley*, 5 Johns. 375, 4 Am. Dec. 372; *Allwood v. Haseldon*, 2 Bailey L. 457.

⁷⁰ *Goodall v. Dolley*, 1 T. R. 712; *Borradaile v. Lowe*, 4 Taunt. 93; *Thornton v. Wynn*, 12 Wheat. 183, 6 L. Ed. 595; *Martin v. Winslow*, 2 Mas. 241; *Kennon v. McRae*, 7 Port. 175;

Walker v. Rogers, 40 Ill. 279, 89 Am. Dec. 348; *Freeman v. O'Brien*, 38 Ia. 406; *Bank of Tennessee v. Smith*, 9 B. Mon. 609; *Landrum v. Trowbridge*, 2 Met. (Ky.) 281; *Blum v. Bidwell*, 20 La. Ann. 43; *James v. Wade*, 21 La. Ann. 548; *Byram v. Hunter*, 36 Me. 217; *Lewis v. Brehme*, 33 Md. 412, 3 Am. Rep. 190; *Low v. Howard*, 10 Cush. 159; *Kelley v. Brown*, 5 Gray, 108; *Parks v. Smith*, 155 Mass. 26, 28 N. E. 1044; *Newberry v. Trowbridge*, 13 Mich. 263; *Hamilton v. Winona Lumber Co.*, 95 Mich. 436, 54 N. W. 903; *Farrington v. Brown*, 7 N. H. 271; *Norris v. Ward*, 59 N. H. 487; *United States Bank v. Southard*, 2 Harr. 473; *Tebbetts v. Dowd*, 23 Wend. 379; *Hunter v. Hook*, 64 Barb. 468; *Lilly v. Petteway*, 73 N. C. 358; *Loose v. Loose*, 36 Pa. 538; *Fotheringham v. Price*, 1 Bay, 291, 1 Am. Dec. 618; *Golladay v. Union Bank*, 2 Head, 57; *Ford v. Dallam*, 3 Cold. 67; *Commercial Bank v. Clark*, 28 Vt. 325.

⁷¹ *Bilbie v. Lumley*, 2 East, 469; *Givens v. Merchants' Natl. Bank*, 85 Ill. 442; *Hughes v. Bowen*, 15 Iowa, 446; *Cheshire v. Taylor*, 29 Iowa, 492; *Davis v. Gowen*, 17 Me. 387; *Beck v. Thompson*, 4 Har. & J. 537; *Matthews v. Allen*, 16 Gray, 594, 77 Am. Dec. 430; *Third Natl. Bank v. Ashworth*, 105 Mass. 503; *Glidden v. Chamberlin*, 167 Mass. 486, 46 N. E. 103, 57 Am. St. Rep. 479; *Ladd v. Kenney*, 2 N. H. 340, 9 Am. Dec. 77; *Edwards v. Tandy*, 36 N. H. 540; *Tebbetts v. Dowd*, 23 Wend. 379; *Richter v. Selin*, 8 S. & R.

be unequivocal in its terms.⁷² A mere acknowledgment of liability has been held insufficient.⁷³ A conditional promise by the discharged drawer or indorser will bind him it is said, if the condition is accepted by the holder;⁷⁴ and certainly if the promise is accepted by the holder, a promise to pay part of the indebtedness is also binding.⁷⁵ As to the propriety of

425; *Schmidt v. Radcliff*, 4 Strob. 296, 53 Am. Dec. 678. But see *contra*, *Spurlock v. Union Bank*, 4 Humph. 336; *Williams v. Union Bank*, 9 Heisk. 441.

⁷² *Keyes v. Fenstermaker*, 24 Cal. 329; *Brooks v. Laws*, 202 Ill. App. 448; *Campbell v. Varney*, 12 Ia. 43; *Creamer v. Perry*, 17 Pick. 332, 28 Am. Dec. 297; *Carter v. Burley*, 9 N. H. 558; *Richardson v. Kulp*, 81 N. J. L. 123, 78 Atl. 1062; *Whittier v. Collins*, 15 R. I. 90, 23 Atl. 47, 2 Am. St. Rep. 879. In *Glidden v. Chamberlin*, 167 Mass. 486, 46 N. E. 103, 57 Am. St. Rep. 479, a discharged endorser promised to "do what he could" to secure payment of the note for the holder. This was held not to amount to a new promise. In *Bank of Gilby v. Farnsworth*, 7 N. D. 6, 72 N. W. 901, 38 L. R. A. 843, a drawer discharged by the laches of the holder of a draft drew a duplicate draft to take the place of the original which had been lost. It was held this did not amount, as matter of law, to a new promise by the drawer. And similarly discharged indorsers were held not to renew their liability by indorsing new checks which had been drawn to take the place of the lost originals. *Lewis v. Commercial Nat. Bank*, 37 Tex. Civ. App. 241, 83 S. W. 423; *Aebi v. Bank of Evansville*, 124 Wis. 73, 102 N. W. 329, 68 L. R. A. 964, 109 Am. St. Rep. 925.

⁷³ *Brooks v. Laws*, 202 Ill. App. 448; *Crandall v. Moston*, 24 N. Y. App. D. 547, 50 N. Y. S. 145. But a statement by the drawer of a bill, when informed of its dishonor that "it must be paid" has been held suf-

ficient to charge him. *Rogers v. Stephens*, 2 T. R. 713. In *Reynolds v. Douglass*, 12 Pet. 497, 505, 9 L. Ed. 1171, the court said: "A party to a note entitled to notice, may waive it by a promise to see it paid; or an acknowledgment that it must be paid; or a promise that 'he will set the matter to rights,' or by a qualified promise, having knowledge of the laches of the holder."

In *Sigerson v. Mathews*, 20 How. 496, 15 L. Ed. 989, the defendant indorser answered a question of the holder's agent as to "what he was going to do," by saying that "in a few days he would see the witness, and arrange it." The court said (p. 500): "This was an unconditional promise to pay the note which no one could misunderstand."

In *Parsons v. Dickinson*, 23 Mich. 56, an indorser discharged by failure to give notice stated to the holder that he expected to have to pay the note but wished the holder to try to get payment from the maker. This statement was held sufficient to sustain a judgment against the indorser.

⁷⁴ *Holdsworth v. Dimsdale*, 24 L. T. N. S. 360, 19 W. R. 798; *Dixon v. Elliott*, 5 C. & P. 437; *Long v. Dismer*, 71 Mo. 452; *Agan v. M'Manus*, 11 John. 180; *Shaw v. McNeill*, 95 N. C. 535; *Tardy v. Boyd*, 26 Gratt. 631. But see *Campbell v. Varney*, 12 Ia. 43, where the court says that a new promise to be effective "must be unqualified."

⁷⁵ *Fletcher v. Froggatt*, 2 C. & P. 569. See also *Zacharie v. Kirk*, 14 Ia. Ann. 433; *Holdsworth v. Dimsdale*, 24 L. T. N. S. 360, 19 W. R. 798. In the two cases last cited a discharged indorser

requiring acceptance by the creditor, reference may be made to the corresponding question arising where debts are barred by the Statute of Limitations.⁷⁶ Part payment by a drawer or indorser is not only evidence that he was duly charged and is therefore liable, but even though it be proved that due diligence to charge the drawer or indorser was not used, it seems that part payment is sufficient evidence of a new promise to pay the whole indebtedness to render the discharged drawer or indorser liable,⁷⁷ unless the payment is explained or qualified by accompanying words or circumstances manifesting an intention not to become liable for the whole.

§ 158. Promise by a discharged bankrupt.

In England it was formerly held that a new promise was effectual to bind a discharged bankrupt.⁷⁸ But in the English Bankruptcy Acts of 1849 and 1861, it was provided that such promises should not be binding. In the two most recent Acts—those of 1869 and 1883—there is no such provision. Nevertheless the English courts still hold such a promise unenforceable,⁷⁹ unless given for new consideration⁸⁰ after the discharge.⁸¹ In the United States such promises have always been held binding.⁸² Doubtless, it would be within

promised to pay the face of the instrument without costs, and was held bound to keep the promise.

⁷⁶ See *infra*, § 180.

⁷⁷ *Whitaker v. Morrison*, 1 Fla. 25, 44 Am. Dec. 627; *Sigourney v. Wetherell*, 6 Metc. 553; *Sherer v. Easton Bank*, 33 Pa. 134; *Knapp v. Runals*, 37 Wis. 135. But see *Brooks v. Laws*, 202 Ill. App. 448.

⁷⁸ *Twiss v. Massey*, 1 Atk. 67; *Trueman v. Fenton*, Cowp. 544; *Brix v. Braham*, 1 Bing. 281; *Roberts v. Morgan*, 2 Esp. 736; *Birch v. Sharland*, 1 T. R. 715; *Earle v. Oliver*, 2 Exch. 71.

⁷⁹ *Jones v. Phelps*, 20 W. R. 92; *Heather v. Webb*, 2 C. P. D. 1; *Ex parte Barrow*, 18 Ch. D. 464.

⁸⁰ *Jakeman v. Cook*, 4 Ex. D. 26; *Re Aylmer*, 1 Manson, 391.

⁸¹ *Ex parte Barrow*, 18 Ch. D. 464.

⁸² *Allen v. Ferguson*, 18 Wall. 1, 21 L. Ed. 854; *Zavelo v. Reeves*, 227 U. S. 625, 57 L. Ed. 676, 33 S. Ct. 365, Ann. Cas. 1914 D. 664; *Mutual Reserve Assoc. v. Beatty*, 93 Fed. 747, 35 C. C. A. 573; *Re Sweetser*, 128 Fed. 165; *Dearing v. Moffitt*, 6 Ala. 776; *Evans v. Carey*, 29 Ala. 99; *Nelson v. Stewart*, 54 Ala. 115, 25 Am. Rep. 660; *Wolfe v. Eberlein*, 74 Ala. 99, 49 Am. Rep. 809; *Kraus v. Torry*, 146 Ala. 543, 40 So. 956; *Torry v. Krauss*, 149 Ala. 200, 43 So. 184; *Anthony v. Sturdivant*, 174 Ala. 521, 56 So. 571; *Lanagin v. Nowland*, 44 Ark. 84; *Pindall v. Loague*, 56 Ark. 525, 20 S. W. 350; *Lambert v. Schmals*, 118 Cal. 33, 50 Pac. 13; *Ross v. Jordan*, 62 Ga. 298; *Moore v. Trounstone*, 126 Ga. 116, 54 S. E. 810; *Bank of Elberton v. Vickery*, 20 Ga. App. 96, 92 S. E. 547; *St. John*

the power of Congress to enact provisions in the Federal Bankruptcy Act governing the matter, but as there is no such provision each State is at liberty to apply its own rule.⁸³

In a few States, by Statute, it is required that such a new promise be in writing in order to be effectual.⁸⁴ But such statutes are not usual. The new promise must be clear and free from ambiguity. Expressions of expectation or of good intentions are insufficient;⁸⁵ and the implication in fact of a

v. Stephenson, 90 Ill. 82; *Stern v. Smith*, 225 Ill. 430, 80 N. E. 307; 116 Am. St. Rep. 151; *Cheney v. Barge*, 26 Ill. App. 182; *Post v. Losey*, 111 Ind. 74, 88, 12 N. E. 121, 60 Am. Rep. 677; *Carey v. Hess*, 112 Ind. 398, 14 N. E. 235; *Willis v. Cushman*, 115 Ind. 100, 17 N. E. 168; *Knapp v. Hoyt*, 57 Ia. 591, 10 N. W. 925; *Brooks v. Paine*, 25 Ky. L. Rep. 1125, 77 S. W. 190; *Andrieu's Succession*, 44 La. Ann. 103, 10 So. 388; *Corliss v. Shepherd*, 28 Me. 550; *Otis v. Gazlin*, 31 Me. 567; *Hussey v. Danforth*, 77 Me. 17, 22; *Yates v. Hollingsworth*, 5 H. & J. 216; *Webster v. LeCompte*, 74 Md. 249, 22 Atl. 232; *Maxim v. Morse*, 8 Mass. 127; *Champion v. Buckingham*, 165 Mass. 76, 42 N. E. 498; *Craig v. Seitz*, 63 Mich. 727, 30 N. W. 347; *Higgins v. Dale*, 28 Minn. 126, 9 N. W. 583; *Pearsall v. Tabour*, 98 Minn. 248, 108 N. W. 808; *McWillie v. Kirkpatrick*, 28 Miss. 802, 64 Am. Dec. 125; *Wislizenus v. O'Fallon*, 91 Mo. 184, 3 S. W. 837; *Farmers' & Merchants' Bank v. Richards*, 119 Mo. App. 18, 95 S. W. 290; *Underwood v. Eastman*, 18 N. H. 582; *Wiggin v. Hodgdon*, 63 N. H. 39; *Holt v. Akarman*, 84 N. J. L. 371, 86 Atl. 408; *Shippey v. Henderson*, 14 Johns. 178, 7 Am. Dec. 458; *Herrington v. Davitt*, 220 N. Y. 162, 115 N. E. 476, 1 A. L. R. 1700; *Graham v. O'Hern*, 24 Hun, 221; *Tompkins v. Hazen*, 30 N. Y. App. Div. 359, 51 N. Y. S. 1003 (*conf.* s. c. 165 N. Y. 18, 58 N. E. 762); *Fraleigh v. Kelly*, 88 N. C. 227, 43 Am. Rep. 743; *Earnest v. Parke*, 4 Rawle,

452, 27 Am. Dec. 280; *Murphy v. Crawford*, 114 Pa. 496, 7 Atl. 142; *Harris v. Peck*, 1 R. I. 262; *Lanier v. Tolleson*, 20 S. Car. 57; *Moseley v. Coldwell*, 3 Baxt. 208; *Blackwell v. Farmers' & Merchants' Nat. Bank* (Tex. Civ. App.) 76 S. W. 454; *Farmers' & M. Bank v. Flint*, 17 Vt. 508, 44 Am. Dec. 351; *In Taylor v. Skiles*, 113 Tenn. 288, 81 S. W. 1258, it was held that a new promise did not revive a debt discharged by composition proceedings in bankruptcy; the court following the analogy of debts voluntarily discharged. See *infra*, § 159. But this decision seems open to criticism. See 18 Harv. L. Rev. 59. Contrary decisions holding such a new promise binding are *Zavelo v. Reeves*, 227 U. S. 625, 57 L. Ed. 676, 33 S. Ct. 365, Ann. Cas. 1914 D. 664; *Re Merriman's Est.*, 44 Conn. 587; *Higgins v. Dale*, 28 Minn. 126, 9 N. W. 583; *Herrington v. Davitt*, 220 N. Y. 162, 115 N. E. 476, 1 A. L. R. 1700.

⁸³ *Holt v. Akarman*, 84 N. J. L. 371, 86 Atl. 408, and see cases in the preceding note.

⁸⁴ See Maine Rev. L. (1903), C 113, § 1; *Nathan v. Leland*, 193 Mass. 576, 79 N. E. 793; *Holt v. Akarman*, 84 N. J. L. 371, 86 Atl. 408; *Tompkins v. Hazen*, 165 N. Y. 18, 58 N. E. 762; *Bair v. Hilbert*, 84 N. Y. App. Div. 621, 82 N. Y. S. 1010. The American statutes follow the similar English statute of 6 Geo. IV, c. 16.

⁸⁵ *Mucklow v. St. George*, 4 Taunt. * 613; *Lynbuy v. Weightman*, 5 Esp.

new promise from past payment⁸⁶ or from a mere acknowledgment of liability⁸⁷ is not sufficiently clear to revive the obligation. A conditional promise is effectual according to its terms, but the condition must happen,⁸⁸ or be waived.⁸⁹ Therefore, a promise to pay a discharged debt in instalments does not afford a basis for a suit for the whole debt at once.⁹⁰

It has been held in a few cases that some express acceptance of the condition, on the part of the creditor is necessary.⁹¹

A new promise after the beginning of bankruptcy proceedings is valid though made before the discharge is granted;⁹² and

* 198; *Brook v. Wood*, 13 Price, 667; *Allen v. Ferguson*, 18 Wall. 1, 21 L. Ed. 854; *Dearing v. Moffitt*, 6 Ala. 776; *Torry v. Krauss*, 149 Ala. 200, 43 So. 184; *Stern v. Smith*, 225 Ill. 430, 80 N. E. 307; *Dressler v. Van Vliissingen*, 195 Ill. App. 63; *Shockey v. Mills*, 71 Ind. 288; *Bartlett v. Peck*, 5 La. Ann. 669; *United Society v. Winkley*, 7 Gray, 460; *Bigelow v. Norris*, 139 Mass. 12, 29 N. E. 61; *Smith v. Stanchfield*, 84 Minn. 343, 87 N. W. 917; *Pearsall v. Tabour*, 98 Minn. 248, 108 N. W. 808; *Stewart v. Reckless*, 4 Zab. 427; *Holt v. Akarman*, 84 N. J. L. 371, 86 Atl. 408; *Roosevelt v. Mark*, 6 Johns. Ch. 266; *Herrington v. Davitt*, 220 N. Y. 162, 115 N. E. 476; *Yoxtheimer v. Keyser*, 11 Pa. 364, 51 Am. Dec. 555; *Brown v. Collier*, 8 Humph. 510; *Moseley v. Coldwell*, 3 Baxt. 208. Cf. *Bolton v. King*, 105 Pa. 78; *Taylor v. Nixon*, 4 Sneed, 352.

⁸⁶ *Tolle v. Smith*, 98 Ky. 464, 33 S. W. 410; *Merriam v. Bayley*, 1 Cush. 77, 48 Am. Dec. 591; *Institute for Savings v. Littlefield*, 6 Cush. 210; *Jacobs v. Carpenter*, 161 Mass. 16, 36 N. E. 676; *Stark v. Stinson*, 23 N. H. 259; *Lawrence v. Harrington*, 122 N. Y. 408, 25 N. E. 406; *Wheeler v. Simmons*, 60 Hun, 404.

⁸⁷ *Crandall v. Moston*, 24 N. Y. App. D. 547, 50 N. Y. S. 145.

⁸⁸ *Besford v. Saunders*, 2 H. Bl. 116; *Campbell v. Sewell*, 1 Chitty, 609; *Earle v. Oliver*, 2 Exch. 71; *Dearing v.*

Moffitt, 6 Ala. 776; *Branch Bank v. Boykin*, 9 Ala. 320; *Kraus v. Torry*, 146 Ala. 548, 40 So. 956; *Mason v. Hugbart*, 9 B. Mon. 480; *Carson v. Osborn*, 10 B. Mon. 155; *Tolle v. Smith*, 98 Ky. 464, 33 S. W. 410; *Brashears v. Combs*, 174 Ky. 344, 192 S. W. 482; *Yates v. Hollingsworth*, 5 Har. & J. 216; *Baltimore &c. R. Co. v. Clark*, 19 Md. 509; *Randidge v. Lyman*, 124 Mass. 361; *Elwell v. Cumner*, 136 Mass. 102; *Wiggin v. Hodgdon*, 63 N. H. 39; *Scouton v. Eislord*, 7 Johns. 36; *Herrington v. Davitt*, 220 N. Y. 162, 115 N. E. 476; *Kingston v. Wharton*, 2 S. & R. 208; 7 Am. Dec. 638; *Taylor v. Nixon*, 4 Sneed, 352; *Sherman v. Hobart*, 26 Vt. 60.

⁸⁹ *Tompkins v. Hazen*, 30 N. Y. App. Div. 359, 51 N. Y. S. 1003.

⁹⁰ *International Harvester Co. v. Lyman*, 90 Minn. 275, 96 N. W. 87.

⁹¹ *Craig v. Brown*, 3 Wash. C. C. 503; *Samuel v. Cravens*, 10 Ark. 380; *Brashears v. Combs*, 174 Ky. 344, 192 S. W. 482; *Smith v. Stanchfield*, 84 Minn. 343, 87 N. W. 917; *International Harvester Co. v. Lyman*, 90 Minn. 275, 96 N. W. 87. See discussion as to the necessity of acceptance where a conditional promise to pay a debt barred by the Statute of Limitations is made by the debtor, *infra*, § 180.

⁹² *Roberts v. Morgan*, 2 Esp. 736; *Brix v. Braham*, 1 Bing. 281; *Earle v. Oliver*, 2 Exch. 71; *Kirkpatrick v. Tattersall*, 13 M. & W. 766; *Zavelo v.*

so it has been held in Pennsylvania, even though made before bankruptcy proceedings have been begun;⁹³ but the latter cases probably would not be followed elsewhere.⁹⁴

§ 159. Promise to pay debt voluntarily released.

If a creditor voluntarily releases his debtor, it is nearly if not quite universally agreed that a new promise by the debtor is not binding without new consideration. Even courts which are disposed to accept the doctrine of moral consideration would hold that no moral obligation lay upon the debtor thus voluntarily released, and courts which assert as a principle that a new promise is only effectual to revive a previously existing debt barred by some rule of law would hold that the bar created by a voluntary release is not within the scope of the rule. Accordingly if creditors enter into a common-law composition with their debtor,⁹⁵ or otherwise voluntarily discharge any debt by release⁹⁶ or accord and satisfac-

Reeves, 227 U. S. 625, 57 L. Ed. 676, 33 S. Ct. 365; *Re Sweetser*, 128 Fed. 165; *Griel v. Solomon*, 82 Ala. 85, 2 So. 322, 60 Am. Rep. 733; *Lanagin v. Nowland*, 44 Ark. 84; *Bank of Elberton v. Vickery*, 20 Ga. App. 96, 92 S. E. 547; *Knapp v. Hoyt*, 57 Ia. 591, 10 N. W. 925; *Corliss v. Shepherd*, 28 Me. 550; *Otis v. Gaslin*, 31 Me. 567; *Old Town Nat. Bank v. Parker*, 121 Md. 61, 87 Atl. 1105; *Lerow v. Wilmarth*, 7 Allen, 463, 83 Am. Dec. 701; *Wiggin v. Hodgdon*, 63 N. H. 39; *Stilwell v. Coope*, 4 Denio, 225; *Jersey City Ins. Co. v. Archer*, 122 N. Y. 376, 25 N. E. 338; *Fraley v. Kelly*, 67 N. C. 78; *Hornthal v. McRae*, 67 N. C. 21; *Hill v. Trainer*, 49 Wis. 537, 5 N. W. 926. But see *contra Thornton v. Nichols*, 119 Ga. 50, 45 S. E. 785; *Odgen v. Redd*, 13 Bush, 581; *Graves v. McGuire*, 79 Ky. 532; *Holt v. Akarman*, 84 N. J. L. 371, 86 Atl. 408.

⁹³ *Kingston v. Wharton*, 2 S. & R. 208, 7 Am. Dec. 638; *Haines v. Stauffer*, 13 Pa. 541, 53 Am. Dec. 493.

⁹⁴ *Thornton v. Nichols*, 119 Ga. 50, 45 S. E. 785; *Reed v. Frederick*, 8

Gray, 230; *Lowell on Bankruptcy*, § 249. In *Cheney v. Barge*, 26 Ill. App. 182, a new promise mailed before the beginning of proceedings but received after adjudication was held enforceable.

⁹⁵ *Ex parte Hall*, 1 Deac. 171; *Samuel v. Fairgrieve*, 21 Ont. App. 418; *Rasmussen v. State Bank*, 11 Col. 301, 18 Pac. 28; *Grant v. Porter*, 63 N. H. 229; *Lewis v. Simons*, 1 Handy, 82; *Callahan v. Ackley*, 9 Phila. 99; *Taylor v. Skiles*, 113 Tenn. 288, 81 S. W. 1258. Compare decisions as to compositions under bankruptcy proceedings, *supra*, § 158, n. 82 *ad fin.*

⁹⁶ *Warren v. Whitney*, 24 Me. 561, 41 Am. Dec. 406; *Phelps v. Dennett*, 57 Me. 491; *Ingersoll v. Martin*, 58 Md. 67, 42 Am. Rep. 322; *Hall v. Rice*, 124 Mass. 292; *Mason v. Campbell*, 27 Minn. 54, 6 N. W. 405; *Zoebis v. Von Minden*, 47 Hun, 213 (see S. C. 120 N. Y. 406, 24 N. E. 795); *Snevily v. Read*, 9 Watts, 396; *Shepard v. Rhodes*, 7 R. I. 470, 84 Am. Dec. 573. But see *contra Jamison v. Ludlow*, 3 La. Ann. 492; *Willing v. Peters*, 12 S. & R. 177.

tion⁷⁷ a subsequent promise by the debtor to pay all or any portion of the debt which was not paid in the previous settlement cannot be enforced.

§ 160. Promise to pay debt barred by statute of limitations—early law.

It became settled not a great while after the allowance of the action of assumpsit to enforce a promise to pay an antecedent debt, that a new promise by the debtor to pay his debt whether then barred by the Statute of Limitations or not, bound the promisor for a new period of six years.⁷⁸ There can be little doubt that the general doctrine that a precedent debt was sufficient consideration for a subsequent promise⁷⁹ furnished the basis for the present doctrine allowing the enforcement of promises to pay debts barred by the statute though such promises are supported by no new consideration. When it became the law that the mere existence of a debt gave the creditor, under the fiction of a promise implied by law, a right to treat the debtor as if he had made a promise to pay the debt,¹ it was natural that an acknowledgment of indebtedness as distinguished from a promise should be held to justify the implication of such a promise as would extend the bar of the statute, especially as the circumstances frequently warranted the inference of a promise implied in fact; and on this new promise, whether implied in fact or simply imposed by the law the debtor became liable afresh.²

⁷⁷ *Evans v. Bell*, 15 Lea, 569.

⁷⁸ In *Dickson v. Thomson*, 2 Show. 126, the court held "promise of payment within six years, though the debt were contracted long before, will evade the Statute of Limitations, but confession or only acknowledgment that he owed the plaintiff so much will not do it." Other early cases recognizing the same doctrine are—*Bland v. Haselrig*, 2 Vent. 151; *Heyling v. Hastings*, 5 Mod. 425, s. c. 1 Salk. 29, Carth. 470; *Dean v. Crane*, 1 Salk. 28, s. c. 6 Mod. 309, sub nom. *Green v. Crane*, Ld.

Ray. 1101; *Williams v. Gun*, Fortescue, 177.

⁷⁹ See *supra*, § 143.

¹ See *supra*, § 143.

² *Hyleing v. Hastings*, 1 Ld. Ray. 421; *Williams v. Gun*, Fortescue, 177, 181, quoting from a decision of Lord Holt a few years previously,—"Though he that acknowledges a debt doth not thereby promise payment, yet it is evidence to the jury of a promise, which creates a new debt though upon an old foundation."

§ 161. Any admission was at one time held sufficient.

Subsequently, under the lead of Lord Mansfield, this doctrine was carried so far that an admission of indebtedness was held necessarily to give rise to a new obligation even though the admission was accompanied by an expression of a determination not to pay the debt.³ But this doctrine was later overruled, and an admission treated as merely evidence of a new promise, but not conclusive evidence. The matter was finally settled in a case involving an admission in these words: "I know that I owe the money, but the bill I gave is on a three penny stamp and I will never pay it." The court held this insufficient;⁴ and it has ever since been recognized in England, and generally in the United States, that the effect of an admission or acknowledgment is merely that of evidence of a promise implied in fact. And if, taking all the circumstances into account the admission does not indicate an intention to pay, no liability arises from it.^{5, 6}

§ 162. Modern rule as to revival of indebtedness.

In a recent English case Lord Justice Mellish said in words often quoted: "There must be one of these three things to take the case out of the statute. Either there must be an acknowledgment of the debt, from which a promise to pay is to be implied; or, secondly, there must be an unconditional promise to pay the debt; or, thirdly, there must be a conditional promise to pay the debt, and evidence that the condition has been performed."⁷ If the word "acknowledgment" in this quotation is understood to include part payment as well as verbal acknowledgment, the statement is undoubtedly accurate in almost every jurisdiction, though as will be seen from the following sections, the application of the rule is not everywhere the same.

³ See *Trueman v. Fenton*, 1 Cowp. 544; *Quantoek v. England*, 5 Burr. 2628; *Bryan v. Horseman*, 4 East, 599; *Frost v. Bengough*, 1 Bing. 266; *Clark v. Hougham*, 2 B. & C. 149; *Leaper v. Tatton*, 16 East, 420; *Dowthwaite v. Tibbut*, 5 M. & S. 75; *Mountstephen v. Brooke*, 3 B. & Ald. 141; *Scales v. Ja-*

cob, 3 Bing. 638; *Partington v. Butcher*, 6 Esp. 66.

⁴ *A'Court v. Cross*, 3 Bing. 329.

^{5, 6} *Cosio v. Guerra*, 67 Fla. 331, 65 So. 5.

⁷ *Mitchell's Claim*, L. R. 6 Ch. 822, 828, quoted, *e. g.*, in *Custy v. Donlan*, 159 Mass. 245, 247, 34 N. E. 360, 38 Am. St. Rep. 419.

§ 163. A new promise or acknowledgment is sufficient whether made before or after the statute has already run.

A new promise made either before or after the statute has completely run extends the period of limitation for the statutory period.⁸ The same rule prevails almost universally in regard to acknowledgments. Though here distinctions have been suggested: It has with some reason been urged that an acknowledgment before the statute had run when there was no defence possible and the debtor's liability was undeniable, should not justify the inference of a new promise or have any effect other than its obvious one of an admission that at the time of speaking, the debtor owed what he admitted.⁹ Curiously enough a distinction precisely the opposite is actually taken in a few States; namely, that after a debt is once barred, an acknowledgment is insufficient to revive the debtor's liability. A new promise is then necessary,¹⁰ though before the period of limitation had expired an acknowledgment would be sufficient to start time running afresh.

§ 164. Necessity of a writing.

Until 1829 no formal requisite for a new promise or acknowledgment of indebtedness was made by the law of England. In that year, however, Lord Tenterden's Act, so called, was passed,¹¹ which required new promises and acknowledgments to be in writing as a condition of their validity. By a proviso the effect of part payment was left unchanged. In the United States a similar statute has been enacted in most, but by no means in all States.¹² The exact language of the Act has,

⁸ See cases in the following sections, *passim*.

⁹ This theory was suggested but not adopted in *Wald v. Arnold*, 168 Mass. 134, 46 N. E. 419.

¹⁰ *In re McGuire*, 132 Fed. 394 (reversed on another point in *Dacovich v. Schley*, 134 Fed. 72, 67 C. C. A. 198); *Chapman v. Barnes*, 93 Ala. 433, 9 So. 589; *Pollak v. Billing*, 131 Ala. 519, 32 So. 639; *Slaughter's Succession*, 108 La. 492, 32 So. 379; *Weil v. Jacobs'*

Est., 111 La. 358, 35 So. 599; *George W. Helm Co. v. Griffin*, 112 N. C. 356, 16 S. E. 1023; *Pierce v. Seymour*, 52 Wis. 272, 9 N. W. 71; *Phelan v. Fitzpatrick*, 84 Wis. 240, 54 N. W. 614. See also *Rankin v. Anderson*, 24 Ky. L. Rep. 647, 69 S. W. 705; *Hill v. Hill*, 51 S. C. 134, 141, 28 S. E. 309.

¹¹ 9 George IV, c. 14, § 1.

¹² There seems to be no such statute in Colorado, Connecticut, Kentucky, Maryland, New Hampshire,

however, not been copied, and the differences in form of these statutes have not infrequently been made the basis for slight differences in the law of the several States which have enacted them. It was required by Lord Tenterden's Act that the writing should be signed "by the party chargeable thereby." Under this provision an acknowledgment signed by an agent was on a somewhat narrow construction held insufficient.¹³ But this construction was corrected by the Mercantile Law Amendment Act of 1856, which provided that the signature of an authorized agent should have the same effect as that of the party to be charged. Since the later statute the questions as to the sufficiency of a writing seem similar to those arising in regard to memoranda under the Statute of Frauds.¹⁴ In the United States the construction put upon Lord Tenterden's Act in England as to the power of an agent has been followed in New Jersey;¹⁵ but it seems probable that under most American Statutes based on Lord Tenterden's Act the signature of an authorized agent would be held sufficient, though not expressly permitted by the statute.¹⁶ No formality in the terms of the writing is necessary;¹⁷ though it is said that the provisions of the statute should be construed strictly in favor of the statutory bar.¹⁸ The requirement of a writing extends not only to new promises to pay debts already barred, but also to promises to pay debts not yet barred.¹⁹ How far the American statutes requiring a new promise to be in writing affect the question of part payment has been considered in another section.²⁰ A new promise which is supported by contemporaneous consideration is not within the terms of such statutes and need not be in writing.²¹

Pennsylvania, Rhode Island or Tennessee.

¹³ *Hyde v. Johnson*, 2 Bing. N. C. 776, 3 Scott, 239; *Gibson v. Baghott*, 5 C. & P. 211; *Clark v. Alexander*, 8 Scott, N. R. 147. See further *infra*, § 190.

¹⁴ See *infra*, §§ 568 *et seq.*

¹⁵ *De Raimes v. De Raimes*, 70 N. J. L. 15, 56 Atl. 170.

¹⁶ *Liberman v. Gurensky*, 27 Wash. 410, 67 Pac. 998.

¹⁷ *Concannon v. Smith*, 134 Cal. 14, 66 Pac. 40; *Miller v. Beardsley*, 81 Iowa, 720, 45 N. W. 756; *Howard v. Windom*, 86 Tex. 560, 26 S. W. 483.

¹⁸ *Gray v. Day*, 109 Me. 492, 84 Atl. 1073, 43 L. R. A. (N. S.) 535.

¹⁹ *Floyd v. Pearce*, 57 Miss. 140, 142; *Wells v. Moor*, 42 Tex. Civ. App. 47, 93 S. W. 220.

²⁰ *Infra*, § 174.

²¹ *Burnett v. Turner*, 105 Ark. 290, 151 S. W. 249; *Devine v. Murphy*, 168

§ 165. The indebtedness to which a new promise or acknowledgment relates must be certainly defined.

Under the general principle that no promise can be enforced unless its meaning can be ascertained,²² a new promise (whether express or implied from an acknowledgment) to pay a debt cannot be effectual unless it can be determined to what debt the promise relates, and where a statute requires a new promise to be in writing the terms of the promise must sufficiently appear in the writing.²³ If on interpreting the new promise in

Mass. 249, 46 N. E. 1066; *Graham v. Stanton*, 177 Mass. 321, 58 N. E. 1023; *San Antonio &c. Assoc. v. Stewart*, 94 Tex. 441, 61 S. W. 386, 86 Am. St. Rep. 864.

²² See *infra*, § 37.

²³ *Bell v. Morrison*, 1 Pet. 351, 7 L. Ed. 174; *Pollak v. Billing*, 131 Ala. 519, 32 So. 639 (promise to pay "all" notes of the debtor sufficiently definite); *Ringo v. Brooks*, 26 Ark. 540 (promise to pay all debts due from a partnership too indefinite); *Opp v. Wack*, 52 Ark. 288, 12 S. W. 565, 5 L. R. A. 473; *Pierce v. Merrill*, 128 Cal. 473, 61 Pac. 67, 79 Am. St. Rep. 63; *Buckingham v. Smith*, 23 Conn. 453 (promise that all debtor owed "would be settled and made right" insufficient to remove the bar where there were a number of debts); *Walker v. Griggs*, 32 Ga. 119; *Pendley v. Powers*, 129 Ga. 69, 58 S. E. 653; *Carroll v. Forsyth*, 69 Ill. 127; *O'Hara v. Murphy*, 196 Ill. 599, 63 N. E. 1081 (promise by debtor to pay "every cent he owed him" held sufficiently definite); *Kleis v. McGrath*, 127 Iowa, 459, 103 N. W. 371, 69 L. R. A. 260, 109 Am. St. Rep. 396 (a promissory note for interest due on a prior note, but not so stating will not revive the prior note not being an admission in writing of the earlier debt); *Lehman v. Mahier*, 34 La. Ann. 319 (an acknowledgment of indebtedness of \$3,468.52, the amount named in a statement tendered by the creditor, cannot be shown by parol to include a

note, though witnesses testified the note was included in the statement); *Pray v. Garcelon*, 17 Me. 145 (general acknowledgment of indebtedness insufficient though there seems to have been but one debt); *Smith v. Moulton*, 12 Minn. 352 (general acknowledgment of indebtedness insufficient where creditor has more than one claim); *Russell v. Davis*, 51 Minn. 482, 53 N. W. 766 (acknowledgment of "this note and the one attached to it" sufficient, and the notes though no longer attached may be identified by parol); *Baxter v. Brandenburg*, 137 Minn. 259, 163 N. W. 516 (reiterates the general rule, but holds that checks given for outlawed debts were enforceable against the maker though they did not recite the consideration); *Big Diamond Milling Co. v. Chicago &c. Ry. Co.*, (Minn. 1919), 171 N. W. 799 (promise to pay all claims of a certain class sufficiently definite); *Allen v. Hillman*, 69 Miss. 225, 13 So. 871 (general acknowledgment of indebtedness insufficient); *Braithwaite v. Harvey*, 14 Mont. 208, 36 Pac. 38, 27 L. R. A. 101, 43 Am. St. Rep. 625; *Clarke v. Dutcher*, 9 Cow. 674; *Faison v. Bowden*, 72 N. C. 405 (general acknowledgment insufficient to revive barred portion of running account); *Hussey v. Kirkman*, 95 N. C. 63; *Rosencrance v. Johnson*, 191 Pa. 520, 43 Atl. 360 (general acknowledgment insufficient to revive barred portion of running account); *Cole's Exec. v. Martin*, 99

the light of the circumstances surrounding its making, the debt to which it relates can be determined, there seems no necessity for any other identification. Nevertheless a few cases hold that the promise itself must so define the indebtedness to which it relates, that it can be identified without extrinsic evidence,²⁴ and a few courts even hold that the amount of the claim must be defined.²⁵ But generally, and rightly, an acknowledgment or new promise is held sufficient if, under the circumstances, as shown by parol, it is clear to what the acknowledgment must have related.²⁶ In many jurisdictions where the debtor makes a general acknowledgment of indebtedness, a presumption is made by the court that the acknowledgment relates to the debt afterwards sued

Va. 223, 37 S. E. 907; *Holley's Ex'r v. Curry*, 58 W. Va. 70, 51 S. E. 135 (promise to pay whatever the debtor owed, insufficient to revive barred portion of debt); see a discussion of analogous questions under the Statute of Frauds, *infra*, §§ 576, 578.

²⁴ *Kleis v. McGrath*, 127 Ia. 459, 103 N. W. 371, 69 L. R. A. 260, 109 Am. St. Rep. 396; *Burr v. Burr*, 26 Pa. St. 284 (the creditor requested a payment "on that note which I hold of thine," and a payment was made. There was no evidence of any other note between the parties but the acknowledgment was held insufficient); *Ward v. Jack*, 172 Pa. 416, 33 Atl. 577; see also cases in the preceding note.

²⁵ See *infra*, § 188.

²⁶ *Beale v. Nind*, 4 B. & Ald. 568; *Cheslyn v. Dailby*, 10 L. J. Exch. 4; *Cook v. Martin*, 29 Conn. 63 (general acknowledgment. There were two claims. Jury must determine to which the acknowledgment referred); *Deep River Nat. Bank's Appeal*, 73 Conn. 341, 47 Atl. 675 (general acknowledgment. Jury justified in inferring it related to both of two debts); *O'Hara v. Murphy*, 196 Ill. 599, 63 N. E. 1081 (promise by debtor to pay "every cent he owed" construed as including barred,

as well as unbarred indebtedness); *Campbell v. Campbell*, 118 Iowa, 131, 91 N. W. 894 (a payment stated to be "on my note," the note in question being the only note of the defendant held by the plaintiff, sufficiently identifies the debt); *Kugler's Succession*, 23 La. Ann. 455 (promise to pay indebtedness, parol evidence admissible to show no other debt but that in suit existed); *Barnard v. Bartholomew*, 22 Pick. 291 (general acknowledgment held to cover barred as well as unbarred indebtedness); *Rumsey v. Settle's Estate*, 120 Mich. 372, 79 N. W. 579 (promise by debtor to pay "every cent" he owed held applicable to all of various barred and unbarred notes which he owed the promisee); *Stewart v. Forman*, 90 Miss. 85, 43 So. 67; *Manchester v. Breedner*, 107 N. Y. 346, 14 N. E. 405, 1 Am. St. Rep. 829 (orders given by debtor to creditor for the payment of money may be shown by parol to have been given to secure part payment of a debt); *Wilcox v. Clarke*, 18 R. I. 324, 27 Atl. 219; *Gruenberg v. Buhring*, 5 Utah, 414, 16 Pac. 486. ("I will pay you all" is a sufficient written promise and may be shown to refer to a general account, the only indebtedness of the defendant to the plaintiff).

upon by the creditor, in the absence of evidence on the part of the defendant to prove that the acknowledgment referred to some other indebtedness.²⁷ But other jurisdictions allow no such presumption and require the plaintiff to prove that the debt to which the acknowledgment relates was clearly identified.²⁸

§ 166. An unqualified acknowledgment of a debt implies a promise to pay it.

It is a somewhat artificial inference of fact that an unqualified admission of a debt necessarily implies, so far as the Statute of Limitations is concerned, a new promise to pay it. Though the contrary is often assumed, there is no such necessary inference or implication as a matter of fact.²⁹ This is shown by the fact that if a debt is barred by a discharge in bankruptcy an admission will not operate as a new promise to pay

²⁷ *Baillie v. Inchiquin*, 1 Esp. 435 (Lord Kenyon ruled that a general acknowledgment "should be taken to apply to the debt in question; and that it should lie on the defendant to explain the promise so made and show that it applied to some other demand"); *Frost v. Bengough*, 1 Bing. 266; *Morrell v. Ferrier*, 7 Col. 22, 1 Pac. 94; *Blackmore v. Neale*, 15 Col. App. 49, 60 Pac. 952; *Cook v. Martin*, 29 Conn. 63; *Whitney v. Bigelow*, 4 Pick. 110 (but in *Bailey v. Crane*, 21 Pick. 323, 324, the court said: "Had there been any other demands between the parties, it could not have been known to which it referred, and so it could not be applied to either."); *Wilcox v. Williams*, 5 Nev. 206; *Howard v. Windom*, 86 Tex. 560, 26 S. W. 483; *Cotulla v. Urbahn*, 104 Tex. 208, 135 S. W. 1159, 34 L. R. A. (N. S.) 345. See also *Doran v. Doran*, 145 Ia. 122, 123 N. W. 996, 25 L. R. A. (N. S.) 805.

²⁸ *Opp v. Wack*, 52 Ark. 288, 12 S. W. 565, 5 L. R. A. 743 (the written acknowledgment must identify the debt referred to if there are more than one); *Stout v. Marshall*, 75 Iowa, 498,

39 N. W. 808 (promise to pay "every cent that is due" made by one who owed several notes will not revive one which is barred); *Pray v. Garcelon*, 17 Me. 145 (general acknowledgment insufficient though no evidence of any debt other than that sued on); *Whitney v. Reese*, 11 Minn. 138, 148 ("When there are more debts than one due from the defendant to the plaintiff, it must appear to which it applies, or it cannot be applied to either,"); *Anderson v. Nystrom*, 103 Minn. 168, 114 N. W. 742, 13 L. R. A. (N. S.) 1141, 123 Am. St. Rep. 320; *Allen v. Hillman*, 69 Miss. 225, 13 So. 871; *Braithwaite v. Harvey*, 14 Mont. 208, 36 Pac. 38, 27 L. R. A. 101, 43 Am. St. Rep. 625. See also *Faison v. Bowden*, 72 N. C. 405; *Landis v. Roth*, 109 Pa. 621, 1 Atl. 49, 58 Am. Rep. 747. See also *Boxley v. Gale*, 19 Ala. 151; *Walker v. Griggs*, 32 Ga. 119.

²⁹ See as to such inferences in cases not involving the Statute of Limitations, *Hegeman v. Moon*, 131 N. Y. 462, 30 N. E. 487; *Patterson v. Chapman*, (Cal. 1919), 176 Pac. 37, 2 A. L. R. 1467.

the debt;³⁰ nor will an admission by a discharged surety be effectual;³¹ nor, according to the weight of authority will an admission or part payment determine an infant's right to avoid his obligation.³² So in a jurisdiction which holds a widow bound by a new promise to pay an indebtedness which she purported to incur when incapacitated by marriage from doing so, it is held that a mere admission during her widowhood is insufficient to bind her;³³ but as to the Statute of Limitations it is well settled in most jurisdictions that "an unqualified acknowledgment of present indebtedness . . . unaccompanied with any evidence showing a determination not to pay" ³⁴ is equivalent to a new promise.³⁵ All the words of an acknowledgment, however, must be considered in order to determine whether the acknowledgment was unqualified and whether it was accompanied by any evidence showing a determination not to pay. The line drawn in regard to these matters can best be determined by an examination of the illustrations in the following sections.

§ 167. An admission of indebtedness though implying no promise to pay is still sufficient in some jurisdictions.

In a few States the courts have construed local statutes as removing the defence of the statute from any defendant who has acknowledged the debt within the statutory period, though no willingness to pay can fairly be implied. These statutes were perhaps intended merely to reenact the common law as modified by Lord Tenterden's Act in England, but they have been construed as making the admission sufficient of itself and not merely as evidence of a promise. Such States

³⁰ *Supra*, § 158.

³¹ *Supra*, § 157.

³² See *supra*, § 153.

³³ *Kelly v. Eby*, 141 Pa. 176, 21 Atl. 512; *Simrell v. Miller*, 169 Pa. 326, 32 Atl. 548.

³⁴ *Barnard v. Bartholomew*, 22 Pick. 291, 293; *Custy v. Donlan*, 159 Mass. 245, 247, 34 N. E. 360, 38 Am. St. Rep. 419.

³⁵ *Banner v. Berridge*, 18 Ch. D. 254; *Wooster v. Scorse*, 16 Ariz. 11, 140 Pac.

819; *Radigan v. Hughes*, 84 Conn. 137, 79 Atl. 50; *Freeman v. Walker*, 67 Ill. App. 309; *Whiteman v. McFarland*, 68 Ill. App. 295; *Hemsley v. Hollingsworth*, 119 Md. 431, 87 Atl. 506; *King v. Davis*, 168 Mass. 133, 46 N. E. 418; *Berryman v. Becker*, 173 Mo. App. 346, 158 S. W. 899; *Savage v. Gaut* (Tenn. Ch. App.), 57 S. W. 170; *Howard v. Windom*, 86 Tex. 560, 26 S. W. 483.

are Iowa,³⁶ Kansas,³⁷ Nebraska,³⁸ New Mexico,³⁹ and Oklahoma.⁴⁰ In one of these States the rule has been thus defined: "Anything that will indicate that the party making the acknowledgment admits that he is still liable on the claim, that he is still bound for its satisfaction, and that he is still held for its liquidation and payment, is sufficient to revive the debt or claim; and there is no necessity that there should also be a promise to pay the same, either express or implied."⁴¹ There is less difference than might be expected between the actual results reached under statutes thus construed and those reached under other statutes. The difference is usually merely that under the ordinarily prevailing rule the court says a promise is implied from an unqualified admission while in the jurisdictions in question it is said that the admission itself is sufficient.

§ 168. Acknowledgments qualified by refusal or statement of inability to pay.

If the debtor admits his indebtedness but couples the admission with a refusal to pay, no new promise can be implied.⁴² A statement that the debtor is unable to pay at present does not qualify his admission so far as to prevent the implication

³⁶ *Stewart v. McFarland*, 84 Iowa, 55, 50 N. W. 221; *Nelson v. Hanson*, 92 Iowa, 356, 60 N. W. 655, 54 Am. St. Rep. 568; *Jenckes v. Rice*, 119 Iowa, 451, 93 N. W. 384.

³⁷ *Fort Scott v. Hickman*, 112 U. S. 150, 28 L. Ed. 636, 5 S. Ct. 56; *Elder v. Dyer*, 26 Kans. 604, 40 Am. Rep. 320; *Disney v. Healey*, 73 Kans. 326, 85 Pac. 287. But a letter expressing regret at the debtor's inability to pay was held insufficient. *Corbett v. Hoss*, 98 Kans. 290, 157 Pac. 1195.

³⁸ *Devereaux v. Henry*, 16 Neb. 55, 19 N. W. 697.

³⁹ *Cleland v. Hostetter*, 13 N. Mex. 43, 79 Pac. 801.

⁴⁰ *Andrew v. Kennedy*, 4 Okla. 625, 629, 46 Pac. 485.

⁴¹ *Elder v. Dyer*, 26 Kans. 604, 40 Am. Rep. 320.

⁴² *A'Court v. Cross*, 3 Bing. 329; *Cosio v. Guerra*, 67 Fla. 331, 65 So. 5; *Gray v. McDowell*, 6 Bush, 475; *Stewart v. Watts*, 15 La. Ann. 135; *Porter v. Hill*, 4 Me. 41; *Bailey v. Crane*, 21 Pick. 323; *Buckner v. Johnson*, 4 Mo. 100; *Laurence v. Hopkins*, 13 Johns. 288; *Lee v. Polk*, 4 McCord, 215; *Burnett v. Munger*, 23 Tex. Civ. App. 278, 56 S. W. 103.

Under the early English rule prevailing in the latter part of the 18th century, such an admission would have been sufficient. See *supra*, § 161, and in some early American cases the same doctrine is applied. See, *e. g.*, *Olcott v. Scales*, 3 Vt. 173, 21 Am. Dec. 585.

of a new promise; ⁴³ and if the statement of present inability is coupled with a promise or even an expression of hope to pay in the future, it is even clearer that the debtor thereby renews his liability. ⁴⁴ It would seem, however, that in any case where the debtor asserted present inability, any promise implied must be rather to pay after a reasonable time or when he becomes able, than to pay immediately. ⁴⁵ A declaration of inability to pay which fairly construed relates not merely to the present, but to the future as well, is equivalent to a refusal to pay, and it is immaterial whether or not the debtor also admits the existence of the debt. ⁴⁶

§ 169. Acknowledgment coupled with claim of set-off or reduction.

Frequently a debtor couples his admission of a debt with the assertion that he is entitled to set off a claim of his own against the debt. If the assertion is to the effect that the

⁴³ *Gardner v. McMahon*, 3 Q. B. 561; *De Forest v. Hunt*, 8 Conn. 179; *Robinson v. Day*, 7 La. Ann. 201 (interrupts prescription of debt not barred); *Bloom v. Kern*, 30 La. Ann. 1263 (interrupts prescription of debt not barred); *Beeler v. Clarke*, 90 Md. 221, 44 Atl. 1038, 78 Am. St. Rep. 439; *Chidsey v. Powell*, 91 Mo. 622, 4 S. W. 446; *Rolfe v. Pilloud*, 16 Neb. 21, 19 N. W. 615, 970; *Cudd v. Jones*, 63 Hun, 142, 17 N. Y. S. 582; *Howard v. Windon*, 86 Tex. 560, 26 S. W. 483; *cf. Eckford v. Evans*, 56 Miss. 18; *Kirkbride v. Gash*, 34 Mo. App. 256; *Atwood v. Coburn*, 4 N. H. 315.

⁴⁴ *Lee v. Wilmot*, L. R. 1 Exch. 364; *Walker v. Freeman*, 209 Ill. 17, 70 N. E. 595; *Quinlan v. Thompson*, 152 Ill. App. 275; *Boylliss v. Street*, 51 Ia. 627, 2 N. W. 437; *Jenckes v. Rice*, 119 Ia. 451, 93 N. W. 384; *Cleland v. Hostetter*, 13 N. Mex. 43, 79 Pac. 801; *Coffin v. Secor*, 40 Ohio St. 637; *Carsley v. McFarlane*, 26 Nova Scotia, 48.

⁴⁵ *In re Bethell*, 34 Ch. D. 561; *Bullion & Exchange Bank v. Hegler*,

93 Fed. 890. But see *Lee v. Wilmot*, L. R. 1 Exch. 364.

⁴⁶ *Knott v. Farren*, 4 D. & R. 179 ("I can't afford to pay my new debts, much less my old ones"); *Rackham v. Marriott*, 2 H. & N. 196 ("I do not wish to avail myself of the Statute of Limitations to refuse payment of the debt. I have not the means of payment and must crave a continuance of your indulgence. My situation as a clerk does not afford me the means of paying up a shilling, but in time I may reap the benefit of my services in an augmentation of salary that may enable me to propose some satisfactory arrangement. I am much obliged to you for your forbearance"). See also *Thayer v. Mills*, 14 Me. 300; *Kirkbride v. Gash*, 34 Mo. App. 256; *Bailey v. Crane*, 21 Pick. 323; *Wald v. Arnold*, 168 Mass. 134, 46 N. E. 419; *Atwood v. Coburn*, 4 N. H. 315; *Manning v. Wheeler*, 13 N. H. 486; *Hancock v. Bliss*, 7 Wend. 267; *Galpin v. Barney*, 37 Vt. 627 (defendant said plaintiff ought to have his pay, but he was poor and could not pay).

set-off will cancel the indebtedness, it is obvious that the statement taken as a whole amounts to a refusal to pay the debt, and no new promise can be implied.⁴⁷ So if the acknowledgment of indebtedness is conditional on the creditor's assent to the validity of a set-off, no new obligation on the part of the debtor can arise unless the creditor expresses such assent.⁴⁸ But if the debtor acknowledges the debt unqualifiedly, there seems no reason why a new promise should not be inferred from the acknowledgments merely because he asserts that he has a cross claim. In effect the debtor thereby promises to pay the excess of the old debt over and above his own claims. In one of the exceptional jurisdictions which require the promise or acknowledgment to fix the amount of the debt,⁴⁹ the promise to pay even a fixed amount subject to an undefined set-off, would not be effectual.⁵⁰ But wherever an acknowledgment of indebtedness of indefinite amount is effective, the assertion of a right to set off such valid claims as the debtor may have ought not to prevent the revival of the debt.⁵¹ An acknowledgment of indebtedness, coupled with an assertion that the amount claimed by the creditor is excessive presents the same question. Such an acknowledgment has been held sufficient;⁵² and if the debtor indicates to what degree he considers it excessive, so that his implied new promise is not too uncertain for enforcement, this result should be reached.

§ 170. An unqualified acknowledgment made under circumstances showing no intention to pay.

As the force of an acknowledgment depends in most States upon the inference to be drawn from it of an intention to pay,

⁴⁷ *Cripps v. Davis*, 12 M. & W. 159; *In re River Steamer Co.*, L. R. 6 Ch. 822; *Deshon v. Eaton*, 4 Me. 413; *Bradley v. Field*, 3 Wend. 272; *Eckert v. Wilson*, 12 Serg. & R. 393; *Lee v. Polk*, 4 McCord, 215.

⁴⁸ *Nicholls v. Warfield*, 18 Fed. Cas. No. 10, 234, 2 Cranch C. C. 429; *Stiles v. Laurel Fork Oil, etc., Co.*, 47 W. Va. 838, 35 S. E. 986.

⁴⁹ See *infra*, § 188.

⁵⁰ See *Teessen v. Camblin*, 1 Ill. App.

424, 428; *Davidson v. Morris*, 5 Sm. & M. 564; *Gordon's Estate*, 3 Pa. Co. Ct. 160; *Sutton v. Burruss*, 9 Leigh, 381, 33 Am. Dec. 246.

⁵¹ *White v. Potter, Coxe* (N. J.), 159; *Johnson's Adm. v. Bounethea*, 3 Hill (S. C.), 15, 30 Am. Dec. 347; *Jones v. Brown*, 9 U. C. C. P. 201.

⁵² *College v. Horn*, 3 Bing. 119; *Gardner v. M'Mahon*, 3 Q. B. 561; *Skeet v. Lindsay*, 2 Ex. D. 314.

if there is anything tending to negative such an inference in the surrounding circumstances even though not in the words of the acknowledgment, the indebtedness will not be revived.⁵³ The admission of a witness that he is indebted, being made under the compulsion of an oath, does not afford any warrant for the implication of a promise.⁵⁴ An acknowledgment in an answer to a bill in equity, being also made under compulsion, affords no implication of a new promise,⁵⁵ except in jurisdictions where an admission of indebtedness even though no implication of a promise to pay can be made from it, imposes a fresh liability on the debtor.⁵⁶ Though a new promise should not be implied from an admission compulsorily made under such circumstances, there seems no reason why a debtor may not in a pleading, as well as elsewhere, effectively make a new promise, by words sufficiently express.⁵⁷ In order to amount to a new promise the words of the debtor in a pleading must conform to the ordinary requirements of a new promise.⁵⁸ If, therefore, any part of the statement of the debtor indicates an intention not to pay the debt, it is abundantly clear that no new liability is created.⁵⁹ Allowing judgment to go by default involves no promise of payment;⁶⁰ but confessing judgment

⁵³ *Bell v. Morrison*, 1 Pet. 351, 362, 7 L. Ed. 174; *Goldsbey v. Gentle*, 5 Blackf. 436; *Johnston v. Hussey*, 89 Me. 488, 36 Atl. 993.

⁵⁴ *Sanford v. Clark*, 29 Conn. 457; *Bloodgood v. Bruen*, 8 N. Y. 362; *Walter v. Whitacre*, 113 Va. 150, 73 S. E. 984. As to what will amount to a withdrawal by the testimony of a defendant of a plea of the statute, see *Moore v. Stuart*, 215 Mass. 456, 102 N. E. 658.

⁵⁵ *Commercial Mutual Ins. Co. v. Brett*, 44 Barb. 489; *Holberg v. Jaffray*, 65 Miss. 526, 5 So. 94.

⁵⁶ See *supra*, § 167, and especially see *McMillan v. Toombs*, 74 Ga. 535; *Roberts v. Leak*, 108 Ga. 806, 33 S. E. 995; *Blakeney v. Wyland*, 115 Ia. 607, 89 N. W. 16; *Bissell v. Jaudon*, 16 Oh. St. 498; *Blair v. Nugent*, 9 Irish Eq. 400.

⁵⁷ Thus where in a pleading a debtor asserts an indebtedness to the creditor and claims the right to deduct it from another claim made against himself, *Brigham v. Hutchins*, 27 Vt. 569; *Dinguid v. Schoolfield*, 32 Gratt. 803; or asserts in a bill in equity as a ground for relief, his own indebtedness. *Bradley v. Briggs*, 22 Vt. 95.

⁵⁸ *Thornton v. Nichols*, 119 Ga. 50, 45 S. E. 785; *McMillan v. Leeds*, 58 Kans. 815, 49 Pac. 159.

⁵⁹ *Hinkle v. Currin*, 2 Humph. 137. As where the debtor admitting an obligation to pay the debt asserts a right of set-off exceeding it in amount, *Badford v. Spyker's Adm'r*, 32 Ala. 134, or where the debtor though confessing the debt pleads an avoidance of liability upon it. *Southern Mutual Ins. Co. v. Pike*, 34 La. Ann. 825.

⁶⁰ *Boone v. Colehour*, 165 Ill. 305, 46

does,⁶¹ as does signing a statement of indebtedness intended as a basis for a judgment by confession though no judgment was in fact entered.⁶² A schedule of debts made by one who assigns his property for the benefit of creditors,⁶³ or in compliance with a bankruptcy law,⁶⁴ will not revive a debt listed therein. Though it is essential to an effective acknowledgment that the court shall be able to infer from it the debtor's intention to pay, it is not necessary that the debtor should have known when he expressed such an intention that the claim was barred.⁶⁴

§ 171. Illustrations of sufficient acknowledgment.

It was held in the following cases that the acknowledgment was sufficiently absolute to justify the inference of an implied new promise: "Received of [the creditor] the sum of \$700 at various times to date, which is hereby acknowledged;"⁶⁵ "We owe it and I will have to pay it;"⁶⁶ "I [a surety] will not be longer held good for note in case it be not promptly collected;"⁶⁷ "You ask me if I wished to keep the money yet. I am glad you do not need it at present. I can make good use of it yet;"⁶⁸ "I regret to say that my neglect in not responding to your statement of account was owing to my not having disposed of but few of your goods; . . . but

N. E. 253; *Lane v. Richardson*, 79 N. C. 159; *Goodwin v. Buzzell*, 35 Vt. 9.

⁶¹ *Bissell v. Jaudon*, 16 Oh. St. 498; *Moon's Adm'x v. Highland Development Co.*, 104 Va. 551, 52 S. E. 209.

⁶² *Trenery v. Swan*, 93 Iowa, 619, 61 N. W. 947.

⁶³ *Ex parte Topping*, 4 DeG. J. & S. 551; *Davies v. Edwards*, 7 Exch. 22; *Everett v. Robertson*, 1 E. & E. 16. In the early part of the nineteenth century when any acknowledgment of indebtedness was held sufficient to revive it though accompanied by words or circumstances indicating an intention not to pay, the law was otherwise. But see *Bowie v. Henderson*, 6 Wheat. 514, 5 L. Ed. 319; *Stuart v. Foster*, 18 Abb. Pr. 305.

⁶⁴ *Georgia Insurance Co. v. Ellicott*, Taney, 130; *Nonotuck Silk Co. v. Pritsker*, 143 Ill. App. 644; *Richardson v. Thomas*, 13 Gray, 381, 74 Am. Dec. 636; *Stoddard v. Doane*, 7 Gray, 387; *Roscoe v. Hale*, 7 Gray, 274; *Christy v. Flemington*, 10 Pa. St. 129, 49 Am. Dec. 590; *Hidden v. Cozzens*, 2 R. I. 401, 60 Am. Dec. 93; *O'Donnell v. Parker*, 48 Utah, 578, 160 Pac. 1192. But see *Sartor v. Beaty*, 25 S. Car. 293, 303.

⁶⁵ *Langston v. Aderhold*, 60 Ga. 376.

⁶⁶ *Custy v. Donlan*, 159 Mass. 245, 34 N. E. 360, 38 Am. St. Rep. 419.

⁶⁷ *Miller v. Kinsel*, 20 Col. App. 346, 78 Pac. 1075.

⁶⁸ *Harms v. Freytag*, 59 Neb. 359, 80 N. W. 1039.

⁶⁹ *Bueker v. Korff's Estate*, 5 Neb. Unof. 194, 97 N. W. 804.

now that I have got the ball rolling, am in hopes to do good business in the future . . .;"⁶⁹ "I am ashamed the account has stood so long;"⁷⁰ a promise to make a due bill though accompanied with a refusal to sign promissory notes;⁷¹ a request for an extension of time;⁷² a request from a surety that the creditor should get all he could from the principals, coupled with the statement that he himself would be home in two weeks and see the creditor;⁷³ a promise to "settle";⁷⁴ a promise to renew a note.⁷⁵ But renewal notes cannot be considered promises to pay the original notes.⁷⁶ A promise to pay interest indicates sufficiently an intention to pay the principal.⁷⁷ Where a debtor in making out a statement of his affairs for a creditor inserts therein a barred debt as due to the creditor the statute begins to run afresh.⁷⁸ Asking for an account of specified indebtedness since it implies an admission of its existence revives the debt;⁷⁹ and so does assent to the correctness of an account presented by the

⁶⁹ *Wright v. Parmenter*, 23 N. Y. Misc. 629, 52 N. Y. S. 99. See also as to expression of hope of ability *Sidwell v. Mason*, 2 H. & N. 306, 310.

⁷⁰ *Cornforth v. Smithard*, 5 H. & N. 13.

⁷¹ *Benedict v. Slocum*, 95 N. Y. App. Div. 602, 88 N. Y. S. 1052.

⁷² *Clayton v. Watkins*, 19 Tex. Civ. App. 133, 47 S. W. 810.

⁷³ *Woodsville Guaranty Sav. Bank v. Ricker*, 85 Vt. 340, 82 Atl. 2.

⁷⁴ *Mowry v. Saunders*, 33 R. I. 45, 80 Atl. 421. See also *Hopkins v. Warner*, 109 Cal. 133, 41 Pac. 868; *Brody v. Doherty*, 30 Miss. 40, 44; *Edson v. Fuller*, 22 N. H. 183, 190; *Stilwell v. Coope*, 4 Denio, 225, 226; *Taylor v. Miller*, 113 N. C. 340, 18 S. E. 504. But see *contra*, *Bell v. Crawford*, 8 Gratt. 110, 123.

⁷⁵ *Peavey v. Brown*, 22 Me. 100; *Rumsey v. Settle's Est.*, 120 Mich. 372, 79 N. W. 579; *Hart v. Boyt*, 54 Miss. 547; *Bowman v. Rector* (Tenn. Ch.), 59 S. W. 389. In *Hartranft's Est.* 153 Pa. 530, 26 Atl. 104, 34 Am. St. Rep.

717, the court said: "To make a renewal note or to waive the Statute by an instrument in writing to be executed in future, will not amount to a renewal or a waiver when it appears that the instrument was prepared but its execution postponed or put off, from time to time, and finally left undone." See also *Ritter's Estate*, 161 Pa. 79, 28 Atl. 1011; *Alexander v. Muse*, 112 Tenn. 233, 79 S. W. 117. The fact, however, that the debtor refused or failed to give the promised renewal note merely shows that he had changed his mind since he made the original promise.

⁷⁶ *Foster v. Dawber*, 6 Exch. 839.

⁷⁷ *Taylor v. Steele*, 16 M. & W. 665. See also cases *infra*, § 174, of actual payment of interest.

⁷⁸ *Holmes v. Mackrell*, 3 C. B. (N. S.) 789.

⁷⁹ *Quincey v. Sharpe*, 1 Ex. D. 72; *Skeet v. Lindsay*, 2 Ex. D. 314; *In re Lorillard*, 108 Fed. 591, 47 C. C. A. 511; *Burrows v. Baker*, Irish R. 3 Eq. 596. But see *Powell v. Petch*, 166 Cal. 329, 136 Pac. 55.

creditor, which includes a barred debt.⁸⁰ But the debtor's failure to object to such an account submitted by his creditor will not do so.⁸¹

§ 172. Illustrations of insufficient acknowledgment.

In the following cases the acknowledgments were held not sufficiently positive to justify the inference of a new implied promise:—A letter from the debtor in reply to a claim for \$77.91 saying in substance, that the debtor could not pay at once and did not know when he could, adding "furthermore the bill is \$55.70 in all, deducting \$20 on my last payment;"⁸² a letter from the debtor saying "I think a little later as soon as things start up I may be able to do something for you;"⁸³ a letter from the debtor offering to endeavor to raise a certain sum if the creditor would accept it in full satisfaction of certain notes, adding "I am not backing up or repudiating anything;"⁸⁴ a delivery by the maker of a note at the request of the payee's executor of a true copy of the note to the executor;⁸⁵ a letter by the maker of a note saying that if he could keep the land which was mortgaged to secure the note a year longer, he thought he could make a half payment in the year and if he could not, he would be glad to give up the land, further asking that he be given a show;⁸⁶ a promise to try to pay a debt if sickness did not continue too long, and that the debtor wanted to pay the debt in the current season;⁸⁷ an offer to arbitrate, since it does not involve an admission of liability;^{87a} a promise to leave money by will unless it is

⁸⁰ *Elliott v. Mills*, 10 Ind. 368;

⁸¹ *Re McHenry*, 71 L. T. Rep. 146; *Verrier v. Guillou*, 97 Pa. 63; *Robinson v. Monroe* (Tex. Civ. App.), 25 S. W. 53.

⁸² *Wald v. Arnold*, 168 Mass. 134, 46 N. E. 419. See also *France v. Ruby*, 93 Neb. 214, 140 N. W. 175.

⁸³ *Gill v. Gibson*, 225 Mass. 226, 114 N. E. 196.

⁸⁴ *Throop v. Russell*, 145 Mich. 482, 108 N. W. 1013, 116 Am. St. Rep. 314.

⁸⁵ *Goodrich v. Case*, 68 Oh. St. 187, 67 N. E. 295.

⁸⁶ *Wood v. Merrietta*, 66 Kans. 748, 71 Pac. 579. In Kansas an acknowledgment must apparently be more direct and explicit than in most States, though, as has been seen (*supra*, § 167), no new promise needs to be implied. See *McMillan v. Leeds*, 58 Kans. 815, 49 Pac. 159; *Cooper v. Haythorn*, 65 Kans. 860, 70 Pac. 581; *Durban v. Knowles*, 66 Kans. 397, 71 Pac. 829. Cf. decisions stated *supra*, § 171.

⁸⁷ *Koop v. Cook*, 67 Or. 93, 135 Pac. 317.

^{87a} *Curtis v. Sacramento*, 70 Cal. 412,

clear that the money is to be left, not as a gift, but as payment of an obligation;⁸⁸ an acknowledgment of the debt as having once existed. "There must be a distinct and unequivocal acknowledgment of the debt as still subsisting as a personal obligation of the debtor."⁸⁹ Therefore, an acknowledgment that a debt subsisted formerly, accompanied with a statement that it has been paid or discharged will not revive a debt, though in fact it has not been paid or discharged.⁹⁰

§ 173. Giving security is an effective acknowledgment.

The giving of a pledge or other security for a debt is such an acknowledgment of it as a still subsisting obligation as to imply a promise of payment.⁹¹ So far as concerns the implication of a new promise, there seems no reason why

11 Pac. 748; *Rossiter v. Colby*, 71 N. H. 386, 52 Atl. 927. See also *Linderman v. Pomeroy*, 142 Pa. 168, 21 Atl. 820, 24 Am. St. Rep. 494.

⁸⁸ *Outwaters v. Brownlee*, 22 Cal. App. 535, 135 Pac. 300; *Schönbachler v. Schönbachler*, 22 Ky. L. Rep. 314, 57 S. W. 232; *Watson v. Barber*, 105 La. 799, 30 So. 127; *Gill v. Staylor*, 97 Md. 665, 55 Atl. 398. As a new promise to pay a discharged debt in the future is binding, see *infra*, §§ 179 *et seq.*, it follows that a promise to pay a debt as such at the promisor's death, that is by will, is binding. See *Gill v. Donovan*, 96 Md. 518, 54 Atl. 117.

⁸⁹ *Shepherd v. Thompson*, 122 U. S. 231, 235, 30 L. Ed. 1156, 7 Sup. Ct. 1229, per Gray, J. See also *Cooper v. Haythorn*, 65 Kans. 860, 70 Pac. 581; *Durban v. Knowles*, 66 Kans. 397, 71 Pac. 829.

⁹⁰ *Birk v. Guy*, 4 Esp. 184; *Brydges v. Plumptre*, 1 D. & R. 746; *Buckmaster v. Russell*, 10 C. B. (N. S.) 745; *Marshall v. Dalliber*, 5 Conn. 480; *Kelly v. Strouse*, 116 Ga. 872, 43 S. E. 280; *New Orleans & Carrollton R. Co. v. Harper*, 11 La. Ann. 212; *Lombard v. Pease*, 14 Me. 349; *Higdon's Admrs. v. Stewart*, 17 Md. 105; *Bailey v. Bailey*, 14 S. & R. 195; *George v. Ver-*

mont Farm Machine Co., 65 Vt. 287, 26 Atl. 722. And see decisions *supra*, § 169, to the effect that an admission coupled with a claim of set-off equal to the creditor's claim will not revive a debt. But see *Partington v. Butcher*, 6 Esp. 66; *Stimis v. Stimis*, 60 N. J. Eq. 313, 47 Atl. 20.

⁹¹ *Russell v. LaRoque*, 11 Ala. 352; *Merrills v. Swift*, 18 Conn. 257, 46 Am. Dec. 315; *Maddox v. Walker's Exr.*, 25 Ky. L. Rep. 124, 74 S. W. 741; *Balch v. Onion*, 4 Cush. 559; *First Nat. Bank v. Bell*, 141 La. 53, 74 So. 628; *Smith v. Ryan*, 66 N. Y. 352, 23 Am. Rep. 60; *Miller v. McGee*, 2 N. Y. Supp. 156; *Souder's Estate*, 169 Pa. 239, 32 Atl. 417; *Stanford v. Andrews*, 12 Heisk. 664; *Grayson v. Taylor*, 14 Tex. 672. But see *Shepherd v. Thompson*, 122 U. S. 231, 30 L. Ed. 1156, 7 S. Ct. 1229. The taking by a surety of security from the principal debtor is not an acknowledgment of liability by the surety to the creditor. *Holt v. Gage*, 60 N. H. 536. In Louisiana it seems to be the law that so long as the creditor retains possession of security belonging to the debtor there is a continuing acknowledgment of the debt. See *Taylor v. Vossberg Mineral Springs Co.*, 128 La. 364, 54 So. 907.

an invalid attempt to give security should not be as effectual as a valid pledge;⁹² nor why an offer to give security should not be as unequivocal an acknowledgment of a debt as the actual giving of the security, unless the offer is in the nature of a proposed compromise, which would require acceptance.⁹³ The giving, or the offer to give security may be accompanied with such terms as to negative any implication of an unqualified new promise;⁹⁴ and an agreement which goes no further than to provide that certain property shall be applied to the payment of a debt carries with it no implication of a personal promise to pay.⁹⁵ On the other hand, if there is an unqualified acknowledgment or new promise, the effect of it will not be diminished by the further promise to pay in a certain mode or from specified property.⁹⁶

§ 174. Partial payment amounts to an acknowledgment.

Partial payment of a debt is regarded as equivalent to an admission of the debt and, therefore, a new promise is implied therefrom. This doctrine was early established in England,⁹⁷ and has continuously represented the generally accepted law.⁹⁸ In Lord Tenterden's Act,⁹⁹ which required that new promises to be effective must be in writing, it was expressly provided that nothing in the Act should alter the effect of any payment of principal or interest. This English statute has generally been copied in the United States, but not in identical language. The omission from the statute in some States of the proviso saving the effect of partial payment has

⁹² The contrary was, however, held in *Scott v. Shreveport*, 20 Fed. 714 (D. C. La.).

⁹³ See *infra*, § 180. Such was the nature of the offer in *Exeter Bank v. Sullivan*, 6 N. H. 124.

⁹⁴ See *Cawley v. Furnell*, 12 C. B. 291; *Wells v. Hill*, 118 N. C. 900, 24 S. E. 771.

⁹⁵ *Rutledge v. Ramsay*, 8 A. & E. 221; *Howcutt v. Bonser*, 3 Exch. 491; *Cawley v. Furnell*, 12 C. B. 291; *Hughes v. Paramore*, 7 DeG. M. & G. 229; *Everett v. Robertson*, 1 E. & E. 16; *Shepherd v. Thompson*, 122 U. S. 231, 238, 30

L. Ed. 1156, 7 S. Ct. 1229; *Cook v. Farley*, 1 Neb. Unof. 540, 95 N. W. 683.

⁹⁶ *Southern Pacific Co. v. Prosser*, 122 Cal. 413, 52 Pac. 836, 55 Pac. 145; *Gill v. Donovan*, 96 Md. 518, 54 Atl. 117.

⁹⁷ *Dickson v. Thomson*, 2 Show. 126.

⁹⁸ *Hollis v. Palmer*, 2 Bing. (N. C.) 713; *Bealy v. Greenslade*, 2 C. & J. 61; *Purdon v. Purdon*, 10 M. & W. 562; *Ridd v. Moggridge*, 2 H. & N. 567; *In re Salmon*, 239 Fed. 413. And see American cases cited in this section, *passim*.

⁹⁹ 9 George IV, c. 14, § 1.

been held to involve a repeal of the common-law rule by which such a payment revived the debt, or at least to require such written evidence of the partial payment as would amount to an acknowledgment in writing signed by the debtor.¹ But generally no writing is necessary.² In order that a debt should be renewed by a payment, it must be established that the payment was made on account of the debt in question;³ and as only a partial payment of it.⁴ Accordingly, if the only evidence in a case is the making of a payment, and the further fact that a larger sum was due the creditor, there is not sufficient evidence to submit to the jury in an action by the creditor for the remainder of his claim.⁵ If, however, it

¹ *Kirk v. Williams*, 24 Fed. 437 (Tenn.); *Peña v. Vance*, 21 Cal. 142; *Moore v. Moore*, 103 Ga. 517, 521, 30 S. E. 535; *Gray v. Pierson*, 7 Idaho, 540, 64 Pac. 233; *Hale v. Wilson*, 70 Ia. 311, 30 N. W. 739; *Kleis v. McGrath*, 127 Ia. 459, 103 N. W. 371, 69 L. R. A. 260, 109 Am. St. Rep. 396; *Anderson v. Robertson*, 24 Miss. 389; *McCullough v. Henderson*, 24 Miss. 92; *Perry v. Ellis*, 62 Miss. 711; *Wilcox v. Williams*, 5 Nev. 206; *Taylor v. Hendrie*, 8 Nev. 243; *Lock v. Wilson*, 9 Heisk. 784; *Locke v. Wilson*, 10 Heisk. 441; *Folk v. Russell*, 7 Baxt. 591; *Tilliard v. Hall*, 11 Tex. Civ. App. 381, 32 S. W. 863. But even in such States it should be noticed that a writing accompanying the payment and characterizing it may be such an acknowledgment as the law requires. Thus in *Campbell v. Campbell*, 118 Ia. 131, 91 N. W. 894, a letter enclosing a check and containing these words "which I think pays the interest on my note" was held a sufficient acknowledgment.

² *Walker v. Chicago &c. R.*, 277 Ill. 451, 115 N. E. 659; *Haslam v. Perry*, 115 Me. 295, 98 Atl. 812; *Thompson v. Richardson* (Mo.), 195 S. W. 1039; *Eureka &c. Shingle Co. v. Knack*, 95 Wash. 339, 163 Pac. 753, and see cases cited on part payment, *passim*.

³ *Waters v. Tompkins*, 2 C. M. & R.

723, 726; *In re Salmon*, 239 Fed. 413; *Toothaker v. Boulder*, 13 Col. 219, 22 Pac. 468; *Reed v. Thomas & McNeal*, 66 Ga. 595; *Rothschild v. Sessell*, 103 Ill. App. 274; *Ketcham v. Hill*, 42 Ind. 64; *Good v. Ehrlich*, 67 Kans. 94, 72 Pac. 545; *Pond v. French*, 97 Me. 403, 54 Atl. 920; *Day v. Mayo*, 154 Mass. 472, 28 N. E. 898; *Crow v. Gleason*, 141 N. Y. 489, 36 N. E. 497; *Barnes v. Pickett Hardware Co.*, 203 Pa. St. 570, 53 Atl. 378; *Austin v. McClure*, 60 Vt. 453, 15 Atl. 161; *Bell v. Crawford*, 8 Gratt. 110.

⁴ See cases cited in the previous note; also *Tippets v. Heane*, 1 C. M. & R. 252; *Wainman v. Kynman*, 1 Exch. 118; *Richardson v. Chanslor's Trustee*, 103 Ky. 425, 20 Ky. L. Rep. 121, 45 S. W. 774; *McCarthy Bros. Co. v. Hanskutt*, 29 S. Dak. 535, 137 N. W. 286; *Hebiniger v. Ross*, 175 Mich. 241, 141 N. W. 629; *Brown v. Latham*, 58 N. H. 30; *Rogers v. Newton*, 71 N. J. L. 469, 58 Atl. 1100; *Burdick v. Hicks*, 29 N. Y. App. Div. 205, 51 N. Y. S. 789; *Notman v. Crooks*, 10 U. C. Q. B. 105.

⁵ *Tippets v. Heane*, 1 C. M. & R. 252; *Brisbin v. Farmer*, 16 Minn. 215; *Chadwick v. Cornish*, 26 Minn. 28; *Crow v. Gleason*, 141 N. Y. 489, 36 N. E. 497; *Burdick v. Hicks*, 29 N. Y. App. Div. 205, 51 N. Y. S. 789; *Steel v. Matthews*, 7 Yerg. 313. In

is clear that a payment is made as a partial payment of what the debtor owes, in some jurisdictions at least, it is not essential that the debtor shall indicate to which of several debts which he owes, the payment shall be applied. Under the law governing application of payments⁶ the creditor may apply the payment to any indebtedness which is not barred or tainted with illegality, or in part to each enforceable debt with the effect of extending the period of limitation on all the indebtedness.⁷ The propriety of such decisions seems to turn on whether the creditor's right of application is based on assent of the debtor implied in fact or on a rule enforced irrespective of his intention. The payment must be made by the debtor or with his knowledge and acquiescence.⁸ If there are any words or circumstances tending to negative the implication naturally to be drawn from a partial payment, the debt will not be revived. Thus if the debtor asserts when making the payment that it is made as payment in full,⁹ or as a gratuity,¹⁰ or if he refuses to pay more, no new promises can be implied. So if the debtor promises when making a partial payment, to pay in instalments he can only be held liable to that extent and no general promise can be implied.¹¹ Payment of interest

Mississippi it is held that there must be an express acknowledgment or express promise accompanying the part payment. *McCullough v. Henderson*, 24 Miss. 92; *Anderson v. Robertson*, 24 Miss. 389.

⁶ See *infra*, §§ 1795 *et seq.*

⁷ *Walker v. Butler*, 6 E. & B. 506; *Armour Packing Co. v. Vinegar Bend Lumber Co.*, 149 Ala. 205, 42 So. 866; *Samuels v. Samuel's Admr.*, 151 Ky. 235, 151 S. W. 676, 42 L. R. A. (N. S.) 1155; *Blake v. Sawyer*, 83 Me. 129, 21 Atl. 834, 12 L. R. A. 712, 23 Am. St. Rep. 762; *Ramsay v. Warner*, 97 Mass. 8; *Kennedy v. Drake*, 225 Mass. 303, 114 N. E. 310; *Anderson v. Nystrom*, 103 Minn. 168, 172, 114 N. W. 742, 13 L. R. A. (N. S.) 1141, 123 Am. St. Rep. 320; *Beck v. Haas*, 111 Mo. 264, 20 S. W. 19, 33 Am. St. Rep. 516; *Wright v. Wayland (Mo.)*, 188 S. W. 928.

Cf. infra, § 178, as to the law where one of the debts is barred; also *supra*, § 165, collecting cases where instead of making a part payment, a debtor who owes several debts makes a general promise of payment.

⁸ *Myers v. Erwin*, 180 Mich. 469, 147 N. W. 458; *Security Bank v. Finkelstein*, 76 N. Y. Misc. 461, 135 N. Y. S. 640; *Union Natl. Bank v. Dean*, 139 N. Y. S. 835, 154 N. Y. App. Div. 869.

⁹ *Richardson v. Chanslor's Trustee*, 103 Ky. 425, 20 Ky. L. Rep. 121, 45 S. W. 774; *Hebinger v. Ross*, 175 Mich. 241, 141 N. W. 629.

¹⁰ *Ryan v. Canton Nat. Bank*, 103 Md. 428, 63 Atl. 1062; *Quincy v. Blanchard*, 36 R. I. 296, 90 Atl. 209.

¹¹ *Gillingham v. Brown*, 178 Mass. 417, 60 N. E. 122, 55 L. R. A. 320.

revives the obligation to pay the principal;¹² and a note for interest is as effectual as cash.^{12a} But an overdue interest coupon on a bond is for this purpose regarded as a separate instrument, and payment of it will not interrupt the running of the statute against the bond.¹³ Partial payment of the principal revives the obligation to pay the whole remaining debt including interest.¹⁴

§ 175. Partial payment must be voluntary.

The payment must be voluntary to justify the inference of a new promise and therefore a partial payment collected on execution,¹⁵ or derived from foreclosure of a mortgage,¹⁶ or collected from rents and profits by a mortgagee in possession,¹⁷ or made by a receiver or an assignee¹⁸ or trustee in

¹² *Evans v. Davies*, 4 A. & E. 840; *Bamfield v. Tupper*, 7 Exch. 27; *Waters v. Tompkins*, 2 C. M. & R. 723; *Kirk v. Williams*, 24 Fed. 437; *Lyman v. Warner*, 113 Fed. 87, 51 C. C. A. 73; *Bachrach v. Jewish Foster Home*, 185 Fed. 847; *New Paddock-Hawley Co. v. Fayetteville, etc., Lumber Co.*, 207 Fed. 786; *Taylor v. Perry*, 48 Ala. 240; *Petty v. Gacking*, 97 Ark. 217, 133 S. W. 832; *MacMillan v. Clements*, 33 Ind. App. 120, 70 N. E. 997; *Barrett v. Sipp*, 50 Ind. 304, 98 N. E. 310; *Topeka Capital Co. v. Merriam*, 60 Kans. 397, 56 Pac. 757; *Canal Bank v. Bank of Ascension*, 140 La. 465, 73 So. 269; *Fryeburg Parsonage Fund v. Osgood*, 21 Me. 176; *Fisk v. Stewart*, 24 Minn. 97; *Bridgeton v. Jones*, 34 Mo. 471; *First Cong. Soc. v. Miller*, 15 N. H. 520; *In re Clad's Est.*, 214 Pa. St. 141, 63 Atl. 542.

^{12a} *Bennett v. Baird*, 67 Ill. App. 422; *Wenman v. Mohawk Ins. Co.*, 13 Wend. 267, 28 Am. Dec. 464. In Iowa even such a written obligation is held insufficient, owing to the denial in that State of the effect usually given to part payment. *Kleis v. McGrath*, 127 Ia. 459, 103 N. W. 371, 69 L. R. A. 260, 109 Am. St. Rep. 396.

¹³ *New Paddock-Hawley Co. v. Fayetteville, etc., Lumber Co.*, 207 Fed. 786, 792.

¹⁴ See *Suber v. Richards*, 61 S. C. 393, 39 S. E. 540.

¹⁵ *Taylor v. Hollard*, [1902] 1 K. B. 676; *Moffitt v. Carr*, 48 Neb. 403, 67 N. W. 150, 58 Am. St. Rep. 696; *Lefurgey v. Harrington*, 36 Nova Scotia, 88.

¹⁶ *Thomas v. Brewer*, 55 Ia. 227, 229, 7 N. W. 571; *Jacobs v. Calderwood*, 4 La. Ann. 509; *Buffinton v. Chase*, 152 Mass. 534, 25 N. E. 977, 10 L. R. A. 123; *Westinghouse Co. v. Boyle*, 126 Mich. 677, 86 N. W. 136, 86 Am. St. Rep. 570; *Regan v. Williams*, 88 Mo. App. 577; *Moffitt v. Carr*, 48 Neb. 403, 67 N. W. 150, 58 Am. St. Rep. 696.

¹⁷ *Adams v. Holden*, 111 Ia. 54, 82 N. W. 468; *Shanks v. Louthan*, 79 Kans. 363, 99 Pac. 613.

¹⁸ *Holmquist v. Gilbert*, 41 Col. 113, 92 Pac. 232; *Richardson v. Thomas*, 13 Gray, 381, 74 Am. Dec. 636; *Parsons v. Clark*, 59 Mich. 414, 26 N. W. 656; *Whitney v. Chambers*, 17 Neb. 90, 22 N. W. 229, 52 Am. Rep. 398; *Pickett v. Leonard*, 34 N. Y. 175; *Shelby Nat. Bank v. Hamrick*, 162 N. C. 216, 78 S. E. 12; *Marienthal v. Mosler*, 16

bankruptcy¹⁹ of the debtor from the proceeds of property in his hands, or paid on a judgment for interest,²⁰ or paid by a stranger²¹ is insufficient.

§ 176. Partial payment derived from sale of collateral.

Payments derived from the sale of collateral have given rise to some difference of decision. Doubtless if a payment is obtained from collateral by the creditor acting *in invitum*, there is no basis for implying a new promise.²² Nor is the crediting on the indebtedness, without the debtor's authority, the amount of a cross-claim due the latter.²³ If, however, the debtor transfers property to his creditor with directions for its immediate sale, and for the application of the proceeds of the creditor's claim, since it is said that the credit given for the proceeds of the property must be regarded as given with the assent of the debtor it has been held in several cases that the statute will begin to run afresh from the time when credit is given;²⁴ though if the creditor fails for more than

Oh. St. 566; *Kilton v. Providence Tool Co.*, 22 R. I. 605, 620, 48 Atl. 1039; *Benton v. Holland*, 58 Vt. 533, 3 Atl. 322. A contrary decision is *Letson v. Kenyon*, 31 Kans. 301, 1 Pac. 562. And see *Lilley v. Foad*, [1899] 2 Ch. 107, where payment by a receiver was held sufficient to revive the debt.

¹⁹ *American Woolen Co. v. Samuelsohn*, (N. Y. 1919), 123 N. E. 154; *Simpson v. Tootle & Co.*, 42 Okl. 275, 141 Pac. 448.

²⁰ *Morgan v. Rowlands*, L. R. 7 Q. B. 493.

²¹ *Gallagher v. Whalen*, 10 Ky. L. Rep. 458, 9 S. W. 390, 701; *Miser v. Emigh*, 63 Neb. 245, 88 N. W. 479; *Harper v. Fairley*, 53 N. Y. 442; *Union Bank v. Dean*, 154 N. Y. App. Div. 869, 139 N. Y. S. 835. But under the Oregon Statute whatever amounts to part payment, if made before the limitation has expired, though not made with the debtor's assent, revives the debt. *Sheak v. Wilber*, 48 Oreg. 376, 86 Pac. 375.

²² *Nunn v. McKnight*, 79 Ark. 393, 396, 96 S. W. 193; *Jones v. Langhorne*, 19 Col. 206, 34 Pac. 997; *Ferris v. Curtis*, 53 Col. 340, 127 Pac. 236; *Good v. Ehrlich*, 67 Kans. 94, 72 Pac. 545; *Wolford v. Cook*, 71 Minn. 77, 73 N. W. 706, 70 Am. St. Rep. 315; *Atwood v. Lammers*, 97 Minn. 214, 106 N. W. 310; *Fletcher v. Brainerd*, 75 Vt. 300, 306, 55 Atl. 608. See also *Desha Bank & Trust Co. v. Quilling*, 118 Ark. 114, 176 S. W. 132, L. R. A. 1915 E, 794.

²³ *Atchison & Co. v. Atchison Grain Co. (Kan.)*, 70 Pac. 933; *Samuel v. Samuel's Adm.*, 151 Ky. 235, 151 S. W. 676, 42 L. R. A. (N. S.) 1155; *Freeze v. Lockhard*, 87 Mo. App. 102; *Arthur v. Burke*, 83 Wash. 690, 145 Pac. 974. Cf. *McKeon v. Byington*, 70 Conn. 429, 39 Atl. 853; *Lawrence v. Harrington*, 122 N. Y. 408, 25 N. E. 406, where the credit was made with the debtor's authority.

²⁴ *Haven v. Hathaway*, 20 Me. 345; *Porter v. Blood*, 5 Pick. 54; *Taylor v. Foster*, 132 Mass. 30; *Sornberger v.*

a reasonable time to carry out the authority given him, the debtor cannot be regarded as giving such an assent to the transaction as to imply a new promise when the credit is made.²⁵ It would be a more logical position to deny that in any case a renewed right arises at the time payment is collected by the creditor from collateral in his hands, unless at least the debtor at the time of the sale voluntarily authorizes the credit or subsequently voluntarily ratifies it.²⁶ In any other case though it be granted that the debtor originally authorized the collection, a new promise may fairly be implied only at the time when the authority was given. The authority when once given could not subsequently be revoked by the debtor had he wished to do so, and there is nothing from which it can be inferred that at the time the collection was made the debtor still acknowledged the existence of the debt or was willing to pay it.²⁷ Where a third person under a revocable authority is directed to make a payment on behalf of the

Lee, 14 Neb. 193, 15 N. W. 345, 45 Am. Rep. 106; *Rowell v. Lewis' Estate*, 72 Vt. 163, 47 At. 783. See also *McKeon v. Byington*, 70 Conn. 429, 39 Atl. 853; *Latson v. Kenyon*, 31 Kan. 301, 1 Pac. 562. In *Boulder Nat. Bank v. Rowland*, 1 Col. App. 468, it was held that where authority was given by the debtor to a third person, at the time of making a deposit of collateral, to sell the collateral and apply the proceeds to the debt in case of the debtor's default, such sale and payment of proceeds revived the indebtedness.

²⁵ *Good v. Ehrlich*, 67 Kans. 94, 72 Pac. 545; *Harper v. Fairley*, 53 N. Y. 442. Cf. *First Nat. Bank v. King*, 164 N. C. 303, 80 S. E. 251.

²⁶ *Nunn v. McKnight*, 79 Ark. 393, 96 S. W. 193; *Myers v. Muskegon Imp. Co.*, 169 Mich. 689, 135 N. W. 949; *Security Bank v. Finkelstein*, 76 N. Y. Misc. 461, 135 N. Y. S. 640, 160 N. Y. App. Div. 315, 145 N. Y. S. 5. On the other hand, where the debtor makes a voluntary payment, though he derives the means from property held as security for the debt it is clearly revived.

Thus where plaintiff loaned money to defendant on the security of stock and bonds of a corporation, and defendant, as the interest coupons became due, collected them from the company and sent a personal check to the plaintiff for the amount, the Statute of Limitations was tolled. *Carlson v. Dixon*, 155 Wis. 63, 143 N. W. 1064.

²⁷ *Gowan v. Forster*, 3 B. & Ad. 507; *Brown v. Latham*, 58 N. H. 30; *Smith v. Ryan*, 66 N. Y. 352, 23 Am. Rep. 60; *Brooklyn Bank v. Barnaby*, 197 N. Y. 210, 90 N. E. 834, 27 L. R. A. (N. S.) 843. The force of this reasoning is shown when the facts in *Divine v. Miller*, 70 S. Car. 225, 49 S. E. 479, 106 Am. St. Rep. 743, are considered. The creditor acted under instructions from the debtor, but after his death. The Statute was held not arrested. See also cases cited *supra*, n. 18, in which it is held that payments by an assignee under a general assignment by the debtor do not revive the debt. In such cases also the payment when made is made under an authority originally given by the debtor.

debtor, time may well be counted from the making of the payment, not from the giving of authority,²⁸ for the fact that the debtor allowed a revocable agency to continue until payment was made indicates that the payment when made is to be given the effect of a voluntary payment at that time by the debtor. If, however, authority given a third person is irrevocable, as that given to a trustee under a deed of trust, the date of the authority, not of its exercise, is the time from which the statute runs.²⁹ Indeed unless the creditor is a party to the transaction, or the trustee is in effect his agent, the authority given to the trustee can amount to no more than an acknowledgment to an unauthorized third person and will be ineffectual to revive the debt even from the time when the authority was given.³⁰

§ 177. Partial payment need not be made in money.

A payment to revive a debt need not be made in money; since the giving of any property, note or security as a partial payment, warrants the same inference as if payment had been made in cash.³¹ And so does an agreement by the debtor to apply the amount of a cross-claim held by him to the barred indebtedness.³²

²⁸ But see *Marreco v. Richardson*, [1908] 2 K. B. 584. There a check in part payment was given a debtor on May 10, but the creditor agreed not to present it until June 20. He presented it on the latter day and it was paid. The part payment as a revival of the debtor's obligation was held to have been made only on the earlier day.

²⁹ *Ferris v. Curtis*, 53 Col. 340, 127 Pac. 236; *Regan v. Williams*, 185 Mo. 620, 84 S. W. 959, 105 Am. St. Rep. 600. Cf. *First Nat. Bank v. King*, 164 N. C. 303, 80 S. E. 251, 49 L. R. A. (N. S.) 392, where a debtor, to secure his note left collateral with a bank and constituted the cashier his agent on default, to apply the proceeds to the note. A sale and application of proceeds by the cashier, seven years from the date of the note, was held to

amount to a voluntary payment sufficient to interrupt the Statute of Limitations. The dissenting opinion in the case seems the more convincing.

³⁰ See *infra*, § 189.

³¹ *Hart v. Nash*, 2 C. M. & R. 237; *Sibley v. Lumbert*, 30 Me. 253; *Pracht v. McNee*, 40 Kan. 1, 18 Pac. 925; *Wolford v. Cook*, 71 Minn. 77, 73 N. W. 706, 70 Am. St. Rep. 315; *Smith v. Ryan*, 66 N. Y. 352, 23 Am. Rep. 60; *McCarthy Bros. Co. v. Hanskutt*, 29 S. Dak. 535, 137 N. W. 286; *Cuthbertson v. Hill*, 65 Vt. 573, 27 Atl. 71; *Rowell v. Lewis' Est.*, 72 Vt. 163, 47 Atl. 783.

³² *Worthington v. Grimesditch*, 7 Q. B. 479; *McKeon v. Byington*, 70 Conn. 429, 39 Atl. 853; *Vinson v. Palmer*, 45 Fla. 630, 34 So. 276; *State Nat. Bank v. Harris*, 96 N. C. 118, 1 S. E. 459;

§ 178. Application of payments to barred debts.

If a debtor owes several debts to his creditor and when a payment is made gives no direction as to its application, the creditor may apply it as partial payment of a debt barred by the Statute of Limitations; but as it is not a partial payment as such but the new promise implied from it which revives a barred debt, such an application by the creditor without the debtor's direction or assent will not remove the bar of the Statute.³³ Even though all the debts are barred, the application of the payment by the creditor will not remove the bar; for though in such a case a new promise by the debtor may be inferred, it does not identify the debt to which it relates.³⁴ Nor will an appropriation by the law without the debtor's volition revive a debt.³⁵ But, as has been seen, a payment may be so applied by the creditor as to renew all obligations not already barred.³⁶ It seems possible, moreover, for a partial payment to be made with the intent manifested in acts and circumstances if not in words that it shall be applied generally on account of the debtor's total indebtedness, although that may be represented by several notes or due on more than one account. If the part payment, under the circumstances, involves such an acknowledgment of the whole indebtedness,

Eureka &c. Shingle Co. v. Knack, 95 Wash. 339, 163 Pac. 753.

³³ *Mills v. Fowkes*, 5 Bing. (N. C.) 455; *Burn v. Boulton*, 2 C. B. 476; *Nash v. Hodgson*, 6 DeG. M. & G. 474 (*cf. Friend v. Young*, [1897] 2 Ch. 421); *Becker v. Oliver*, 111 Fed. Rep. 672, 49 C. C. A. 533; *Royston v. May*, 71 Ala. 398; *Armistead v. Brooke*, 18 Ark. 521; *McBride v. Noble*, 40 Col. 372, 90 Pac. 1037; *Blake v. Sawyer*, 83 Me. 129, 21 Atl. 834, 12 L. R. A. 712, 23 Am. St. Rep. 762; *Pond v. Williams*, 1 Gray, 630; *Ramsay v. Warner*, 97 Mass. 8; *Anderson v. Nystrom*, 103 Minn. 168, 114 N. W. 742, 12 L. R. A. (N. S.) 1141, 123 Am. St. Rep. 320; *Wilden v. McAllister*, 91 Mo. App. 446, *affd.* 178 Mo. 732, 77 S. W. 730; *Shafer v. Pratt*, 79 N. Y. App. Div. 447, 80 N. Y. S. 109. In a few States, however, it is

held that the barred debt is revived by such an application of payment by the creditor. *Youmans v. Moore*, 11 Ga. App. 66, 74 S. E. 710; *Leach v. Curtin*, 123 N. C. 85, 31 S. E. 269; *Hopper v. Hopper*, 61 S. C. 124, 39 S. E. 366; *Ayer v. Hawkins*, 19 Vt. 26; *Sanborn v. Cole*, 63 Vt. 590, 22 Atl. 716, 14 L. R. A. 208; *Rowell v. Lewis' Est.*, 72 Vt. 163, 47 Atl. 783; compare *Austin v. McClure*, 60 Vt. 453, 15 Atl. 161.

³⁴ *Anderson v. Nystrom*, 103 Minn. 168, 114 N. W. 742, 12 L. R. A. (N. S.) 1141. But see *contra*, *Miller v. Miller*, 169 Mo. App. 432, 155 S. W. 76. The question involved seems identical with that considered, *supra*, § 165.

³⁵ *Anderson v. Baxter*, 4 Oreg. 105.

³⁶ See *supra*, § 174.

all will be revived.³⁷ The balance due on an account stated is one debt, and a payment thereon interrupts the running of the statute as to all items.³⁸

§ 179. Conditional promises.

It has already been said³⁹ that a conditional promise to pay a debt coupled with evidence that the condition has been performed, will revive the debt. It may be said more broadly, "If the admission be conditional, limited or qualified in any way or to any extent, the new promise will have a like quality, and the statute will operate so far as it may in view of the condition, limitation, or qualification. In case there is a condition, the creditor must show that it has been fulfilled or complied with, to entitle himself to the implication of a new promise."⁴⁰ A new promise may be to pay "on request, or at a future time, or on a condition."⁴¹ Instances of conditional and limited promises may be found in the following sections.

As no immediate liability arises from a conditional obligation the statute runs afresh, not from the making of the new

³⁷ *Walker v. Butler*, 6 E. & B. 506; *Pond v. French*, 97 Me. 403, 54 Atl. 920; *Taylor v. Foster*, 132 Mass. 30; *Brafford v. Reed*, 125 N. C. 311, 34 S. E. 443. In *Taylor v. Foster*, *supra*, the court said (at page 33): "But where the identity of the debt sued on with the debt on which the payment is made is established, such payment will take the whole debt out of the statute, whether it is represented by one note or by more than one note. For instance, suppose a debtor owing a man three thousand dollars, evidenced by three notes of one thousand dollars each, says to the creditor, I owe you this three thousand dollars, I cannot pay you the whole debt, but I now pay you fifteen hundred dollars on account of it. This is clearly an acknowledgment of the whole debt, and would take it out of the operation of the statute of limitations, although neither party should at any time make any specific

application of the money paid to either of the promissory notes." Compare the statement in *Pond v. Williams*, 1 Gray, 630, 635, quoted with approval in *Kennedy v. Drake*, 225 Mass. 303, 114 N. E. 310, 312. "To effect" the revival of the barred debt "the payment must be specifically made or directed by the defendant."

³⁸ *Nunn v. McKnight*, 79 Ark. 393, 96 S. W. 193. See also *Pond v. French*, 97 Me. 403, 54 Atl. 920.

³⁹ See *supra*, § 162.

⁴⁰ *Barker v. Heath*, 74 N. H. 270, 272, 67 Atl. 222. See also *Big Diamond Milling Co. v. Chicago &c. Ry. Co.*, (Minn. 1919), 171 N. W. 799; *MacDiarmid v. Steele*, 176 N. Y. App. D. 313, 162 N. Y. S. 263, and cases in § 162 and this section, *passim*.

⁴¹ *Rackham v. Marriott*, 2 H. & N. 196. See to the same effect the passage quoted from *Philips v. Philips*, 3 Hare, 281, 299, *infra*, § 196.

promise but from the time when it was to be performed,—thus on a new promise to pay when the creditor should make demand, only from the time when such demand was made,⁴² and on a promise to pay when the debtor should be able, only from the time of such ability.⁴³

§ 180. When a conditional new promise needs acceptance.

A debtor may make an offer to compromise any claim against him, and a new conditional promise to pay a debt will be such an offer if some performance or promise is requested as the consideration or exchange for the debtor's promise. Such an offer, like any other offer to contract, will require acceptance according to its terms within a reasonable time in order to make it binding.⁴⁴ On the other hand, just as a promise where there is no antecedent debt may be conditional in its terms without requesting a performance of the condition or a counter-promise in return,⁴⁵ so a new promise by a debtor may be conditional in its terms and yet gratuitous, except for the antecedent indebtedness. In determining to which of these two classes a given promise belongs, it is important to consider both the terms of the promise, and all surrounding circumstances.⁴⁶ If the new promise by the debtor, though

⁴² *Rankin v. Anderson*, 24 Ky. L. Rep. 647, 69 S. W. 705. It will be noticed that the happening of this condition is wholly within the power of the creditor, and the decision of the court apparently gives him power to postpone indefinitely the period of limitation. As to this, see *infra*, § 183.

⁴³ *Tebo v. Robinson*, 29 Hun, 243; *Scott v. Thornton*, 104 Tenn. 547, 58 S. W. 236.

⁴⁴ *Philp v. Hicks*, (Miss. 1917), 73 So. 610.

⁴⁵ See *supra*, § 112.

⁴⁶ In *Woolwine v. Storrs*, 148 Cal. 7, 82 Pac. 434, 113 Am. St. Rep. 183, the debtor requested the creditor for an extension of time for one year, and accompanied the request with a written promise by the guarantor to pay the note at the expiration of the year.

It was held that this promise of the guarantor's was conditional upon the acceptance by the creditor of the proposition for a year's extension. So a letter from the debtor stating in substance that he is unable to pay the note in question, but offering to buy it if the holder would sell it for some small sum which the debtor could afford to pay is merely an offer, and if unaccepted does not extend the debtor's liability. *Connecticut Trust Co. v. Wead*, 172 N. Y. 497, 65 N. E. 261, 92 Am. St. Rep. 756. Somewhat similar in its facts is *Throop v. Russel*, 145 Mich. 482, 108 N. W. 1013. In *Gray v. Day*, 109 Me. 492, 84 Atl. 1073, 43 L. R. A. (N. S.) 535, a debtor replying to a request for part payment to keep the creditor's claim good, replied "I don't see how I can pay anything, but I will

conditional, is not an offer there seems no reason on principle why an acceptance should be required.⁴⁷ Nothing is asked from the creditor. Like a new absolute promise, the new conditional promise is a pure gratuity, and the fact that it is a less extensive gratuity than it would have been if unconditional seems no reason for denying it effect accordingly to its terms.⁴⁸

§ 181. New promise to pay a debt in part or in instalments.

A promise to pay a specified part of a debt or to pay the debt in instalments or without interest or in any other way than that for which the debtor at the time stands bound, if made upon condition that the creditor shall agree to accept the payment in satisfaction of his claim is an offer to compromise, and by its terms conditional on that agreement, that is, it is conditional on acceptance by the creditor. Though it may indicate that the debtor acknowledges a debt (an offer to compromise will not necessarily admit even this) no new promise to pay can be inferred except on the terms stated. The promise therefore can be binding only if the condition is complied with. If the offer is unaccepted the debtor's liability is not extended or removed.⁴⁹ If, however, the debtor merely

give a new note which will amount to the same thing you mentioned. Will you let me know if that will do?" The creditor refused to take a new note unless at a higher rate of interest. The statute was held not tolled by the defendant's letter. Other offers to compromise held to have no effect unless accepted by the creditor may be found in *Buckmaster v. Russell*, 10 C. B. (N. S.) 745 (an offer to pay in annual instalments if creditor agreed); *Cawley v. Furnell*, 12 C. B. 291; *Andrew v. Kennedy*, 4 Okl. 625, 46 Pac. 485.

⁴⁷ See further, *supra*, §§ 157, 158.

⁴⁸ *Big Diamond Milling Co. v. Chicago &c. Ry. Co.*, (Minn. 1919), 171 N. W. 799.

⁴⁹ *Cawley v. Furnell*, 12 C. B. 291; *Buckmaster v. Russell*, 10 C. B. (N. S.) 745; *Bell v. Morrison*, 1 Pet. 351, 7

L. Ed. 174; *Edwards v. Bates County*, 55 Fed. 436; *Duffie v. Phillips*, 31 Ala. 571; *Pearson v. Darrington*, 32 Ala. 227, 258; *Brenneman v. Edwards*, 55 Iowa, 374, 7 N. W. 621; *Marcum's Adm. v. Terry*, 146 Ky. 145, 142 S. W. 209, 37 L. R. A. (N. S.) 885; *Lackey v. MacMurdo*, 9 La. Ann. 15 (cf. *Kohn v. Davidson*, 23 La. Ann. 467); *Smith v. Eastman*, 3 Cush. 355; *Weston v. Hodgkins*, 136 Mass. 326; *Morris v. Hazlehurst*, 30 Md. 362; *Throop v. Russell*, 145 Mich. 482, 108 N. W. 1013; *Chambers v. Rubey*, 47 Mo. 99, 9 Am. Rep. 318; *Atwood v. Coburn*, 4 N. H. 315; *Weare v. Chase*, 58 N. H. 225; *Conn. Trust Co. v. Wead*, 172 N. Y. 497, 65 N. E. 261; *Hartley v. Requa*, 17 N. Y. Misc. 74, 39 N. Y. S. 846; *Heaton v. Leonard*, 69 Hun, 423, 23 N. Y. S. 469; *Matter of Narganes*,

promises to pay a specified part of his indebtedness, implying that he will pay no more but making no request that the payment shall be accepted as full satisfaction, or that any other agreement or performance be made by the creditor, the promise is unconditional and no acceptance by the creditor is necessary.⁵⁰ Again, the debtor's promise to pay a barred debt on a fair construction may mean simply that the debtor will pay part at once without any implication that he will not pay more ultimately. Such a promise, unless the facts warrant the positive inference that the debtor acknowledges the balance as a continuing debt, will not have the effect of reviving the whole debt.⁵¹ If such an inference is justified the whole debt will be revived, though the debtor's liability for the remainder should not arise until the

161 N. Y. App. D. 563, 565, 146 N. Y. S. 922, *affd.* 213 N. Y. 659, 700, 107 N. E. 1082, 108 N. E. 1101; *Andrew v. Kennedy*, 4 Okla. 625, 46 Pac. 485; *Wolfe v. Fleming*, 1 Ired. 290; *Gest v. Heiskell*, 5 Rawle, 134; *Farley v. Kustenbader*, 3 Pa. St. 418; *Reynold Iron Works v. Mitchell* (Tex. Civ. App.), 27 S. W. 508; *Goldstein v. Gans* (Tex. Civ. App.), 32 S. W. 185; *Aldrich v. Morse*, 28 Vt. 642; *Slack v. Norwich*, 32 Vt. 818. In jurisdictions where it is not requisite that an admission of indebtedness shall imply a new promise (see *supra*, § 167), in order to make it effective, an offer to compromise coupled with an admission of indebtedness is sufficient. *Pracht v. McNee*, 40 Kans. 1, 18 Pac. 925; *Disney v. Healey*, 73 Kans. 326, 85 Pac. 287. (*Cf.* *Brenneman v. Edwards*, 55 Iowa, 374, 7 N. W. 621; *Walker v. Cruikshank*, 23 La. Ann. 252; *Graham v. Keys*, 29 Pa. 189.) See also *Austin v. Bostwick*, 9 Conn. 496, 25 Am. Dec. 42.

⁵⁰ In *Strong v. Andros*, 34 Dist. Col. App. 278, the debtor promised to pay small monthly instalments until the debt should be liquidated. This was held to prevent the bar of the statute. In *Foster v. Smith*, 52 Conn. 449, the court said: "A promise to pay may be

absolute although it be to pay on time or in instalments." So in *McDonald v. Grey*, 29 Tex. 80, the court said: "An unconditional acknowledgment of a part of the debt, although coupled with a denial of liability for the remainder and a refusal to pay it, if not made as a qualification of the admission, will take so much of the debt as is acknowledged out of the statute. The law will imply a promise to pay the amount admitted to be due. It is not incumbent upon the creditor to show that he has admitted the validity of the objections of the debtor to that part of the debt which he repudiates, or to show that he had relinquished his claim to it." But see *Weare v. Chase*, 58 N. H. 225. In North Carolina it is held that a new promise to be effectual must be to pay the whole amount of the debt. *Greenleaf v. Norfolk Southern R. Co.*, 91 N. C. 33; *Wells v. Hill*, 118 N. C. 900, 24 S. E. 771.

⁵¹ In *Lambert v. Doyle*, 117 Ga. 81, 43 S. E. 416, where the debtor wrote to the creditor "It will be impossible to pay you anything until after the first of June. I will send you a check for something then. Hope to be able to clear your account quick" the debt was held not revived.

lapse of a reasonable time. If an unqualified acknowledgment is accompanied by a request to the creditor to abate a portion of the claim, this request will not prevent the revival of the debt;⁵² nor will an inquiry as to what the debtor will take in full payment.⁵³ A promise to pay a debt in instalments involves the same question as a promise to pay in part so far as the question of acceptance is concerned. If acceptance is made or is unnecessary the debtor becomes liable according to the terms of his promise, but only on those terms, even though some of the instalments are paid.⁵⁴

§ 182. A new promise to pay when a debtor is able, or on other conditions.

The effect of a promise to pay when able is of legal importance not simply with reference to debts barred by the Statute of Limitations, but in other cases. Such promises when supported by consideration are generally, though not universally, upheld and enforced according to their natural meaning.⁵⁵ If the propriety of treating the existence of a barred debt as sufficient support for a promise is admitted, there seems no reason why such promises should not similarly be enforced when the Statute of Limitations is involved. That is, the new promise should bind the promisor to pay on the condition, and only on the condition that he becomes able to do so. This is the generally accepted rule.⁵⁶ So a promise to pay when

⁵² *Will v. Marker*, 122 Iowa, 627, 98 N. W. 487.

⁵³ *Rumsey v. Settle's Est.*, 120 Mich. 372, 79 N. W. 579; *Crandall v. Moston*, 42 N. Y. App. Div. 629, 59 N. Y. S. 146.

⁵⁴ *Earle v. Oliver*, 2 Exch. 71, 90; *Gillingham v. Brown*, 178 Mass. 417, 60 N. E. 122, 55 L. R. A. 320. See also *Strong v. Andros*, 34 App. D. C. 278; *Galvin v. O'Gorman*, 40 Mont. 391, 106 Pac. 887; *Equitable Trust Co. v. MacLaire*, 77 N. Y. Misc. 116, 135 N. Y. S. 1022; and *infra* § 196.

⁵⁵ See *infra*, § 804.

⁵⁶ *Davies v. Smith*, 4 Esp. 36; *Scales v. Jacob*, 3 Bing. 638; *Tanner v. Smart*,

6 B. & C. 603; *Edmunds v. Downes*, 2 C. & M. 459; *Lusher v. Hassard*, 20 T. L. Rep. 31, 563; *Richardson v. Bricker*, 7 Col. 58, 1 Pac. 433, 49 Am. Rep. 344; *Sedgwick v. Gerding*, 55 Ga. 264; *Boone v. A'Hern*, 98 Ill. App. 610; *Desell v. Thayer*, 2 Kans. App. 587, 44 Pac. 686; *Chism v. Barnes*, 104 Ky. 310, 317, 47 S. W. 232, 875; *Mattocks v. Chadwick*, 71 Me. 313; *Bidwell v. Rogers*, 10 Allen, 438; *Gill v. Gibson*, 225 Mass. 226, 114 N. E. 198; *Halladay v. Weeks*, 127 Mich. 363, 86 N. W. 799, 89 Am. St. Rep. 478; *Wilcox v. Williams*, 5 Nev. 206; *Barker v. Heath*, 74 N. H. 270, 67 Atl. 222; *Parker v. Butterworth*, 46 N. J. L. 244, 50 Am.

a certain estate is settled,⁵⁷ or a promise to pay if on looking the matter up in his books the promisor found that it had not already been paid,⁵⁸ is given effect according to its terms. Moreover, since the creditor first acquires a new right of action when the time for performance of the debtor's promise arrives, it follows that the debt is revived for a new statutory period computed from the time when the promise should have been performed, not from the time when it was made.⁵⁹

§ 183. Promises not to plead the Statute of Limitations.

Either prior to the expiration of the statutory period or subsequently, a debtor may promise not to plead the Statute of Limitations. He may make such a promise for sufficient consideration, or he may make it for no consideration. If the promise is made for sufficient consideration the only questions that can arise are whether such a promise is altogether opposed to public policy, and, if not, for how long a period the promise is effective. There seems no reason to distinguish in this respect between promises made at the time of the creation of the debt⁶⁰ and promises made subsequently, but

Rep. 407; *Tompkins v. Brown*, 1 Denio, 247; *Tebo v. Robinson*, 29 Hun, 243; *Scott v. Thornton*, 104 Tenn. 547, 58 S. W. 236. The North Carolina court apparently does not recognize the validity of conditional promises to pay even though the condition has happened. *Cooper v. Jones*, 128 N. C. 40, 38 S. E. 28. See also *Simrell v. Miller*, 169 Pa. St. 326, 32 Atl. 548. A few decisions holding that such a promise is in effect an absolute one, creating an immediate liability can be supported only on the assumption not now generally permissible that the mere admission of indebtedness revives it. *Horner v. Starkey*, 27 Ill. 13 (see *Walker v. Freeman*, 209 Ill. 17, 70 N. E. 595, and cases cited); *Norton v. Shepard*, 48 Conn. 141, 40 Am. Rep. 157; *First Congl. Society v. Miller*, 15 N. H. 520 (overruled in *Barker v. Heath*, 74 N. H. 270, 67 Atl. 222); *Cummings v. Gossett*, 19 Vt. 310. In *Boynton v. Moul-*

ton, 159 Mass. 248, 34 N. E. 361, the defendant promised to pay on a certain barred claim "such amount as I can." It was held this was a promise merely to pay what the defendant could pay on the particular day when the promise was made, and, it being found as a fact that on that day he could pay nothing, the plaintiff was held entitled to recover nothing.

⁵⁷ *Francis v. Rycroft*, 148 N. Y. App. Div. 65, 132 N. Y. S. 14.

⁵⁸ *Thyng v. Hussey*, 76 N. H. 572, 79 Atl. 690.

⁵⁹ See *Irving v. Veitch*, 3 M. & W. 90; *Re Stock*, 3 Manson, 324; *Matter of Nargones*, 161 N. Y. App. Div. 563, 565, 146 N. Y. S. 922, *affd.* 213 N. Y. 659, 700, 107 N. E. 1082, 108 N. E. 1101; *M'Donnell v. Broderick*, [1896] 2 I. R. 136.

⁶⁰ Such were the promises in *Quick v. Corlies*, 39 N. J. L. 11; *State Trust Co. v. Sheldon*, 68 Vt. 259, 35 Atl. 177.

for good consideration.⁶¹ To some courts it has seemed that as the Statute of Limitations is founded in part at least on principles of public policy, and not simply as a protection to the debtor, the period of limitation prescribed by statute cannot be changed by contract or action in reliance on a promise though an agreement to this end subsequent to the creation of the debt if in writing and if fairly to be construed as including an admission of the debt, might have the same effect as a new promise or acknowledgment.⁶² But more commonly such agreements have been held valid contracts.⁶³ If such a contract is valid and ordinary principles are applicable "the Statute of Limitations would not begin to run upon [it] so long as it remained unbroken,"⁶⁴ and since if the creditor forbore to sue indefinitely, the contract not to plead the Statute would never be broken, in effect the creditor would require a perpetual cause of action. It is not likely, however, that most courts would accept this logical consequence of the premise, and thereby allow the creditor a perpetual right. In California, indeed, it has been said that the promise not to plead the Statute is binding so long as the creditor acts upon it,⁶⁵ but more commonly the contract is treated as limited by the same term as it would be if merely a new promise to pay the debt.⁶⁶

See also *Newell v. Clark*, 73 N. H. 289, 61 Atl. 555.

⁶¹ See cases cited in the following notes in this section.

⁶² *Green v. Coos Bay Wagon Road Co.*, 23 Fed. Rep. 67, 70; *Moxley v. Ragan*, 10 Bush, 156, 159, 19 Am. Rep. 61; *Wright v. Gardner*, 98 Ky. 454, 33 S. W. 622, 35 S. W. 1116; *Carraby v. Navarre*, 3 La. 362; *Crane v. French*, 38 Miss. 503; *Shapley v. Abbott*, 42 N. Y. 443, 452, 1 Am. Rep. 548; *Mutual L. Ins. Co. v. United States Hotel Co.*, 82 N. Y. Misc. 632, 644, 144 N. Y. S. 476; *Nunn v. Edmiston*, 9 Tex. Civ. App. 562, 29 S. W. 1115. See also *Hodgdon v. Chase*, 29 Me. 47, 32 Me. 169.

⁶³ *Waters v. Thanet*, 2 Q. B. 757; *Randon v. Toby*, 11 How. 493, 13

L. Ed. 784; *Wells, Fargo & Co. v. Enright*, 127 Cal. 669, 60 Pac. 439; *State Trust Co. v. Cochran*, 130 Cal. 245, 62 Pac. 466, 600; *Mann v. Cooper*, 2 Dist. Col. App. 226; *Holman v. Omaha, etc., Ry. Bridge Co.*, 117 Ia. 268, 90 N. W. 833, 62 L. R. A. 395, 94 Am. St. Rep. 293; *Webber v. Williams College*, 23 Pick. 302; *Bridges v. Stephens*, 132 Mo. 524, 34 S. W. 555; *Quick v. Corlies*, 39 N. J. L. 11; *State Trust Co. v. Sheldon*, 68 Vt. 259, 35 Atl. 177.

⁶⁴ *Kellogg v. Dickinson*, 147 Mass. 432, 435, 18 N. E. 223; 1 L. R. A. 346.

⁶⁵ *State Trust Co. v. Cochran*, 130 Cal. 245, 253, 62 Pac. 466, 600. See also *Holman v. Omaha, etc., Ry. & Bridge Co.*, 117 Ia. 268, 90 N. W. 833, 62 L. R. A. 395, 94 Am. St. Rep. 293.

⁶⁶ *Waters v. Thanet*, 2 Q. B. 757;

§ 184. Promises without consideration not to plead the Statute of Limitations.

A promise not to plead the statute will generally on a fair construction imply a promise to pay the debt. If such a promise is fairly to be implied, the debt will be revived to the same extent as if there had been an express acknowledgment or new promise in terms to pay it.⁶⁷ It is possible, however, for a debtor to make a promise which fairly construed means merely that the debtor will not rely on the defence of the Statute of Limitations, but may take advantage of any other defence open to him. It is doubtful if such a promise is binding without either consideration,⁶⁸ or action by the promisee in reliance on the promise.⁶⁹ The exceptional doctrine which allows the enforcement of promises based on antecedent debts must, it would seem, be confined to promises to pay the debts in whole or in part.⁷⁰ Where the promise not to plead the statute is made prior to the expiration of the statutory period, and the creditor relying on the promise refrains from bringing action, some cases hold the debtor estopped to plead the statute.⁷¹ It may

Cameron v. Cameron, 95 Ala. 344, 10 So. 506; *Crane v. French*, 38 Miss. 503; *Bowmar v. Peine*, 64 Miss. 99, 8 So. 166; *Newell v. Clark*, 73 N. H. 289, 61 Atl. 555; *Joyner v. Massey*, 97 N. C. 148, 1 S. E. 702; *Cecil v. Henderson*, 121 N. C. 244, 28 S. E. 481. *McIntosh v. Condron*, 20 Pa. Sup. 118. Under this construction a promise not to plead the Statute made as part of the original transaction would not extend the obligation beyond the period within which it would have been enforceable had there been no promise to waive the Statute. *Newell v. Clark*, 73 N. H. 289, 61 Atl. 555. See also *Mutual L. I. Co. v. United States Hotel Co.*, 82 N. Y. Misc. 632, 144 N. Y. S. 476. Therefore cases like *Quick v. Corlies*, 39 N. J. L. 11, and *State Trust Co. v. Sheldon*, 68 Vt. 259, 35 Atl. 177, which allow the creditor to sue after the lapse of the original statutory period are opposed to the decisions previously cited.

⁶⁷ *Gardner v. M'Mahon*, 3 Q. B. 561; *Trask v. Weeks*, 81 Me. 325, 17 Atl. 162; *Bowmar v. Peine*, 64 Miss. 99, 8 So. 166; *Shapley v. Abbott*, 42 N. Y. 443, 446, 1 Am. Rep. 548; *Lowry v. Dubose*, 2 Bailey (S. C.), 425; *Gardenhire v. Rogers* (Tenn. Ch. App.), 60 S. W. 616; *Jordan v. Jordan*, 85 Tenn. 561, 3 S. W. 896; *Burton v. Stevens*, 24 Vt. 131, 58 Am. Dec. 153; *Stearns v. Stearns' Adm.*, 32 Vt. 678.

⁶⁸ *Mann v. Cooper*, 2 D. C. App. 226, 238; *Warren v. Walker*, 23 Me. 453; *Stockett v. Sasscer*, 8 Md. 374; *Marseilles v. Kenton's Exec.*, 17 Pa. 238, 245. See also *Woodham v. Hollis*, 3 L. J. K. B. (N. S.) 70; *Alexander v. Muse*, 112 Tenn. 233, 79 S. W. 117. But see *State, Trust Co. v. Cochran*, 130 Cal. 245, 251, 62 Pac. 466, 600.

⁶⁹ See *supra*, § 139.

⁷⁰ See *supra*, § 143.

⁷¹ See *supra*, § 139.

seem at first sight that there is no greater reason for applying the doctrine of estoppel in such a case than in any other case where a promise is made without consideration given or requested, but with the knowledge or expectation that the promisee will change his position on the faith of the promise;⁷² but there is much authority to indicate that though original contractual rights cannot be created by means of such a promissory estoppel, defences may be thus effectively waived or surrendered.⁷³

§ 185. Terms on which a new promise revives a debt.

If the new promise whether express, or implied from an acknowledgment, is itself the cause of action, the indebtedness should be extended by such a promise for the period allowed by law for the enforcement of simple contracts, and such is believed to be the proper rule, unless the natural construction of a statute governing the matter leads to a different result.⁷⁴ Largely because of the construction put upon particular statutes, there are decisions which hold that the new promise operates to set aside the defence of the Statute, and to allow the enforcement of the claim during a new period equal to that allowed by law for the enforcement of the original indebtedness. Under this view, if the Statute allows ten years for the enforcement of a note, a new promise starts a new period of ten years, although the period allowed for the enforcement of simple contract obligations is shorter.⁷⁵ A somewhat analogous question is whether the terms of the

⁷² See *supra*, § 139.

⁷³ See *infra*, § 689.

⁷⁴ *McCormick v. Brown*, 36 Cal. 180, 95 Am. Dec. 170; *Boukofsky v. Powers*, 1 Utah, 333; *Gruenberg v. Buhring*, 5 Utah, 414, 16 Pac. 486.

⁷⁵ *Frisbee v. Seaman*, 49 Iowa, 95; *Bayliss v. Street*, 51 Iowa, 627, 2 N. W. 437; *Brisbin v. Farmer*, 16 Minn. 215, 219; *Gailer v. Grinnel*, 2 Aiken, 349 (judgment); *Bradley v. Briggs*, 22 Vt. 95 (judgment). This result seems to have been reached without discussion in *Abner v. York*, 19 Ky. L. Rep. 643,

41 S. W. 309; *Waltemar v. Schnick's Est.*, 102 Mo. App. 133, 76 S. W. 1053; *McSween v. Windham*, 104 S. Car. 508, 89 S. E. 500. In *Enright v. Griffith*, (Wis. 1919), 172 N. W. 156, a husband had made part payment to his wife on a note he had given her before marriage. The court held that the implied promise did not create a new contract between husband and wife on which under the local statute time would not run, but merely extended the statutory period on the original debt.

old obligation are revived; as, for instance, the rate of interest fixed in the original obligation. It has been held that by implication the new promise adopts the terms of the old;⁷⁶ but if the new promise should state a different rate, it would be controlling.⁷⁷ A mere acknowledgment under seal of a simple contract debt will not operate as a new sealed promise, and will at most revive the debt for the statutory period applicable to simple contracts.⁷⁸

§ 186. A new promise cannot revive liability in tort.

As the remedy of assumpsit was extended to cover cases where originally debt would have been the appropriate remedy,⁷⁹ and as no attempt was made to extend the remedy of assumpsit to promises express or implied to pay for rights of action in tort, except on the theory of waiver of tort, it is natural that where the Statute of Limitations was in question the same line should have been drawn. Just as a promise to pay for a tort would not have been regarded in the seventeenth century as sufficient to enable the plaintiff to get redress in assumpsit, so later if the Statute of Limitations had barred an action for a tort, the English court denied effect to the promise.⁸⁰ And the same doctrine has been consistently followed in the United States.⁽⁸¹⁾ If, however, a tortfeasor has become liable on principles of quasi-contract to pay for a benefit which he has tortiously acquired, a new promise may revive his liability on this quasi-contractual debt, which might have been enforced at common-law in an action of indebitatus

⁷⁶ *Buckingham v. Orr*, 6 Col. 587; *Sennott v. Horner*, 30 Ill. 429. See also *Abner v. York*, 19 Ky. L. Rep. 643, 41 S. W. 309; *Mowry v. Saunders*, 33 R. I. 45, 80 Atl. 421; *Suber v. Richards*, 61 S. C. 393, 39 S. E. 540.

⁷⁷ See *supra*, §§ 181, 182.

⁷⁸ *Harding v. Covell*, 217 Mass. 120, 104 N. E. 452.

⁷⁹ See *supra*, § 143.

⁸⁰ This was so held in *Hurst v. Parker*, 1 B. & Ald. 92. See also *Tanner v. Smart*, 6 B. & C. 603, 605; *Gibbons v. McCasland*, 1 B. & Ald. 690; *Short v. McCarthy*, 3 B. & Ald. 626.

⁸¹ *Goodwyn v. Goodwyn*, 16 Ga. 114; *Nelson v. Petterson*, 229 Ill. 240, 82 N. E. 229; *Peterson v. Breitag*, 88 Iowa, 418, 55 N. W. 86; *Holtham v. Detroit*, 136 Mich. 17, 98 N. W. 754; *Galligher v. Hollingsworth*, 3 H. & McH. 122; *Brand v. Longstreet*, 1 South (4 N. J. L.), 325, 328; *Oothout v. Thompson*, 20 Johns. 277; *Reilly v. Sabater*, 26 N. Y. Civ. Proc. Rep. 34, 43 N. Y. S. 383; *Armstrong v. Levan*, 109 Pa. 177, 1 Atl. 204; *Avant v. Sweet*, 1 Brev. 228; *Ott v. Whitworth*, 8 Humph. 494.

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assumpsit.⁸² It has been held also that a new promise made before the Statute has run on a liability in tort, may estop the defendant to plead the Statute when subsequently sued for the tort, if the plaintiff relying on the promise has delayed in bringing his action until after the Statute of Limitations has run,⁸³ but there are decisions opposed in principle, which hold that a new promise to pay a debt, ineffectual as a promise, cannot be effective as an estoppel.⁸⁴ The propriety of treating such a new promise as enforceable for a new statutory period according to its terms must depend upon whether such a promissory estoppel as exists in the case is to be generally accepted as a substitute for consideration or at least to support any promise to surrender a right.⁸⁵ But on well-settled principles of waiver⁸⁶ the defendant should not be allowed to assert his defence until the plaintiff has had a reasonable time to sue after the promises or representations of the defendant have ceased to justify delay. On this view a new promise to satisfy a liability in tort would justify a reasonable prolongation of the plaintiff's right, but not like a new promise to pay a debt, for the whole of a new statutory period.⁸⁷

⁸² *Hony v. Hony*, 1 Sim. & Stu. 568; *Moses v. Taylor*, 6 Mackey (D. C.), 255. These cases involved the question of liability on new promises to pay the proceeds of converted goods.

⁸³ *Holman v. Omaha, etc., Ry. & Bridge Co.*, 117 Iowa, 268, 90 N. W. 833, 62 L. R. A. 395, 94 Am. St. Rep. 293; *Renackowsky v. Board of Water Commissioners*, 122 Mich. 613, 81 N. W. 581; *Armstrong v. Levan*, 109 Pa. 177, 1 Atl. 204, and see *supra*, § 139.

⁸⁴ *Green v. Coos Bay Wagon Road Co.*, 23 Fed. 67; *Mann v. Cooper*, 2 D. C. App. 226, 238; *Langdon v. Doud*, 10 Allen, 433; *Shapley v. Abbott*, 42 N. Y. 443, 1 Am. Rep. 548.

⁸⁵ See *supra*, § 139.

⁸⁶ See *infra*, §§ 679, 689.

⁸⁷ In *Ennis v. Pullman Palace-Car Co.*, 165 Ill. 161, 46 N. E. 439, the court said:—"Where the parties expressly agree together to suspend legal reme-

dies for the purpose of making inquiry into the merits of a disputed claim, or for the purpose of effecting an adjustment thereof, or in order to await the result of negotiations in reference thereto, advantage should not be taken of the Statute of Limitations in respect to the time employed for such purpose; but a party should not be allowed to trust too long to the anticipated outcome of such proceedings and until his right to legal remedies has been lost by lapse of time. *East India Co. v. Paul*, 7 Moore's Priv. Counc. Cas. 85; *Gooden v. Amoskeag Fire Insurance Co.*, 20 N. H. 73; *Amy v. Watertown*, 130 U. S. 320, 32 L. Ed. 953, 9 Sup. Ct. 537; *Randon v. Toby*, 11 How. 493, 13 L. Ed. 784; *Gaylord v. VanLoan*, 15 Wend. 308; *Utica Ins. Co. v. Bloodgood*, 4 Wend. 652; *Shapley v. Abbott*, 42 N. Y. 443, 1 Am. Rep. 548; *Crane v. French*, 38 Miss. 503."

§ 187. Whether a new promise can revive a liability on a specialty.

The early law never went so far as to hold that a subsequent promise to perform an obligation under seal could be enforced in the action of *assumpsit*. Even if the sealed instrument bound the maker to pay a liquidated sum of money, the remedy was solely on the bond. Accordingly if the early law is logically followed effect will be denied to a new promise to pay a bond debt. This seems to have been the law of England,⁸⁸ until express statutory provision was made for reviving barred specialties by a new promise in writing;⁸⁹ and in the United States there is authority to the same effect.⁹⁰ Some decisions, however, allow action on such a promise,⁹¹ or upon the barred bond, treating the new promise as a rebuttal of a defence based on the Statute;⁹² and similarly an admission,⁹³ or part payment,⁹⁴ has been held effective. If the effect of a seal at common law is done away with by statute, the reason for making a distinction between a new promise to pay a bond debt and a simple contract debt ceases. The same reasoning that is applicable to new promises to pay bond debts is also applicable to new promises to pay judgment debts. Such new promises are generally ineffectual;⁹⁵ but the contrary has also been held;⁹⁶ and in some jurisdictions it is ex-

⁸⁸ *Tanner v. Smart*, 6 B. & C. 603, 605.

⁸⁹ 3 and 4 Wm. IV, c. 42, Sec. 5. *Moodie v. Bannister*, 4 Drewry, 432.

⁹⁰ *Crawford v. Childress*, 1 Ala. 482; *Toothaker v. Boulder*, 13 Colo. 219, 22 Pac. 468.

⁹¹ *Young v. Mackall*, 3 Md. Ch. 398; *Felty v. Young*, 18 Md. 163; *St Mark's Church v. Miller*, 99 Md. 23, 57 Atl. 644. (The new promise was held effective for six years.)

⁹² *Carll v. Hart*, 15 Barb. 565; *Gailer v. Grinnel*, 2 Aiken, 349.

⁹³ *Tillett v. Commonwealth*, 9 B. Mon. 438. But in Maryland nothing less than an express promise, made after the statute has barred the remedy on the bond, is effective. *Brooks v. Preston*, 106 Md. 693, 706, 68 Atl. 294.

⁹⁴ *Bailey v. Butler*, 138 Ala. 153, 35 So. 111; *Armistead v. Brooke*, 18 Ark. 521; *Craig v. Callaway County Court*, 12 Mo. 94; *Hartman v. Sharp*, 51 Mo. 29; *Moore v. Goodwin*, 109 N. C. 218, 13 S. E. 772; *Moore v. Beaman*, 111 N. C. 328, 16 S. E. 177.

⁹⁵ See *Tanner v. Smart*, 6 B. & C. 603, 605; *Harper v. Daniels*, 211 Fed. 57, 129 C. C. A. 242; *Niblack v. Goodman*, 67 Ind. 174; *Brooks v. Preston*, 106 Md. 693, 68 Atl. 294; *Berkson v. Cox*, 73 Miss. 339, 18 So. 934, 55 Am. St. Rep. 539; *Taylor v. Spivey*, 11 Ired. 427; *Hughes v. Boone*, 114 N. C. 54, 19 S. E. 63.

⁹⁶ *Carshore v. Huyck*, 6 Barb. 583; *Boukofsky v. Powers*, 1 Utah, 333; *Olcott v. Scales*, 3 Vt. 173, 21 Am. Dec. 585.

pressly provided by Statute that the new promise shall be effectual.⁹⁷

§ 188. Whether a new promise can revive an unliquidated contractual obligation.

It is frequently said that a new promise can revive a right of action in assumpsit, without distinguishing between *indebitatus assumpsit* on the one hand and special assumpsit to recover damages on the other;⁹⁸ but the analogy on which the right to enforce a new promise to pay a barred debt must be rested⁹⁹ would seem to require the existence of a previous debt as distinguished from a liability in damages for breach of a promise to do something other than make payment of money; and this view finds support in the decisions.¹ The common-law recognized debts for chattels² and there seems, therefore, no reason why such debts should not be revived in the same way as debts for money.³ Though it is only debts which can be revived by new promises, the debt need not be liquidated.⁴ A new promise to pay such a debt, whatever its amount may be found to be, is generally held sufficient if the obligation

⁹⁷ *Naugler v. Jenkins*, 32 Nova Scotia, 333.

⁹⁸ This was stated in *Tanner v. Smart*, 6 B. & C. 603, 605; *A'Court v. Cross*, 3 Bing. 329, 331; *Goodwyn v. Goodwyn*, 16 Ga. 114; *Rice v. Wilder*, 4 N. H. 336; *Exeter Bank v. Sullivan*, 6 N. H. 124.

⁹⁹ See *supra*, § 160.

¹ *Boydell v. Drummond*, 2 Camp. * 157; *Whitehead v. Howard*, 2 B. & B. 372; *Wetzell v. Bussard*, 11 Wheat. 309; *Osment v. Mastin*, 23 Vict. L. Rep. 359. But in *Stroud v. Commissioners*, 157 Ill. App. 427, a new promise to fulfil an obligation to repair a bridge was held to toll the statute, and in *Wade v. Barlow*, 99 Miss. 33, 54 So. 662, a covenant of warranty was held supported by a previous similar warranty, in renewal of which it was given.

² See *supra*, § 11.

³ In *Clapp v. Ingersol*, 11 Me. 83,

notes payable in lumber were revived by partial delivery of the lumber.

⁴ Though in the action of debt it was requisite that the claim should be liquidated (see *supra*, § 11), in substance the rights enforced under counts on *quantum meruit* and *quantum valebat* (which were permitted about the beginning of the seventeenth century) were analogous to liquidated claims in debt; and a plaintiff was also soon allowed to recover, under an *indebitatus* count which alleged a debt of a specific amount, any lesser sum which might be due to him even though that sum were unliquidated. The plaintiff declared that the defendant was indebted to him in a stated sum large enough to include any possible recovery, "and being indebted, promised to pay the sum." He was then allowed to recover whatever unliquidated amount to which he could prove himself entitled. 2 Wm. Saunders, 122 a, notes (2), (3).

of which the promisor speaks is clearly identified.⁵ But in a few jurisdictions, however indefensible the distinction may be, it is said that the amount of the indebtedness must be defined by the new promise either in terms or by reference to some paper which either states the amount or furnishes data for its computation; so that it shall not be necessary to have the amount due determined by a jury.⁶ Whether all the jurisdictions which state this as a requirement would literally and uniformly enforce it where the indebtedness though not fixed in amount was clearly identified and the promise to pay was positive may be doubted.

§ 189. To whom a new promise must be made.

It is generally held that a new promise to be effective must be made to the creditor himself or to his authorized agent.⁷

⁵ *Colledge v. Horn*, 3 Bing. 119; *Gardner v. M'Mahon*, 3 Q. B. 561; *Lechmere v. Fletcher*, 1 C. & M. 623; *Dickenson v. Hatfield*, 5 C. & P. 46; *Chealyn v. Dalby*, 4 Y. & C. 238; *Sidwell v. Mason*, 2 H. & N. 306; *Conway's Ex. v. Reyburn's Ex.*, 22 Ark. 290; *Cook v. Martin*, 29 Conn. 63; *Schmidt v. Pfau*, 114 Ill. 494, 2 N. E. 522; *O'Hara v. Murphy*, 196 Ill. 599, 63 N. E. 1081; *Neish v. Gannon*, 198 Ill. 219, 64 N. E. 1000; *Dinsmore v. Dinsmore*, 21 Me. 433; *Shipley v. Shilling*, 66 Md. 558, 8 Atl. 355; *Hardy v. Hardy*, 79 Md. 9, 28 Atl. 887; *Barnard v. Bartholomew*, 22 Pick. 291; *Eastman v. Walker*, 6 N. H. 367; *Long v. Oxford*, 104 N. C. 408, 10 S. E. 525; *Broddie v. Johnson*, 1 Sneed, 464, 468; *Thompson v. French*, 10 Yerg. 452.

⁶ *Bell v. Morrison*, 1 Pet. 351, 366, 7 L. Ed. 174; *Pollak v. Billing*, 131 Ala. 519, 32 So. 639; *Ringo v. Brooks*, 26 Ark. 540; *Outwaters v. Brownlee*, 22 Cal. App. 535, 135 Pac. 300; *Mask v. Philler*, 32 Miss. 237; *Cohen v. Diamond*, 74 N. Y. Misc. 444, 132 N. Y. S. 355; *Huff v. Richardson*, 19 Pa. 388; *Miller v. Baschore*, 83 Pa. 356, 24 Am. Rep. 187; *Simrell v. Mil-*

ler, 169 Pa. 326, 32 Atl. 548; *Ward v. Jack*, 172 Pa. 416, 33 Atl. 577; *Rosen-
crance v. Johnson*, 191 Pa. 520, 43 Atl. 360. See also *Sutton v. Burruss*, 9 Leigh, 381, 33 Am. Dec. 246.

In *Stiles v. Laurel Fork Oil Co.*, 47 W. Va. 838, the headnote states a new promise must be "of a precise sum." In fact the opinion of the court gives no warrant for this part of the headnote. Nevertheless it is quoted as an accurate statement of the law in *Holley's Exr. v. Curry*, 58 W. Va. 70, 51 S. E. 135, 112 Am. St. Rep. 944.

⁷ In the following cases promises or acknowledgments made to an agent of the creditor were held sufficient: *Evans v. Davies*, 4 A. & E. 840; *O'Hara v. Murphy*, 196 Ill. 599, 63 N. E. 1081; *Wetz v. Greffe*, 71 Ill. App. 313; *Miller v. McDowell*, 69 Kans. 453, 77 Pac. 101; *Yarbrough v. Gilland*, 77 Miss. 139, 24 So. 170; *Mastin v. Brahnam*, 86 Mo. 643; *Kirby v. Mills*, 78 N. C. 124, 24 Am. Rep. 460; *Emerson v. Miller*, 27 Pa. 278; *Criswell v. Criswell*, 56 Pa. 130; *Warnock v. Itawis*, 38 Wash. 144, 80 Pac. 297. Proof of the agent's authority must be made in order to make a new promise, to one who is

An admission or promise to a stranger is ineffectual.⁸ But if a promise is made to a third person with the intention that it shall be communicated to the creditor, and the communication takes place, the new promise is binding.⁹ In a few jurisdictions in view of the exceptional rule there prevailing that an admission of indebtedness though not constituting a new promise is sufficient it is held that an admission to a stranger enables the creditor to recover, since the continued existence of the debt is thereby proved.¹⁰ An admission contained in

claimed to be the creditor's agent, admissible in evidence. *Bahny v. Levy*, 236 Pa. 348, 84 Atl. 835. In *McKinney v. Snyder*, 78 Pa. 497, the court stated as a requisite that the debtor "must be aware of the agency at the time of the promise." No such severe requirement seems generally made.

⁸ *Tanner v. Smart*, 6 B. & C. 603; *Stamford, etc., Banking Co. v. Smith*, [1892] 1 Q. B. 765 (but under the English statute for reviving obligations under seal an acknowledgment to a stranger has been held sufficient. *Moodie v. Bannister*, 4 Drewry, 432); *Fort Scott v. Hickman*, 112 U. S. 150, 161, 28 L. Ed. 636, 5 Sup. Ct. Rep. 56; *Ringo v. Brooks*, 26 Ark. 540; *Rounthwaite v. Rounthwaite* (Cal.), 68 Pac. 304; *Biddel v. Brizolara*, 64 Cal. 354, 30 Pac. 609; *Pierce v. Merrill*, 128 Cal. 473, 61 Pac. 67, 79 Am. St. Rep. 63; *Cunkle v. Heald*, 6 Mackey, 485; *Colar v. Patterson*, 137 Ill. 403, 27 N. E. 604; *Albers Commission Co. v. Sessel*, 87 Ill. App. 378 (affd. in 193 Ill. 153, 61 N. E. 1075); *Niblack v. Goodman*, 67 Ind. 174; *Sibert v. Wilder*, 16 Kans. 176, 22 Am. Rep. 280; *Clawson v. McCunes Adm.*, 20 Kan. 337; *Proctor v. Bell's Adm'r*, 97 Ky. 98, 16 Ky. L. Rep. 823, 30 S. W. 15; *Davis v. Strange*, 156 Ky. 420, 161 S. W. 217; *Cape Girardeau County v. Harbison*, 58 Mo. 90; *Williamson v. Williamson*, 50 Mo. App. 194; *Swinley v. Force*, 78 N. J. Eq. 52, 78 Atl. 249; *Wakeman v. Sherman*, 9 N. Y. 85; *In re Kendrick*, 107 N. Y.

104, 13 N. E. 762; *Hussey v. Kirkman*, 95 N. C. 63; *Spangler v. Spangler*, 122 Pa. St. 358, 15 Atl. 436, 9 Am. St. Rep. 114 (cf. *Croman v. Stull*, 119 Pa. 91, 12 Atl. 812); *Parker v. Remington*, 15 R. I. 300, 3 Atl. 590, 2 Am. St. Rep. 897; *Robbins v. Farley*, 2 Strobb. 348; *Maxwell v. Reilly*, 11 Lea, 307; *Rogers v. Quinn*, L. R. 26 Ir. 136; *Watson Mfg. Co. v. Sample*, 12 Manitoba, 373; *Colquhoun v. Murray*, 26 Ont. App. 204.

⁹ *Strong v. Andros*, 34 Dist. Col. App. 278; *O'Hara v. Murphy*, 196 Ill. 599, 63 N. E. 1081; *Miller v. Teeter*, 53 N. J. Eq. 262, 31 Atl. 394, *DeFreest v. Warner*, 98 N. Y. 217, 50 Am. Rep. 657; *Fuqua v. Dinwiddie*, 6 Lea, 645. In *Big Diamond Milling Co. v. Chicago &c. Ry. Co.*, (Minn. 1919), 171 N. W. 799, a printed statement issued by a number of railroads "to the public" to the effect that the railroads would pay all properly supported claims of a certain class, was held to extend the statutory period in favor of the individual claimant who brought suit. See also *Belcher v. Tacoma Eastern R. Co.*, 99 Wash. 34, 168 Pac. 782.

¹⁰ *St. John v. Garrow*, 4 Port. 223, 29 Am. Dec. 280; *Smith v. Campbell*, 5 Harr. 380; *Doran v. Doran*, 145 Ia. 122, 123 N. W. 996, 25 L. R. A. (N. S.) 805; *Utz v. Utz*, 34 La. Ann. 752; *Peavy v. Brown*, 22 Me. 100; *Stewart v. Garrett*, 65 Md. 392, 5 Atl. 324, 57 Am. Rep. 333; *Whitney v. Bigelow*, 4 Pick. 110; *Titus v. Ash*, 24 N. H. 319; *Minkler v. Minkler*, 16 Vt. 193.

an undelivered writing still more clearly than an acknowledgment to a stranger is insufficient.¹¹ A promise to a legal representative of the creditor as an executor or administrator is, however, sufficient,¹² or to one not yet administrator, but subsequently appointed.¹³ And so is a promise to one beneficially interested in the claim as inheritor,¹⁴ or as assignee of a note,¹⁵ or of a non-negotiable chose in action.¹⁶ It has even been held that the holder of a negotiable note may recover on a promise made to another who was at the time holder of the note.¹⁷ But a new promise or partial payment made to a payee or other holder, after he has transferred all interest in the instrument, unless made to him as agent for the subsequent holder cannot avail the latter.¹⁸ If the transfer by him is merely as collateral security, however, a new promise to the original payee has been upheld.¹⁹

¹¹ *Jackson v. Ogg*, 5 Jurist (N. S.), 976; *Merriam v. Leonard*, 6 Cush. 151; *Allen v. Collins*, 70 Mo. 138, 35 Am. Rep. 416; *Heaton v. Leonard*, 69 Hun, 423. Compare *Rogers v. Southern*, 4 Baxter, 67.

¹² *Farrell v. Palmer*, 36 Cal. 187; *Re Sullenberger*, 72 Cal. 549, 14 Pac. 513; *Felty v. Young*, 18 Md. 163; *Thompson v. Richardson* (Mo.), 195 S. W. 1039; *Hill v. Hill*, 51 S. C. 134, 28 S. E. 309. In *Clark v. Hooper*, 10 Bing. 480, a promise to one acting as administrator but not legally appointed, was held sufficient. See also *Stamford Banking Co. v. Smith*, [1892] 1 Q. B. 765; *Spring v. Perkins*, 156 Mich. 327; *Croman v. Stull*, 119 Pa. 91, 12 Atl. 812.

¹³ *Bodger v. Arch*, 10 Ex. 333; *Baker v. Blaker*, 55 L. T. (N. S.) 723; *Robertson v. Burrill*, 22 Ont. App. 356. But see *Kisler v. Sanders*, 40 Ind. 78.

¹⁴ *Hodnett v. Gault*, 64 N. Y. App. Div. 163, 71 N. Y. S. 831; *Croman v. Stull*, 119 Pa. 91, 12 Atl. 812; *Peters v. Rothermel*, 30 Pa. Sup. 281; *Drawbaugh v. Drawbaugh*, 7 Pa. Sup. 349, 351. But see *Visher v. Wilbur*, 5 Cal.

App. 562, 573, 90 Pac. 1065, 91 Pac. 412.

¹⁵ *McBrayer v. Mills*, 62 S. Car. 36, 39 S. E. 788.

¹⁶ *Lamar v. Manro*, 10 Gill & J. 50.

¹⁷ *McRae v. Kennon*, 1 Ala. 295, 34 Am. Dec. 777; *Bird v. Adams*, 7 Ga. 505; *Little v. Blont*, 9 Pick. 488; *Way v. Sperry*, 6 Cush. 238, 52 Am. Dec. 779; *Soulden v. VanRensselaer*, 9 Wend. 293. But see *contra* *Thompson v. Gilreath*, 3 Jones L. 493. See also *White v. Cushing*, 30 Me. 267; *Depuy v. Swart*, 3 Wend. 135, 20 Am. Dec. 673; *Moore v. Viele*, 4 Wend. 420; *Walbridge v. Harroon*, 18 Vt. 448, where it was held that a new promise to pay a negotiable note discharged by bankruptcy, was not negotiable, and did not revive the negotiable character of the original obligation. See *supra*, § 157.

¹⁸ *Stamford, etc., Banking Co. v. Smith*, [1892] 1 Q. B. 765.

¹⁹ *Girard Trust Co. v. Owen*, 83 Kan. 692, 112 Pac. 619, 33 L. R. A. (N. S.) 262. See also *Maurice v. Fowler*, 78 N. Y. Misc. 357, 138 N. Y. S. 425.

§ 190. By whom a new promise may be made.

On general principles a new promise either express or implied from an acknowledgment or part payment to be effective must be made by the debtor or by his authorized agent.²⁰ A promise made by a stranger is obviously unsupported by consideration of any kind, and can no more be enforced than any other gratuitous promise.²¹ The right of an agent to bind his principal by a new promise was cut off by Lord Tenterden's Act.²² This statute, however, did not require a writing to evidence a part payment, which, therefore, continued to have the effect of reviving a barred debt though made by an agent;²³ and as most American courts give the same effect as the English courts to a part payment not evidenced by writing,²⁴ in the United States also part payment made by an agent will revive a debt.²⁵ By a later English statute²⁶ Lord Tenterden's Act was amended by adding the words "or by his agent duly authorized." Some American States have copied the language of the earlier English statute without the later amendment. In such States, if the English construction is followed, whatever may be the power of an agent to bind his principal by part payment, he cannot do so by a new promise or acknowledgment.²⁷ It may, however,

²⁰ *Pfenninger v. Kokesch*, 68 Minn. 81, 70 N. W. 867; *Mizer v. Emigh*, 63 Neb. 245, 88 N. W. 479; *Smith v. Carpenter*, 48 N. Y. App. Div. 350, 63 N. Y. S. 47; *Cone v. Hyatt*, 132 N. C. 810, 44 S. E. 678, and see cases *infra*, §§ 191-195. Apart from the effect of Lord Tenterden's Act referred to in this section, there is no doubt that an agent acting within the scope of his authority may bind his principal by a new promise, or part payment. *Newbould v. Smith*, 29 Ch. D. 882; *McAbee v. Wiley*, 92 Ark. 245, 122 S. W. 623; *Blanchard v. Jefferson*, 162 N. Y. 630, 57 N. E. 1104, affirming *s. c.* 13 N. Y. App. Div. 314, 43 N. Y. S. 152; *Walker v. Cassels*, 70 S. Car. 271, 49 S. E. 862.

²¹ *Fitzgerald v. Flannagan* (Ia.), 125

N. W. 995; *Morris v. Hazlehurst*, 30 Md. 362.

²² 9 Geo. IV, c. 14. See *supra*, § 164.

²³ *Rew v. Pettet*, 1 A. & E. 196; *Jones v. Hughes*, 5 Exch. 104; *Newbould v. Smith*, 29 Ch. D. 882.

²⁴ See *supra*, § 174.

²⁵ *Cook v. Atkins*, 173 Ala. 363, 56 So. 224; *Boulder Natl. Bank v. Rowland*, 1 Col. App. 468; *First Natl. Bank v. Ballou*, 49 N. Y. 155; *Clute v. Clute*, 197 N. Y. 439, 90 N. E. 988, 134 Am. St. Rep. 891; and see cases in the following section. Where an agent authorized only to make a payment in full satisfaction makes payment on account, the debt is not revived. *Linsell v. Bonsor*, 2 Bing. (N. C.) 241.

²⁶ Mercantile Law Amendment Act, 19 & 20 Vict., c. 97.

²⁷ *DeRaimes v. DeRaimes*, 70 N. J.

be thought that the construction by the English court of the earlier statute was unduly narrow, and that even if the words of that statute are substantially copied, an agent should have the same power to bind his principal in this case as in others.²⁸ Whether a particular person who purports to act as agent has power to do so in a particular case, is mainly a question of fact and need not be here considered.

§ 191. New promise or part payment by a joint obligor.

The question of whether one joint or joint and several obligor having no other authority than that necessarily involved in the joint relationship may bind his co-obligors by a new promise or partial payment is a question of law. In an early decision by Lord Mansfield²⁹ a joint debtor was held to have this power, and this decision was regarded as settling the law in England, though justly criticised by the courts,³⁰ until Lord Tenterden's Act³¹ provided that no joint contractor should lose the benefit of the Statute of Limitations by reason of a written acknowledgment signed by one or more of his co-contractors.^{31a} In the United States the early

L. 15, 56 Atl. 170, 71 N. J. L. 680, 60 Atl. 1133.

²⁸ It was so held in *Liberman v. Gurensky*, 27 Wash. 410, 67 Pac. 998.

²⁹ *Whitcomb v. Whiting*, Doug. 652. This was a case of part payment by one joint debtor, but Lord Mansfield said the same consequence would follow from an admission. A contrary decision had been given in *Bland v. Haselrig*, 2 Vent. 151.

³⁰ *Jackson v. Fairbank*, 2 H. Bl. 340; *Brandram v. Wharton*, 1 B. & Ald. 463; *Burleigh's Exec's v. Stott*, 8 B. & C. 36; *Channell v. Ditchburn*, 5 M. & W. 494. This was so held "although the [co-debtor] was a surety only, and even though the payment was not made until the statute had run out," *Cockrill v. Sparkes*, 1 H. & C. 699, 702. But where the community of interest had been severed by the death of a joint contractor it has uniformly been held

that the admissions of a co-contractor do not bind the executor or administrator, nor the admissions of the latter the co-contractor. *Atkins v. Tredgold*, 2 B. & C. 23; *Slater v. Lawson*, 1 B. & Ad. 396. To the same effect are *Root v. Bradley*, 1 Kan. 437; *Hathaway v. Haskell*, 9 Pick. 42. Nor will payment by one of several inheritors of mortgaged property extend the statutory period in favor of the mortgagee as against other inheritors. *Weidenhammer v. McAdams*, 52 Ind. App. 98, 98 N. E. 883.

³¹ 9 Geo. IV. c. 14.

^{31a} This statute left unchanged the effect of a part payment but the Mercantile Law Amendment Act, 19 and 20 Vict., c. 97, s. 14, provided further that no co-debtor should lose the benefit of the Statute of Limitations by reason only of payment by any other co-debtor. See *Cockrill v. Sparkes*, 1 H. & C. 699.

English decisions were followed in many cases;³² but in most States at the present day, because of statutes or otherwise, a joint contractor has no longer power to bind his co-contractors in this way;³³ though they will be bound if they authorize new promises or partial payments; and knowingly to permit

³² *Caldwell v. Sigourney*, 19 Conn. 37; *Miller v. Miller, MacArthur & Mack* (D. C.), 109, 48 Am. Rep. 738; *White v. Connecticut General Life Ins. Co.*, 34 App. D. C. 460; *Cox v. Bailey*, 9 Ga. 467, 54 Am. Dec. 358 (but see *Rogers v. Burr*, 105 Ga. 432, 446, 31 S. E. 438, 70 Am. St. Rep. 50); *Morgan's Exec. v. Métyer*, 14 La. 612; *Shepley v. Waterhouse*, 22 Me. 497 (now changed by statute); *Frye v. Barker*, 4 Pick. 382 (now changed by statute); *Craig v. Calloway County Court*, 12 Mo. 94; *Lawrence County v. Dunkle*, 35 Mo. 395; *Woonsocket Institution for Savings v. Ballou*, 16 R. I. 351, 16 Atl. 144, 1 L. R. A. 555; *Bowdre v. Hampton*, 6 Rich. 208; *Sifton v. McCabe*, 6 U. C. Q. B. 394.

Of the above decisions *Caldwell v. Sigourney* and *Shepley v. Waterhouse* were cases where a principal debtor revived the liability of a surety who was a joint promisor. To the decisions in this note, may be added *Clinton County v. Smith*, 238 Mo. 118, 141 S. W. 1091, 37 L. R. A. (N. S.) 272; *Moore v. Goodwin*, 109 N. C. 218, 13 S. E. 772; *Moore v. Beaman*, 111 N. C. 328, 16 S. E. 177; *Copeland v. Collins*, 122 N. C. 619, 30 S. E. 315; *Silman v. Silman*, 2 Hill (S. C.), 416, in which it was held that a new promise made by one joint debtor before the debt is barred, binds co-debtors though a promise made after the debt had become barred would not do so.

³³ *Bell v. Morrison*, 1 Pet. 351, 366, 7 L. Ed. 174; *Woody v. State Bank*, 12 Ark. 780; *Slagle v. Box*, 124 Ark. 43, 186 S. W. 299; *State L. & T. Co. v. Cochran*, 130 Cal. 245, 62 Pac. 466, 600; *Boynnton v. Spafford*, 162 Ill. 113, 44

N. E. 379, 53 Am. St. Rep. 274; *McDonald v. Weidmer*, 103 Ill. App. 290; *Meitzler v. Todd*, 12 Ind. App. 381, 39 N. E. 1046, 54 Am. St. Rep. 531; *Steel v. Souder*, 20 Kan. 39, 41; *Elmore v. Fanning*, 85 Kan. 501, 117 Pac. 1019, 38 L. R. A. (N. S.) 685; *Leonard v. Hughlett*, 41 Md. 380, 387; *Peirce v. Tobey*, 5 Met. 168; *Koons v. Vauconsant*, 129 Mich. 260, 88 N. W. 630, 95 Am. St. Rep. 438; *Monidah Trust v. Kemper*, 44 Mont. 1, 118 Pac. 811; *Willoughby v. Irish*, 35 Minn. 63, 27 N. W. 379, 59 Am. Rep. 297; *Atwood v. Lammers*, 97 Minn. 214, 106 N. W. 310; *Briscoe v. Anketell*, 28 Miss. 361, 61 Am. Dec. 553; *Theis v. Wood*, 238 Mo. 643, 142 S. W. 431 (decided under Kansas law); *Oleson v. Wilson*, 20 Mont. 544, 52 Pac. 372, 63 Am. St. Rep. 639; *Dwire v. Gentry*, 95 Neb. 150, 145 N. W. 350; *Exeter Bank v. Sullivan*, 6 N. H. 124; *Whipple v. Stevens*, 22 N. H. 219, 226; *Van Keuren v. Parmelee*, 2 N. Y. 523, 51 Am. Dec. 322; *Murdock v. Waterman*, 145 N. Y. 55, 63, 39 N. E. 829, 27 L. R. A. 418; *Matteson v. Palser*, 173 N. Y. 404, 66 N. E. 110; *Hoover v. Hubbard*, 202 N. Y. 289, 95 N. E. 702; *Cohen v. Diamond*, 74 N. Y. Misc. 444, 132 N. Y. S. 355; *Moore v. Goodwin*, 109 N. C. 218, 13 S. E. 772 (if not made until after the debt is barred); *Hance v. Hair*, 25 Ohio St. 349; *Bush v. Stowell*, 71 Pa. 208, 10 Am. Rep. 694; *Carlton & Manning v. Ludlow Woolen Mills*, 27 Vt. 496; *Hanna v. Kasson*, 26 Wash. 568, 67 Pac. 271; *State Bank v. Pease*, 153 Wis. 9, 139 N. W. 767; *Cowhick v. Shingle*, 5 Wyo. 87, 37 Pac. 689, 25 L. R. A. 606, 63 Am. St. Rep. 17.

them to be made is evidence of authorization.³⁴ A joint debtor may even make a payment on a barred debt as agent for his co-debtor without thereby extending his own liability³⁵ but he must make clear that he is acting merely as agent, or he will revive his own liability.³⁶

§ 192. New promise or part payment by a partner.

The power of a partner to bind his firm by a part payment or a new promise involves a different question from that involved in the case of ordinary joint contractors, and prior to dissolution of the partnership, a partner has implied power to bind the firm either by part payment,³⁷ or by a new promise.³⁸ After dissolution of the firm, though some authorities hold that one partner may still bind the firm by part payment³⁹ or a new promise,⁴⁰ it is almost universally held that after the debt has once been barred, a new promise or part payment by a partner of a dissolved firm will not revive it.⁴¹ And by the weight of authority, in no case will unauthorized

³⁴ See cases cited in the preceding note.

³⁵ *Gray v. Pierson*, 7 Idaho, 540, 64 Pac. 233; *Elmore v. Fanning*, 85 Kans. 501, 117 Pac. 1019, 38 L. R. A. (N. S.) 685; *Holmes v. Durrell*, 51 Me. 201; *Bailey v. Corliss*, 51 Vt. 366. Cp. *Miller v. Talcott*, 54 N. Y. 114.

³⁶ *Cook v. Atkins*, 173 Ala. 363, 56 So. 224; *Holmes v. Durrell*, 51 Me. 201; *Mainzinger v. Mohr*, 41 Mich. 685, 3 N. W. 183; *Miller v. Talcott*, 54 N. Y. 114. In *Gray v. Pierson*, 7 Idaho, 540, 64 Pac. 233, it was held that a joint debtor who made a payment on account of his co-debtor, did not thereby revive his own liability though he said nothing to the creditor to indicate that the payment was not made on his own account. This case is, however, inconsistent with those previously cited, and seems impossible to support on principle.

³⁷ *Watson v. Woodman*, L. R. 20 Eq. 721, 730; *Faulkner v. Bailey*, 123 Mass. 588, 589; *Tappan v. Kimball*,

30 N. H. 136; *Wood v. Barber*, 90 N. C. 76; *Carlton v. Ludlow Woolen Mill*, 28 Vt. 504.

³⁸ *Tate v. Clements*, 16 Fla. 339, 354, 26 Am. Rep. 709; *Abrahams v. Myers*, 40 Md. 499.

³⁹ *Burr v. Williams*, 20 Ark. 171; *Beardsley v. Hall*, 36 Conn. 270, 4 Am. Rep. 74; *Tillinghast v. Nourse, Stone & Co.*, 14 Ga. 641; *Schindel v. Gates*, 46 Md. 604, 24 Am. Rep. 526; *County of Vernon v. Stewart*, 64 Mo. 408; *Merritt v. Day*, 38 N. J. L. 32, 20 Am. Rep. 362; *Casebolt v. Ackerman*, 46 N. J. L. 169.

⁴⁰ *Austin v. Bostwick*, 9 Conn. 496, 25 Am. Dec. 42; *Carroll v. Gayarree*, 15 La. Ann. 671; *Newman v. McComas*, 43 Md. 70.

⁴¹ See cases cited in the preceding note, and also in the following note. See, however, *Mix v. Shattuck*, 50 Vt. 421, 28 Am. Rep. 511, which held the firm bound by a part payment made by a partner after dissolution of the firm and after the debt had been barred.

part payment or new promise after dissolution of a partnership either toll the running of the Statute or revive a barred debt.⁴²

§ 193. Effect of a new promise or part payment by a principal debtor or a surety upon the liability of the other.

There has never been any real basis for supposing that a new promise or part payment by a principal debtor after his debt was barred could renew the liability of the surety unless the principal debtor and surety were joint obligors. It has, however, been decided in a few cases that if the liability of the principal debtor is extended by partial payments made before the Statute has barred the claim, the surety's liability is similarly extended.⁴³

It is always important when a surety or guarantor makes a collateral contract, to observe the terms of it. Its terms may be such that the surety binds himself to pay whatever indebtedness the principal may be under at or during a future period, and the Statute of Limitations on the surety's obliga-

⁴² *Watson v. Woodman*, L. R. 20 Eq. 721; *In re Tucker*, [1894] 3 Ch. 429; *Cronkrite v. Herrin*, 15 Fed. 888; *Bell v. Morrison*, 1 Pet. 351, 7 L. Ed. 174; *Espy v. Comer*, 76 Ala. 501; *Tate v. Clements*, 16 Fla. 339, 354, 26 Am. Rep. 709; *Kallenbach v. Dickinson*, 100 Ill. 427, 39 Am. Rep. 47; *Blethen v. Murch*, 80 Me. 313, 14 Atl. 208; *Ide v. Ingraham*, 5 Gray, 106, 108; *Peirce v. Tobey*, 5 Metc. 168; *Gates v. Fisk*, 45 Mich. 522, 8 N. W. 558; *Mayberry v. Willoughby*, 5 Neb. 368, 25 Am. Rep. 491; *Tappan v. Kimball*, 30 N. H. 136, 142; *Van Keuren v. Parmelee*, 2 N. Y. 523, 51 Am. Dec. 322; *Graham v. Selover*, 59 Barb. 313; *Kerper v. Wood*, 48 Ohio St. 613, 29 N. E. 501, 15 L. R. A. 656; *Jack v. McLanahan*, 191 Pa. 631, 43 Atl. 356; *Folk v. Russell*, 7 Baxter, 591.

⁴³ The principal authority for this position is *Cross v. Allen*, 141 U. S. 528, 35 L. Ed. 843, 12 S. Ct. 67. In this case the court made the remarkable blunder of confusing the question of

payment by a joint debtor with payment by a principal debtor. In all the cases which the court cites of extension of debts by payments made by a principal debtor, the principal and surety were joint debtors and this was the *ratio decidendi* in those cases. In *Cross v. Allen*, however, the surety was not a joint debtor. The obvious truth was stated in *Clinton County v. Smith*, 238 Mo. 118, 141 S. W. 1091, 37 L. R. A. (N. S.) 272. "The reason why a payment by the principal stops it [the statute] as to a surety is not because one is principal and the other surety, but because both are usually joint promisors; that is, the surety is affected by the act of the principal in his capacity as a joint promisor." Other decisions holding the liability of a surety who was not jointly indebted with his principal to have been extended by payments made by the principal are—*Bloom v. Kern*, 30 La. Ann. 1263; *Hooper v. Hooper*, 81 Md. 155, 31 Atl. 508, 48 Am. St. Rep. 496.

tion will not run until that time. Therefore it may not begin to run at the same time that it begins to run on the principal's indebtedness.⁴⁴ But it certainly cannot be admitted, and it is not and never was the law that where a principal and surety are severally bound for the same debt, the principal can in any way extend the statutory period as to the surety⁴⁵ without the assent of the latter given either in his original contract or subsequently. Even though a payment on account of the debt be made in the surety's presence⁴⁶ or at his request,⁴⁷ or is made by the surety himself, but with his principal's money, and on behalf of his principal,⁴⁸ the facts have been held insufficient to warrant the inference of a promise by the surety to pay the remainder of the debt. Nor will a new promise or part payment by a surety revive or enlarge the period of limitation against the principal.⁴⁹

⁴⁴ See *In re Powers*, 30 Ch. D. 291; *Hooper v. Hooper*, 81 Md. 155, 31 Atl. 508, 48 Am. St. Rep. 496. In *Mutual L. I. Co. v. United States Hotel Co.*, 82 N. Y. Misc. 632, 144 N. Y. S. 476, the court denied validity to an agreement by a surety to remain liable on a debt until actual payment, holding it in effect an attempt to waive the statute perpetually. See *supra*, § 183.

⁴⁵ *Underwood v. Patrick*, 94 Fed. 468, 36 C. C. A. 330; *Lowther v. Chappell*, 8 Ala. 353, 42 Am. Dec. 643; *Dean v. Munroe*, 32 Ga. 28; *McLin v. Harvey*, 8 Ga. App. 360, 69 S. E. 123; *Deaton v. Deaton*, 109 Ill. App. 7; *Mozingo v. Ross*, 150 Ind. 688, 50 N. E. 867, 41 L. R. A. 612, 65 Am. St. Rep. 387; *Drake v. Stuart*, 87 Iowa, 341, 54 N. W. 223; *McMillan v. Leeds*, 58 Kan. 815, 49 Pac. 159; *Citizens' Bank v. Murdock*, 22 La. Ann. 130; *Godde v. Marvin*, 142 Mich. 518, 105 N. W. 1112; *Northwest Thresher Co. v. Dohltorp*, 104 Minn. 130, 116 N. W. 66; *Regan v. Williams*, 185 Mo. 620, 84 S. W. 959, 105 Am. St. Rep. 600; *Dwire v. Gentry*, 95 Neb. 150, 145 N. W. 350; *Lang v. Gage*, 65 N. H. 173, 18 Atl. 795; *Newell v. Clark*, 73 N. H. 289, 61 Atl.

555; *Mason v. Kilcourse*, 71 N. J. L. 472, 59 Atl. 21; *Ulster County Sav. Inst. v. Deyo*, 116 N. Y. App. Div. 1, 101 N. Y. S. 263, *affd.* 191 N. Y. 505, 84 N. E. 1122; *Wood v. Barber*, 90 N. C. 76; *Homewood People's Bank v. Hastings*, (Pa. 1919), 106 Atl. 308; *Browning v. Tucker*, 9 R. I. 500. But where a note was signed by officers of a corporation for its accommodation, the corporation not being a party to the instrument, subsequent payments by the makers, though made from funds of the corporation, extended their liability. *Gordon v. Russell*, 98 Kans. 537, 158 Pac. 661.

⁴⁶ *Godde v. Marvin*, 142 Mich. 518, 105 N. W. 1112.

⁴⁷ *Borden v. Fletcher's Est.*, 131 Mich. 220, 91 N. W. 145; *Littlefield v. Littlefield*, 91 N. Y. 203, 43 Am. Rep. 663; *cf.* *First Natl. Bank v. Ballou*, 49 N. Y. 155.

⁴⁸ *Lang v. Gage*, 65 N. H. 173, 18 Atl. 795; *Ulster County Savings Inst. v. Deyo*, 116 N. Y. App. Div. 1, 101 N. Y. S. 263; *affd.* without opinion, 191 N. Y. 505, 84 N. E. 1122; *cf.* *Mainzinger v. Mohr*, 41 Mich. 685, 3 N. W. 183.

⁴⁹ *Winchell v. Hicks*, 18 N. Y.

§ 194. New promise or part payment made by a fiduciary.

If the obligation due from a fiduciary arises not simply from the office which he holds but from a contract originally made by him, he is personally bound unless the contrary is expressly provided. This is true of an executor,⁵⁰ a trustee,⁵¹ a guardian,⁵² though he is entitled to discharge the obligation from the beneficiary's estate if it was legally incurred for the benefit of the estate. A new promise or part payment in such a case would seem to differ in no degree from a similar acknowledgment made by any debtor. If, however, the original obligation did not bind the fiduciary personally, the question may be raised: first, whether the fiduciary incurs a personal liability by a new promise and, second, whether the estate is made liable by such a promise. As to the first point, Lord Mansfield held that a promise to pay a legacy by an executor, who had assets sufficient for the purposes, bound him personally;⁵³ but the contrary was held by the House of Lords in regard to a promise by an executor to pay a debt of his testator;⁵⁴ and at the present day the executor would doubtless not generally be held personally on a promise made without present consideration to pay either a legacy,⁵⁵ or a debt due from the testator.⁵⁶

As to the second question, that which concerns the liability of the estate, the law is in considerable conflict. Many decisions, especially the older ones, hold that a new promise or part payment by an executor or administrator, even after the debt has become completely barred, revives the liability

558; *Harper v. Fairley*, 53 N. Y. 442, 445.

⁵⁰ See *infra*, § 310.

⁵¹ *Infra*, § 312.

⁵² *Infra*, § 314.

⁵³ *Atkins v. Hill*, Cowp. 284; *Hawkes v. Saunders*, Cowp. 289. *Jennings v. Newman*, 4 T. R. 347, 348. See also *Reech v. Kennegal*, 1 Ves. Sen. 123, 126.

⁵⁴ *Rann v. Hughes*, 7 T. R. 350 n. and see *Dowse v. Cox*, 3 Bing. 20 (reversed on another point in 6 B. & C.

255); *Powell v. Graham*, 7 Taunt. 581; *Ashby v. Ashby*, 7 B. & C. 444.

⁵⁵ *Pratt v. Humphrey*, 22 Conn. 317, 322; *Smith v. Carroll*, 112 Pa. 390, 4 Atl. 24; *Dunham v. Elford*, 13 Rich. Eq. 190, 94 Am. Dec. 162; *Adams v. Adams*, 16 Vt. 228. See also *Hay v. Green*, 12 Cush. 282.

⁵⁶ *Rositzke v. Meyer*, 95 N. Y. Misc. 356, 159 N. Y. S. 464, 176 N. Y. App. D. 193, 162 N. Y. S. 613. But see *Burt v. Herron*, 66 Pa. 400, 404; *Claghorn's Est.*, 181 Pa. 608, 614, 37 Atl. 921.

of the estate to the same extent as if made by the debtor himself.⁵⁷ The decisions of most jurisdictions, however, hold that an executor or administrator cannot revive indebtedness of the deceased, at any rate after it has once become barred;⁵⁸ but in many of these jurisdictions a new promise or part payment by an executor or administrator made before the statute has completely run, will start a new statutory period.⁵⁹ In other States the executor or administrator has

⁵⁷ *Smith v. Poole*, 12 Sim. 17; *In re Macdonald*, [1897] 2 Ch. 181; *Townes v. Ferguson*, 20 Ala. 147; *Chambers v. Fennemore's Adm.*, 4 Harr. (Del.) 368; *Trimball v. Marshall*, 66 Ia. 233, 23 N. W. 645; *Thomas v. Daniel's Adm.*, 7 Ky. L. Rep. 98; *Northcut's Adm. v. Wilkinson*, 12 B. Mon. 408; *Fledderman v. Fledderman*, 112 Md. 226, 76 Atl. 85; *Foster v. Starkey*, 12 Cush. 324 (see also *Fisher v. Metcalf*, 7 Allen, 209; *Slattery v. Doyle*, 180 Mass. 27, 61 N. E. 264. But the special statute limiting rights against estates to two years cannot be waived by an executor or administrator as as to bind the estate; *Waltham Bank v. Wright*, 8 Allen, 121); *Preston v. Cutter*, 64 N. H. 461, 13 Atl. 874; *Shreve v. Joyce*, 36 N. J. L. 44, 13 Am. Rep. 417; *Hewes v. Hurff*, 69 N. J. L. 263, 55 Atl. 275; *Rogers v. Rogers*, 3 Wend. 503, 20 Am. Dec. 716; *Heath v. Grenell*, 61 Barb. 190; *McLaren v. McMartin*, 36 N. Y. 88 (but see *Hamlin v. Smith*, 72 N. Y. App. D. 601, 76 N. Y. S. 258). See also *Ricketts v. Ricketts' Heirs*, 4 Lea, 163; *Tazewell Ex. v. Whittle's Adm'r*, 13 Gratt. 329.

⁵⁸ *Thompson v. Peter*, 12 Wheat. 565, 6 L. Ed. 730; *Steele v. Steele's Adm'r*, 64 Ala. 438, 38 Am. Rep. 15; *Lee's Adm'r v. Downey*, 68 Ala. 98; *Hicks v. Hicks*, 113 Ark. 598, 167 S. W. 95; *Vrooman v. Li Po Tai*, 113 Cal. 302, 45 Pac. 470; *Peck v. Botsford*, 7 Conn. 172, 18 Am. Dec. 92; *Ensign v. Battersson*, 68 Conn. 298, 36 Atl. 51; *House v. Peacock*, 84 Conn. 54, 78 Atl. 723 (see

also *Winchell v. Sanger*, 73 Conn. 399, 47 Atl. 706, 66 L. R. A. 935); *Gailey v. Washington's Ex'r*, 2 Harr. (Del.) 204; *Patterson v. Cobb*, 4 Fla. 481 (see also *Deans v. Wilcoxon*, 25 Fla. 980, 1035, 7 So. 163); *Riser v. Snoddy*, 7 Ind. 442, 65 Am. Dec. 740; *Hanson v. Towle*, 19 Kans. 273; *Romero's Succession*, 31 La. Ann. 721; *Driscoll's Succession*, 125 La. 287, 51 So. 200; *Pole v. Simmons' Adm.*, 49 Md. 14; *Sanders v. Robertson*, 23 Miss. 389; *Huntington v. Bobbitt*, 46 Miss. 528; *Bambrick v. Bambrick*, 157 Mo. 423, 58 S. W. 8; *Hamlin v. Smith*, 72 N. Y. App. D. 601, 76 N. Y. S. 258; *Oates v. Liley*, 84 N. C. 643; *Fritz v. Thomas*, 1 Whart. 66, 29 Am. Dec. 3; *Clark v. McGuire's Adm'r*, 35 Pa. 259; *Moore v. Hillebrunt*, 14 Tex. 312, 65 Am. Dec. 118; *Vinson v. Whitfield* (Tex. Civ. App.), 133 S. W. 1095; *Seig v. Acord*, 21 Grat. 365, 8 Am. Rep. 605; *Smith v. Pattie*, 81 Va. 654; *Bank of Montreal v. Buchanan*, 32 Wash. 480, 73 Pac. 482; *Stiles v. Laurel Fork Coal Co.*, 47 W. Va. 838, 35 S. E. 986.

⁵⁹ *Marietta Savings Bank v. Janes*, 66 Ga. 286; *Holmes v. Bartlett*, 160 Ill. App. 443; *Succession of Patrick*, 30 La. Ann. 1071; *Holly v. Gibbons*, 176 N. Y. 520, 68 N. E. 889, 98 Am. St. Rep. 694; *Rositske v. Meyer*, 95 N. Y. Misc. 356, 159 N. Y. S. 464, 176 N. Y. App. D. 193, 162 N. Y. S. 613; *Grady v. Wilson*, 115 N. C. 344, 20 S. E. 518, 44 Am. St. Rep. 461; *Johnson v. Ballard*, 11 Rich. L. 178; *Divine v. Miller*, 70 S. C. 225, 49 S. E. 479, 106 Am.

no power to extend liability on the debt either before the statute has run or afterwards.⁶⁰ A remark made by Lord Tenterden⁶¹ to the effect that though a new promise by an administrator or executor might be effective, such a new promise would not be implied from an admission of indebtedness (as would be the case with an ordinary debtor) has also had some slight following,⁶² but would probably not now be relied upon. In so far as an executor's promise has legal effect, the same effect would probably be given to a promise implied in fact from an admission as to an express promise.⁶³ There are few decisions in regard to new promises by fiduciaries other than executors or administrators. A guardian has been held incapable of imposing a liability upon his ward's estate in this way,⁶⁴ unless the new promise was made before the statute had completely run.⁶⁵ A Vice Chancellor's decision in England held a trust estate bound by the acknowledgment of a trustee.⁶⁶ On principle the effect of a new promise by a fiduciary upon the estate must depend on the powers reasonably appropriate, and therefore given by law, to the fiduciary in question. A right to revive a debt already barred certainly seems beyond what the law should give. On the other hand, it would not seem unreasonable to imply a power effectively to promise to pay a debt which is at the time enforceable, the promise being made perhaps in order to get an extension of time for the benefit of the estate, and frequently leading the creditor because of his natural reliance on the promise to refrain from attempting to enforce his claim until after statutory period has expired, even though he makes no bargain to forbear.

St. Rep. 743; and see cases cited in the preceding note.

⁶⁰ *Dern v. Olsen*, 18 Idaho, 358, 110 Pac. 164, L. R. A. 1915 B, 1016; *Forney v. Benedict*, 5 Pa. 225; *Claghorn's Estate*, 181 Pa. 600, 608, 37 Atl. 918, 921; *Stiles v. Laurel Fork Coal Co.*, 47 W. Va. 838, 35 S. E. 986; *Findley v. Cunningham*, 53 W. Va. 1, 44 S. E. 472.

⁶¹ *In Tullock v. Dunn*, R. & M. 416.

⁶² *Thompson v. Peter*, 12 Wheat. 565, 6 L. Ed. 730; *Oakes v. Mitchell*, 15 Me. 360; *Bunker v. Athearn*, 35 Me. 364.

⁶³ *Darby & Bosanquet*, Statute of Limitations (2d ed.); 92 *Holmes v. Bartlett*, 160 Ill. App. 443.

⁶⁴ *Clement v. Sigur*, 29 La. Ann. 798; *Stone v. McGregor*, 99 Tex. 51, 87 S. W. 334. See also *Weidenhammer v. McAdams*, 52 Ind. App. 98, 98 N. E. 883. But see *First Nat. Bank v. Bangs*, 91 Kan. 54, 136 Pac. 915.

⁶⁵ *Gay v. Hebert*, 44 La. Ann. 301, 10 So. 775.

⁶⁶ *St. John v. Boughton*, 2 Jurist, 413.

§ 195. New promise or part payment made by a surety.

In Kentucky it has been held that a gratuitous new promisee by a surety will not revive his liability.⁶⁷ On historical grounds a forcible argument may be made for this distinction as to a surety. The obligation of a guarantor was not a debt at common law because he did not receive a *quid pro quo*.⁶⁸ And since the consideration required for a new promise which did not have contemporaneous consideration, seems to have been identical with the *quid pro quo* required for an obligation in debt,⁶⁹ the previous liability in assumpsit of the guarantor would not furnish sufficient consideration for a subsequent promise. Nevertheless the Kentucky decisions do not seem to have been followed, and in decisions elsewhere no difference is made between new promises by sureties and by others.⁷⁰ There seems also a certain inconsistency between the Kentucky decisions in question and the numerous cases holding sureties liable on new promises when they have been discharged by a failure to observe some technical requirement necessary to hold them.⁷¹

§ 196. Whether the creditor should sue on the original indebtedness or on the new promise.

There is great confusion in the authorities as to the manner in which the creditor should enforce his rights by action if it be assumed that such a new promise has been made as will entitle him to recover. The early cases in England seem to have been brought in indebitatus assumpsit, and the declaration, as was usual in that form of action, was based on an alleged promise to pay a debt. Whether this promise was actually given or merely implied in law would not appear from the pleading, and the trial of the case on the plea of

⁶⁷ *Tillett v. Commonwealth*, 9 B. Mon. 438; *Emmons v. Overton*, 18 B. Mon. 643; *Fechheimer v. Goldnamer*, 169 Ky. 243, 183 S. W. 541. Cf. *Rafferty v. Bank of Hardinsburg*, 176 Ky. 145, 195 S. W. 429.

⁶⁸ Ames, *Lectures Legal Hist.* 94.

⁶⁹ *Id.* 146.

⁷⁰ *Fisk v. Mitchell*, 24 L. T. Rep.

(N. S.) 272; *Union Nat. Bank v. Lee*, 33 La. Ann. 301; *Mainsinger v. Mohr*, 41 Mich. 685, 3 N. W. 183; *Perkins v. Cheney*, 114 Mich. 567, 72 N. W. 595, 68 Am. St. Rep. 495; *First Nat. Bank v. Ballou*, 49 N. Y. 155; *Long v. Miller*, 93 N. C. 233.

⁷¹ See *supra*, § 157.

non assumpsit involved merely a question whether such a debt existed. Proof of a new promise seems to have been regarded as proof of the continued existence of the debt, and therefore of the truth of the allegation in the declaration that the defendant "promised to pay" the same.⁷² It is probable, however, that the right of the plaintiff to declare expressly on the later promise would not have been doubted. Indeed, in one situation the plaintiff was compelled to adopt this course; namely, where the original creditor had died and the new promise was made to his executor or administrator. In such a case the plaintiff could not successfully allege a promise to the deceased and prove in support of the allegation the continuance of the debt by a new promise to himself. He was obliged, therefore, to declare on a promise made to himself.⁷³ So where the creditor became bankrupt and a new promise was made to the assignee in bankruptcy.⁷⁴ As such cases were exceptional and ordinarily, so far as the form of action indicated, the plaintiff sued upon the old indebtedness, it seems to have become recognized by the courts that whether the practice was defensible or not, the original debt might for the purposes of pleading be regarded as the basis of the action;⁷⁵ but that the method of pleading was anomalous and that the real basis of the right was the new promise has been continuously recognized. The existing law of England was expressed by Wigam, V. C., thus: "The legal effect of an acknowledgment of a debt barred by the Statute of Limita-

⁷² *Dickson v. Thomson*, 2 Show. 126; *Heyling v. Hasting*, 5 Mod. 425; s. c. 1 Salk. 29, *Carthew*, 470. See also *Irv- ing v. Veitch*, 3 M. & W. 90; *Langdell*, *Summ. Contracts*, § 73.

⁷³ *Dean v. Crane*, 1 Salk. 28, s. c., 6 Mod. 309; *Ld. Ray*. 1101; *Williams v. Gun*, *Fortesc.* 177. In this case the court said that "here the action was brought on the express promise to the administrator, though grounded upon an old foundation." *Sarell v. Wine*, 3 East, 409; *Ward v. Hunter*, 6 Taunt. 210.

⁷⁴ *Skinner v. Rebow*, 2 Str. 919; *Kinder v. Paris*, 2 H. Bl. 561.

⁷⁵ In *Leaper v. Tatton*, 16 East, 420, Lord Ellenborough said: "As to the form of declaring insisted on, it is enough to say that it has never been in use, and that it is the common practice to declare on the original contract, and, if the statute be pleaded, the only question is, whether the defence given by it has been waived." In *Upton v. Else*, 12 Moore, 303, Best, C. J., said: "We have every wish to give full effect to the statute. Probably the new promise ought in strictness to be declared on specially, but the practice is inveterate the other way, and we cannot get over it."

tions is that of a promise to pay the old debt, and for this purpose the old debt is a consideration in law. In that sense, and for that purpose, the old debt may be said to be revived. It is revived as a consideration for a new promise. But the new promise, and not the old debt, is the measure of the creditor's right. If a debtor simply acknowledges an old debt, the law implies from that simple acknowledgment a promise to pay it; for which promise the old debt is a sufficient consideration. But if the debtor promises to pay the old debt when he is able, or by instalments, or in two years, or out of a particular fund, the creditor can claim nothing more than the promise gives him."⁷⁶ These words have been quoted with approval in a number of subsequent cases.⁷⁷ If, therefore, the essential rights of the parties turn upon it the English court has recognized that the new promise is in fact the cause of action.⁷⁸ In view of these precedents it is not surprising to find that the majority of American courts allow an action on the original debt and this tendency is the greater because many courts are now disposed to deny validity to moral consideration and past consideration of every kind and seek to avoid the theoretical difficulties of giving effect to new promises to pay barred debts by holding that the new promise operates merely as a waiver of the defence of the statute and must be pleaded, if pleaded at all, by way of replication rather than in the declaration.⁷⁹ Further, in view of the

⁷⁶ *Philips v. Philips*, 3 Hare, 281, 299.

⁷⁷ *Buckmaster v. Russell*, 10 C. B. (N. S.) 745, 750; *Chasemore v. Turner*, L. R. 10 Q. B. 500, 505; *Lusher v. Hassard*, 20 Times L. R. 31; *Shepherd v. Thompson*, 122 U. S. 231, 239, 30 L. Ed. 1156, 7 S. Ct. 1229.

⁷⁸ In *Lechmere v. Fletcher*, 1 Cr. & M. 623, the defendant and another who were jointly indebted to the plaintiff were sued by him, and the Statute of Limitations was set up as a defence. Prior to the action, one of the defendants had made a new promise in writing, and an action was brought on the original debt against the joint debtors. The plaintiff failed

to recover, but subsequently brought this action on the new promise of the single defendant, *Fletcher*. It was held that the judgment in the prior joint action was no bar, that the new promise created a separate several liability on the part of *Fletcher*. See also *Weare v. Chase*, 58 N. H. 225.

⁷⁹ *St. John v. Garrow*, 4 Port. 223, 29 Am. Dec. 280; *Pearson v. Darrington*, 32 Ala. 227, 258; *Harlan v. Bernie*, 22 Ark. 217, 76 Am. Dec. 428; *Austin v. Bostwick*, 9 Conn. 496, 25 Am. Dec. 42; *Vinson v. Palmer*, 45 Fla. 630, 34 So. 276; *Kelly v. Leachman*, 3 Ida. 629, 634, 33 Pac. 44; *Walker v. Freeman*, 209 Ill. 17, 70 N. E. 595; *Willey v. State*, 105

English precedents it is not surprising to find also that in some jurisdictions where the practice is to declare upon the original debt, it is nevertheless stated that the plaintiff's right is on the new promise, and that the old indebtedness serves merely as a foundation or consideration for the new promise.⁸⁰ Sometimes it is said the creditor may as he prefers sue either upon the new promise or on the original indebtedness,⁸¹ and some jurisdictions hold that the plaintiff must sue on the new promise.⁸² A distinction, however, is often taken, in jurisdictions which do not hold an action on the old debt the uniformly correct method of pleading, between cases where the statute has and those in which it has not completely run at the time of the new promise. In the latter class of cases it is held that the action must be on the original debt.⁸³

Ind. 453, 5 N. E. 884; *Bayliss v. Street*, 51 Iowa, 627, 2 N. W. 437; *Guy v. Tams*, 6 Gill, 82; *Ilaley v. Jewett*, 3 Metc. 439, 2 Metc. 168; *Boyd v. Hurlbut*, 41 Mo. 264; *Betton v. Cutts*, 11 N. H. 170; *Barker v. Heath*, 74 N. H. 270, 67 Atl. 222; *Waltermire v. Westover*, 14 N. Y. 16, 20; *Yaw v. Kerr*, 47 Pa. 333; *Haslitt v. Stillwagen*, 23 Pa. Super. 114, 116; *Stearns v. Stearns Adm.*, 32 Vt. 678, 682.

⁸⁰ In *Taylor v. Hotchkiss*, 81 N. Y. App. Div. 470, 474, 80 N. Y. S. 1042, speaking of the analogous case of a new promise to pay a debt discharged in bankruptcy, the court said: "While, as a mere rule of pleading, the courts have allowed cases of this character to proceed upon the former theory, this has seemed to be done as a matter of permission and tolerance and with full recognition of the fact that it was more logical to treat the subsequent promise as the cause of action and the original obligation reduced from a legal to a moral character as merely supplying the consideration. *Depuy v. Swart*, 3 Wend. 135, 20 Am. Dec. 673; *Dusenbury v. Hoyt*, 53 N. Y. 521, 13 Am. Rep. 543; *Scheper v. Briggs*, 28 N. Y. App. Div. 115, 50 N. Y. S. 869. See

also *Champion v. Buckingham*, 165 Mass. 76, 79, 42 N. E. 498; and cases in the preceding note, *passim*.

⁸¹ *Lonsdale v. Brown*, 4 Wash. C. C. 148, 150; *Polk v. Butterfield*, 9 Colo. 325, 12 Pac. 216; *Little v. Blunt*, 9 Pick. 488, 491.

⁸² *Lambert v. Schmalz*, 118 Cal. 33, 35, 15 Pac. 13; *Weinberger v. Weidman*, 134 Cal. 599, 66 Pac. 869; *Pendley v. Powers*, 129 Ga. 69, 58 S. E. 653; *Gilmore v. Green*, 14 Bush, 772; *Wurth v. Paducah*, 116 Ky. 403, 25 Ky. L. Rep. 586, 76 S. W. 143; *Howe v. Saunders*, 38 Me. 350; *Stoker v. Patton* (Tex. Civ. App.), 35 S. W. 64; *Cotulla v. Urbahn*, 104 Tex. 208, 135 S. W. 1159, 34 L. R. A. (N. S.) 345; *Ireland v. Macintosh*, 22 Utah, 296, 306, 61 Pac. 901.

⁸³ *Union Pacific R. Co. v. Ruef*, 120 Fed. 102; *Rodgers v. Byers*, 127 Cal. 528, 60 Pac. 42; *Weinberger v. Weidman*, 134 Cal. 599, 66 Pac. 869; *Richardson v. Bricker*, 7 Colo. 58, 1 Pac. 433, 49 Am. Rep. 344; *Rankin v. Anderson*, 24 Ky. L. Rep. 647, 69 S. W. 705; *Howe v. Saunders*, 38 Me. 350; *Shackelford v. Douglass*, 31 Miss. 95; *Taylor v. Slater*, 16 R. I. 86, 12 Atl. 727.

§ 197. New promise after action brought.

On principle there is a difference between the validity of a new promise made after action brought where the defence is infancy, and where the defence is the Statute of Limitations or bankruptcy, since in the latter cases prior to the new promise there is not even a voidable obligation. An infant's promise is valid until repudiated.⁵⁴ Accordingly a right of action exists against him at the time the action is brought, even though no new promise has been made. The effect of the new promise is merely to defeat the defence of infancy if it is pleaded. This view is accepted by some of the decisions and a new promise is held sufficient though made after beginning of the action.⁵⁵ But other decisions based in the main on an early English case decided before the nature of an infant's obligation was fully understood hold that the new promise in order to be effective must be made before action brought.⁵⁶ Where, however, the obligation is barred by the Statute of Limitations, it is in reality the new promise which is the basis of the creditor's right.⁵⁷ Accordingly until the new promise is made, no right of action exists in favor of a creditor whose claim is barred. The courts, therefore, now generally hold a new promise, after action brought, insufficient.⁵⁸ The same reasoning is involved where a discharge in the bankruptcy is concerned. Here also a promise after action brought is insufficient.⁵⁹

§ 198. A new promise made on Sunday, or by an insolvent.

If under the local law a contract cannot be made on Sunday,

⁵⁴ See *Duncan v. Dixon*, 44 Ch. Div. 211, 213, also *infra*, § 231.

⁵⁵ *Slator v. Trimble*, 14 Irish C.L. 342; *Best v. Givens*, 3 B. Mon. 72; *Snyder v. Gericke*, 101 Mo. App. 647, 74 S. W. 377.

⁵⁶ *Thrupp v. Fielder*, 2 Esp. 628; *Thornton v. Illingworth*, 2 B. & C. 824; *Hyer v. Hyatt*, 3 Cr. C. C. 276; *Ford v. Phillips*, 1 Pick. 202; *Freeman v. Nichols*, 138 Mass. 313; *Merriam v. Wilkins*, 6 N. H. 432, 25 Am. Dec. 472; *Hale v. Gerrish*, 8 N. H. 374.

⁵⁷ See *supra*, §§ 179, 181, 196.

⁵⁸ *Bateman v. Pinder*, 3 Q. B. 574; *Bradford v. Spyker's Adm.*, 32 Ala.

134; *Martin v. Jennings*, 52 S. C. 371. Under the view formerly prevailing that the statute merely raised a presumption of payment, the English court decided in a case, now overruled, that a new promise after action brought would enable the creditor to recover. *Yea v. Fouraker*, 2 Burroughs, 1099, and some early cases in the United States have applied the same doctrine. *Love v. Hackett*, 6 Ga. 486; *Oliver v. Gray*, 1 H. & G. 204; *Danforth v. Culver*, 11 John. 146; *Stevens v. Hewitt*, 30 Vt. 262.

⁵⁹ *Thornton v. Nichols*, 119 Ga. 50, 45 S. E. 785.

neither an express new promise nor one implied from a part payment on that day should be sufficient basis for a creditor's recovery of a barred debt.⁹⁰

If a new promise to pay a debt barred by the Statute of Limitations is made in any form by an insolvent who subsequently goes into bankruptcy its validity need not be questioned so far as it imposes a merely personal liability upon the debtor, enforceable from after-acquired property if the debtor is not discharged; but the right of a creditor who has received such a promise to share in the assets of the bankrupt has been denied, and it seems justly if the creditor has reasonable cause to believe his debtor insolvent, on the ground that the allowance of proof of the obligation in bankruptcy would effect a preference.⁹¹

⁹⁰ It was so held in *Hussey v. Roquemore*, 27 Ala. 281; *Bumgardner v. Taylor*, 28 Ala. 687; *Dennis v. Sharman*, 31 Ga. 607; *Clapp v. Hale*, 112 Mass. 368, 17 Am. Rep. 111; *Whitcher v. McConnell*, 59 N. H. 470; *Haydock v. Tracy*, 3 W. & S. 507. But see *contra*, *Ayres v. Bane*, 39 Iowa, 518; *Thomas v. Hunter*, 29 Md. 406, where the new promise was held merely evidence to support an action on the original indebtedness. In Iowa by statute any written admission of indebtedness is sufficient to revive the debt. This statute was relied on by the court and may justify the decision in that State.

⁹¹ In *In re Salmon*, 239 Fed. 413, 414, L. Hand, J., went farther, saying:

"I have found only two cases dealing with the question—*In re Banks*, 207 Fed. 662, 665, in which Judge Ray makes the question turn upon the creditor's knowledge of the insolvency, there having been a payment; and *In re Blankenship*, 220 Fed. 395, where Judge Bledsoe allowed a written acknowledgment to revive the debt, the creditor being ignorant of the bankrupt's financial condition.

"I cannot agree that a bankrupt,

finding himself in a desperate financial position, may revive an outlawed claim by a written acknowledgment or a part payment. If the situation is looked at without the usual fiction, such an act creates anew the obligation quite as much as though the bankrupt on the eve of bankruptcy were to execute a bond without consideration in a jurisdiction where no consideration is necessary to support a bond. The result is no different if the usual fiction is accepted under which the payment is taken as evidence of a new promise to pay the indebtedness. Under that theory it still remains equally true, as in the case of a bond, that the new promise alone recreates the obligation. Such a promise seems to me to fall within the term 'incumbrance' in section 67 e of the Bankruptcy Act, and within the word 'charge' of section 35 of the New York Personal Property Law (Consol. Laws, c. 41). By it alone the assets of the bankruptcy are charged with an obligation which was either nonexistent before, or against which there was a valid defence, it makes no difference which.

It is unnecessary to consider whether

§ 199. A new promise based on a previous agreement within the Statute of Frauds.

A contract within the Statute of Frauds is not void but merely unenforceable;⁹² and a memorandum made after the original contract removes the statutory difficulty and makes the original contract enforceable.⁹³ But it is possible to suppose either that a new promise to perform the originally unenforceable contract is oral or, if written, that it is not an accurate or complete memorandum of the earlier transaction. Two objections may be made to the enforcement of the new promise. First, that it lacks consideration and, second, that it is in violation of a policy of the law laid down in the Statute of Frauds. As to the first difficulty, it may be said that the question is not materially different from that presented by new promises after debts have been barred by other technical rules of law, except that a contract within the Statute of Frauds though it may be said to exist even if no memorandum has been made⁹⁴ has never been enforceable.⁹⁵ The same objection, it should be observed, however, applies to promises by sureties who have never been charged owing to some condition precedent.⁹⁶ Whatever may be said of the first difficulty, the second would certainly seem to prohibit the enforcement of an oral promise. Even if it be admitted that the Statute of Frauds is intended wholly for the benefit of a defendant, it undertakes to free him from the chance of being held liable because of perjured testimony as to oral promises which he is alleged to have made. This policy of the law can hardly be carried out by allowing a plaintiff to testify that the defendant not only made an oral agreement originally but that he subsequently made another oral promise to carry

or not the creditor, *Hamilton H. Salmon*, was put on inquiry as to the bankrupt's insolvency, the distinction taken in *Re Banks*, *supra*, because the question is only whether the bankrupt may gratuitously destroy a part of his estate, *i. e.*, a valid defence, in the interest of a third person, and to the prejudice of his creditors. The case is analogous to a voluntary transfer in fraud of creditors, where it is never necessary

to show that the transferee had notice."

⁹² See *infra*, §§ 527 *et seq.*

⁹³ See *infra*, § 590.

⁹⁴ See *infra*, § 527.

⁹⁵ This circumstance would exclude it from the terms of the rule stated in the note to *Wennall v. Adney*. See *supra*, § 147, and *infra*, § 202.

⁹⁶ See *supra*, § 157.

out the first agreement. The argument is not so strong against written promises, which definitely state the terms of the promise, though they do not sufficiently state the whole of the original transaction to serve as a memorandum. The question has arisen in regard to various sections of the statute and the decisions are far from uniform. A promise to perform an oral antenuptial agreement has been held invalid;⁸⁷ as has a subsequent promise made to perform an oral guaranty;⁸⁸ but other decisions hold the defendant bound upon a negotiable instrument indorsed or made by him in performance of an oral promise within the statute or in satisfaction for its breach.⁸⁹ Such decisions are slight authority for the proposition that any subsequent written promise is sufficiently supported by a prior contract within the statute, and are no authority at all for the validity of a subsequent oral promise. It has, however, been directly held in at least one case that a subsequent informal written promise is enforceable.¹ A new written promise signed by the party to be charged, the only considera-

⁸⁷ In *Lloyd v. Fulton*, 91 U. S. 479, 485, 23 L. Ed. 363, a promise after marriage to carry out an oral antenuptial agreement was said to be invalid. So in *Richardson v. Richardson*, 148 Ill. 563, 36 N. E. 608, 26 L. R. A. 305, a promissory note, made after his marriage by a husband, was held not sufficiently supported by a prior oral antenuptial agreement. It should be observed in this connection that even if an oral antenuptial agreement is actually carried out after marriage, the settlement is treated as a voluntary conveyance. *Re Holland*, [1902] 2 Ch. 360; *Lloyd v. Fulton*, 91 U. S. 479, 23 L. Ed. 363; *Winn v. Albert*, 2 Md. Ch. 169; *Albert v. Winn*, 5 Md. 66; *Deshon v. Wood*, 148 Mass. 132, 19 N. E. 1, 1 L. R. A. 518; *Borst v. Corey*, 15 N. Y. 505. Whereas a trust unenforceable because of the Statute of Frauds may be carried out by the promisor, and his trustee in bankruptcy cannot set the conveyance aside. *Bailey v. Wood*, 211 Mass. 37, 97 N. E. 902, and cases cited; and gen-

erally an executed conveyance will not be regarded as voluntary when given in satisfaction of an oral agreement within the statute. *Sedgwick v. Tucker*, 90 Ind. 271.

⁸⁸ *Hall v. Soule*, 11 Mich. 494. The subsequent promise was in writing but did not sufficiently state the terms of the original bargain to serve as a memorandum of it. So in *Ribock v. Canner*, 218 Mass. 5, 105 N. E. 462, payments in part performance of an oral guaranty were held not to validate the guaranty.

⁸⁹ *Rogers v. Stevenson*, 16 Minn. 68; *Nelson v. Diffenderfer*, 178 Mo. App. 48, 163 S. W. 271; *Paul v. Stackhouse*, 38 Pa. 302; *Rankin v. Matthiesen*, 10 S. Dak. 628, 75 N. W. 196; *Kinsie v. Harper*, 15 Ont. L. R. 582.

¹ *Wills v. Ross*, 77 Ind. 1, 40 Am. Rep. 279. The subsequent promise was in a letter which did not so state the terms of the original bargain as to be a sufficient memorandum by itself.

tion for which was the rescission of a prior oral contract unenforceable because not to be performed within a year, has also been held binding; ² as have promises by one who originally entered into an oral contract for the purchase or sale of an interest in land, to carry out his agreement or reimburse the promisee for his failure to do so.³ On the other hand, an oral subsequent promise to pay for services of a real estate broker, has been held not binding in a State which required the original transaction to be in writing.⁴ And a subsequent promise to pay damages for failure to carry out an oral contract for the sale of goods which was within the Statute of Frauds has also been held invalid for insufficient consideration.⁵

§ 200. Ratification and adoption.

There are other classes of cases usually referred to the heads of ratification and adoption which in their essence involve the making of promises which are enforced by the law although supported by no present consideration. Thus where a contract has been made by one who purports to be, though he is not agent for another, the ratification of the agreement by the latter for the first time subjects him to legal liability. If he is regarded by the law as simultaneously becoming the promisee

² *Stout v. Ennis*, 28 Kans. 706.

³ In *Harris v. Clark*, 94 Iowa, 327, 62 N. W. 854, and *Poole v. Horner*, 64 Md. 131, 20 Atl. 1036, the defendant had orally contracted to pay the profit derived from a real estate transaction, to the plaintiff, and, after having made a profit, again promised to pay the money and was held legally bound to fulfil his promise, though the original agreement was held an oral trust within the statute. In *Brown v. Latham*, 92 Ga. 280, 18 S. E. 421, a son in consideration of land conveyed promised orally to reconvey it. It was held that this state of affairs was sufficient to support a promise after the father's death to pay the defendant's sister a share of the value of the land. In *Farnham v. O'Brien*, 22 Me. 475, a promise to reimburse the plaintiff

for expense incurred in preparing to carry out an unenforceable oral agreement to make a lease was sustained.

⁴ *Stout v. Humphrey*, 69 N. J. L. 436, 55 Atl. 281. This decision was followed in *Bagnole v. Madden*, 76 N. J. L. 255, 69 Atl. 967. Though in the latter case the subsequent promise was written, the New Jersey court held that a proper construction of the local statute required the original bargain to have been in writing. In *Muir v. Kane*, 55 Wash. 131, 104 Pac. 153, 26 L. R. A. (N. S.) 519, such a subsequent written promise was enforced; as was a note subsequently given in payment in *Mohr v. Rickgauer*, 82 Neb. 398, 117 N. W. 950.

⁵ *Hooker v. Knab*, 26 Wis. 511; *Nichols v. Mitchell*, 30 Wis. 329.

of a promise which was made to the supposed agent, there is consideration for the promise involved in his ratification, but otherwise there is not; and cases can easily be supposed where the ratifying principal gains nothing in exchange for the liability which he assumes.⁶ This is especially true in cases where the agent had a general authority and his violations of instructions or excess of authority, are not sufficient to afford ground to the principal for escaping from liability on a contract made by the agent on his behalf with the third person. Where the agent's general authority, or his apparent authority are thus such that the principal is bound by the contract, he may hold the agent liable for making it; but by his subsequent action may approve or ratify the agent's conduct. Such ratification obviously has no effect on the rights and liabilities of the third person; it simply frees the agent from liability to his principal. This is a pure gift on the part of the principal and yet is binding upon him.⁷ Similarly where a party to

⁶ *Grant v. Beard*, 50 N. H. 129.

⁷ All the decisions admit that the agent is thus freed from liability. *Smith v. Cologan*, 2 T. R. 188 n.; *Norris v. Cook*, 1 Curtis, C. C. 464; *Pacific Vinegar, etc., Works v. Smith*, 152 Cal. 507, 93 Pac. 85; *Triggs v. Jones*, 46 Minn. 277, 48 N. W. 1113; *Hanks v. Drake*, 49 Barb. 186; *Cairnes v. Bleeker*, 12 Johns. 300; *Towle v. Stevenson*, 1 Johns. Cas. 110; *Woodward v. Suydam*, 11 Ohio, 360; *Courcier v. Ritter*, 4 Wash. Cir. Ct. 549. See also *Bank of St. Mary's v. Calder*, 3 Strob. 403; *Mechanics' & Traders Ins. Co. v. Rion* (Tenn.), 62 S. W. 44. In some of these decisions it is held that the acceptance by the principal of the fruits of the transaction proves, or tends to prove adoption of the agent's conduct. But as the principal is in any event bound by the transaction, so far as the third person is concerned, the fact that he endeavors to get what advantage he can from it, does not indicate approval of the agent's conduct. Moreover, this course on the part of the principal is for the agent's advantage, since it mit-

igates damages. In *Triggs v. Jones*, 46 Minn. 277, 283, 48 N. W. 1113, the court said "There is no doubt that the general rule is that, by a ratification of an unauthorized act, the principal absolves the agent from all responsibility for loss or damage growing out of the unauthorized transaction, and that thenceforward the principal assumes the responsibility of the transaction, with all its advantages and all its burdens. Neither is there any question but that, where the rights and obligations of third persons may depend on his election, the principal is bound to act, and give notice of his repudiation or disaffirmance of the unauthorized act at once, or at least within a reasonable time after knowledge of the act; and, if he does not so dissent, his silence will afford conclusive evidence of his approval. Such a rule is necessary to protect the rights of third parties who have dealt with the agent. If the principal, after knowledge, remains entirely passive, it is but just, when the protection of third parties requires it, to presume that what, upon knowledge,

an agreement which he was induced to make by fraud or to which he has another equitable or personal defence, such as mistake or duress, ratifies the transaction; he thereupon without the receipt of any present consideration may subject himself to liability according to the terms of his original voidable promise. Where a forged or altered instrument is enforced merely because it has been ratified or adopted, even more clearly something of the same sort happens.⁸ Adoption, however, properly differs from ratification, in that no fictitious doctrine of relation is involved and recovery must be based on consideration or estoppel.⁹ The fiction of relation, where sanctioned by the law, should not hide the fact that in these cases, obligations are created or discharged without present consideration.

§ 201. Explanation of anomalous cases where transactions are enforced without present consideration.

Various attempts have been made to explain and to classify the cases where promisors are held liable without present consideration; and so far as possible to harmonize them with recognized principles. Three explanations in particular have been given. First,—that a new promise may revive liability based on a former valid consideration, but barred by some rule of positive law. Second,—that there is in these cases a waiver of defence and the plaintiff's right is based on the original cause of action. Third,—that the plaintiff's defence to the original cause of action was from the outset defeasible and has subsequently been defeated. These explanations have value if, and only if they fit the existing law and can be applied to new cases as they come up with correct results. That they have not this value will be evident from the ensuing sections. The truth should be recognized that the cases in question in the main are survivals of the early

he has failed to repudiate, he has tacitly confirmed. But it is apparent that the reasons for such a rule do not apply with equal force in favor of the agent himself, who has wrongfully committed the unauthorized act."

⁸ See as to the adoption of forged in-

struments, *infra*, § 1145; and as to ratification of alteration, *infra*, §§ 1896, 1897.

⁹ *Copps v. Hensley*, 23 Okl. 311, 100 Pac. 515; *Edwards v. Heralds of Liberty*, (Pa. 1919), 107 Atl. 324. See *infra*, § 1145.

rule, based on a fiction originally and still fictitious, that an antecedent debt is consideration for a subsequent promise to pay it. In connection with the cases in question, the fiction has been kept alive by the desire of courts to find some way to hold liable on a new promise any person whose defence or ground of non-liability, though technically valid, had no substantial foundation in justice. The exact boundaries of this branch of the law in view of these facts can be determined only empirically.

§ 202. Revival of debts barred by some positive rule of law.

The often quoted rule that debts which were once enforceable through the medium of an implied promise, and which have thereafter been barred by some positive rule of law, may be revived by a new promise, was suggested by the reporter in the note to *Wennall v. Adney*.¹⁰ Such a rule had not previously been stated by the courts, but it has often been repeated subsequently as expressing the correct rule. The statement, however, is not wholly satisfactory. It is not perfectly clear what defences are included under the designation of a positive rule of law. Moreover, in at least one class of cases where it is well settled that recovery is allowed because of the new promise, the liability was never previously enforceable through the medium of an implied promise or otherwise. This is the case of a surety's promise to pay though a condition precedent to any liability on his part has never been performed.¹¹ The rule itself professes no explanation why such cases should be excepted from the general principle requiring contemporaneous consideration to support a promise. It is an empirical classification, and doubtless in the main is accurate, but as has been indicated not entirely so.

§ 203. Waiver.

It is often said that the new promise of a debtor whose debt is barred by the Statute of Limitations by a discharge in bankruptcy or other similar defence waives the defence

¹⁰ See *supra*, § 147.

¹¹ See *supra*, § 157.

by a new promise rather than creates a new cause of action. This explanation, however, seems unsatisfactory for several reasons. First, because though there are few principles in the law with vaguer boundaries than those applied under the name of waiver, it cannot be admitted as a general rule that a defence can be surrendered without either consideration or a promissory estoppel based on action in reliance on the promise, and even such an estoppel while sufficient to excuse the performance of conditions or to destroy a defence is insufficient as a substitute for consideration to support a promise.¹² A bare agreement to surrender defences other than those within the special classes under consideration is not generally recognized as binding.¹³ For the same reason a promise to surrender the defence of the Statute of Limitations itself is not binding in regard to torts, and perhaps some other forms of action.¹⁴ If an agreement to surrender a defence were ever effectual as such without consideration or estoppel, it should be as effectual in one form of action as in another. Again, a new promise to pay a barred debt, if made after action brought is ineffectual.¹⁵ If the new promise took effect as a waiver of defence it should be good at this time. Moreover, the debtor's promise is to pay the debt, not to give up a particular defence, and the distinction is important.¹⁶ But the strongest reason for refusing to accept the doctrine of waiver is because it is well recognized that the new promise and not the old indebtedness is the measure of the creditor's right. This is so stated expressly in the cases¹⁷ and is proved by a number of decisions which are well established law. Conditional promises are binding.¹⁸ Promises of partial performance

¹² See *supra*, § 139, and *infra*, §§ 679 *et seq.*

¹³ In *Monkman v. Shepherdson*, 11 Ad. & E. 411, a servant had committed a breach of duty justifying the master under the terms of the contract in refusing to pay his wages. The master promised to waive his defence, but the promise was held not to bind him. See also *Green v. Coos Bay Wagon Road Co.*, 23 Fed. Rep. 67, 70; *Danforth v.*

Pratt, 42 Me. 50; but see *Bell v. Smith*, 99 Mass. 617; *Cahill v. Patterson*, 30 Vt. 592; *Patnote v. Sanders*, 41 Vt. 66, 98 Am. Dec. 564. See further, *infra*, §§ 693, 763 *et seq.*

¹⁴ See *supra*, § 186.

¹⁵ See *supra*, § 197.

¹⁶ See *supra*, § 184.

¹⁷ See *infra*, § 196.

¹⁸ See *supra*, § 182.

are binding;¹⁹ promises to pay in instalments are binding;²⁰ a new promise by a joint debtor binds him separately.²¹ The only countervailing arguments of importance are (1) that in many jurisdictions the action is based on the old obligation. As to this it may be said that in the first place in many jurisdictions the law is otherwise;²² but more particularly that in England and in jurisdictions which have followed England in allowing an action on the old indebtedness, it has been generally recognized that this form of pleading is anomalous and that the creditor's right is really based on the new promise;²³ (2) that in some cases a new promise has been held to impose further liability for a statutory period such as was applicable to the original indebtedness.²⁴ Except where such decisions can be sustained under the words of particular statutes, they seem open to objection both theoretically and practically.

§ 204. Defeasible defences.

It may be suggested, finally, as an explanation of the cases in question that the defence was from the outset defeasible in its nature; that is, that the law permitted the defendant to assert, within a proper time, his refusal to be bound by the transaction; that this privilege given by the law ceased either by the expiration of time or by any assertion by the defendant of his willingness to forego the defence or to perform the obligation in question. Such seems indeed to be the nature of the defence given to one induced by fraud to enter into a contract. Mistake and duress rest on similar grounds. The cases of contracts voidable for infancy, insanity, or intoxication may also be brought within the same class. Where the defence is of this nature it is not the new promise or ratification so called which gives rise to the right of action. Rather it is true that the defence or privilege given by the law never extended beyond permitting the defendant when apprised of the facts on which his rights depend to withdraw

¹⁹ See *supra*, § 181.

²⁰ *Ibid.*

²¹ *Lechmere v. Fletcher*, 1 Cr. & M. 623; *Weare v. Chase*, 58 N. H. 225.

²² See *supra*, § 196.

²³ *Ibid.*

²⁴ See *supra*, § 185.

from the transaction. Accordingly a failure extending beyond a reasonable time to assert the privilege should be as effective as express ratification. As to transactions executed on one or both sides, the law supports this statement.²⁵ As to transactions executory on both sides, it is probable that no action need be taken by the defendant until demand is made upon him for performance, and that he may then assert the defence of fraud, infancy, or other defence of the sort, though considerable time may have elapsed since the transaction was first entered into, and its nature discovered.²⁶ But the revival of debts barred by bankruptcy, the Statute of Limitations, or the failure to charge a surety, cannot be explained in the same way. In these cases even though the transaction is executed on the part of the plaintiff the benefit of the transaction may be retained permanently without the defence being forfeited. The explanation therefore of a defeasible defence does not afford a satisfactory legal theory on which to rest the decisions enforcing new promises.

²⁵ See *infra*, § 1526. This is not fully true as to infants, since an infant is excused from liability to perform his executory promise, when he has received during infancy property which he no longer has when he reaches his majority. See *infra*, § 238; *Catlin v.*

Haddox, 49 Conn. 492, 501 n. 44 Am. Rep. 249. The same is presumably true of insanity. The exception is necessary in both cases for the protection of the privileged person.

²⁶ See *infra*, § 1526.

CHAPTER VII

FORMATION OF FORMAL CONTRACTS)

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§ 205. Sealed instruments an old form of obligation.

The contracts most completely based on form are those under seal, and the use of these was common long before the recognition of simple contracts.¹

The obligation of the maker of a sealed instrument under

¹ "The earliest covenants we find in the books seem to touch the land. Y. B. 20 & 21 Ed. I. 494, 497. The earliest instance of a covenant not relating to land is of the time of Edward III, Y. B. 4 ed. III, 57, 71; Y. B. 7 Ed. III. 65, 67. The earliest covenants were regarded as grants, and suits could not be brought on the covenant itself. So a covenant to stand seised was a grant, and executed itself. The same is true of a covenant for the payment of money; it was a grant of the

money, and executed itself. For failure to pay the money, debt would lie. *Chawner v. Bowes*, Godb. 217. Afterwards an action of covenant was allowed, so that to-day there is an option." Ames, *Lectures on Legal Hist.* 98. As to the origin of sealed contracts, see T. Hudson Turner, 5 *Archaeological Journal*, 1; Professor Edward H. Decker, *Illinois Law Bulletin*, Feb., 1918, p. 161; *Wigmore on Evidence*, § 2428.

the common law depends wholly on certain forms being observed. If the forms are observed the obligation is binding. The instrument is not evidence of an obligation, it is the obligation itself.² When this theory is carried to its logical extent, as it once was, the existence of the instrument in proper form necessarily involves the continued existence of the obligation. Thus even though the instrument had been paid or performed according to its terms, it formerly still remained a binding obligation unless cancelled or destroyed, and could be again enforced against the maker.³ And for the same reason the destruction of the instrument necessarily involved the destruction of the obligation. If even the seal of the instrument was destroyed by accident, the obligation was entirely discharged.⁴ It is therefore evident that at common law mutual assent or any intention on the part of either obligor or obligee was entirely unnecessary. Perhaps the most striking illustration of this is found in the early law that one whose seal was attached to an obligation was bound, even though his seal had been stolen and attached to the instrument without his consent.⁵

² So Holmes, J., in *United States &c. Co. v. Riefler*, 239 U. S. 17, 60 L. Ed. 121, 36 Sup. Ct. 12, speaks of a bond "carrying as a specialty does, its complete obligation with the paper." These words are quoted and applied in *Hartford-Aetna Nat. Bank v. Anderson*, 92 Conn. 643, 103 Atl. 845.

³ Ames, *Lectures on Legal Hist.* 109.

⁴ So Shylock says: "Till thou canst rail the seal from off this bond, thou but offend'st thy lungs to speak so loud."

⁵ "Glanvill says that if the defendant admits that a seal upon the instrument is his seal, but denies the execution of the instrument, he is, nevertheless, bound, for he must set it down to his own carelessness that he could not keep his seal. The case supposed would arise where the seal had been lost or stolen. There is a case to this effect in the time of John; Abb. pl. 55, col. 2,

R. 4 (8 John). The doctrine was somewhat qualified by the time of Bracton; Bract. 396 b. He seems to think that a covenantor would not be liable unless it was by his negligence that the matter occurred, as by leaving the seal in the possession of his bailiff or his wife. . . . In the time of Edward I, Abb. pl. 284, col. 2, R. 7 (19 Ed. I) is a case on the same principle, being a petition to the King that a certain seal that had been lost should no longer have validity. In Riley's *Memorials of London*, Page 45 (29 Ed. I), it is said that public cry was made that A. had lost his seal and that he would no longer be bound by the same. Riley, Page 447 (4 Rich. II), also gives an account of making a new seal for the city of London, and it is stated, as if it was important, that the old seal was broken with due formality." Ames, *Lectures on Legal Hist.* p. 98.

§ 206. Requisites of a sealed contract.

It is said by Lord Coke ⁶ that a deed must be written on paper or parchment, but it may perhaps be doubted whether an instrument written or printed on any substance capable of receiving and retaining legible characters, would not have equal validity. The instrument must necessarily be written, printed or engraved, Blackstone suggests ⁷ that a signature of the party whose deed it is should also be added. Doubtless this is ~~unusual~~ and desirable, but it certainly was not requisite in the early law, and it probably is not requisite now.⁸ The instrument must contain a promise sufficiently definite in its terms for enforcement. A seal must be attached and the instrument must be delivered. It should be observed, however, that if parties intend to execute a sealed instrument or to execute effectively an instrument which the law requires to be sealed, but fail to attach a seal to the instrument which is signed and delivered, equity will now afford relief to rectify the mistake, and to this end may treat the instrument as if it had been sealed.⁹

§ 207. What is a seal.

It is said by Lord Coke that a seal is wax on which an impression has been made, and that the wax without the impression would not constitute a seal.¹⁰ But the common law has everywhere in recent times much relaxed this rule. Everywhere to-day any substance as, for instance, a wafer ¹¹ attached as a seal to a document would be held sufficient. So an impression made upon the paper as in the case of the seals ordinarily used by notaries and corporations would be sufficient.¹² It

⁶ Co. Litt, 229, repeated in 2 Blackstone Comm. 297.

⁷ 2 Com. 305.

⁸ *Cromwell v. Grunsden*, 2 Salk. 462; *Taunton v. Pepler*, 6 Maddock, 166; *Jeffery v. Underwood*, 1 Ark. 108. See also *Cooch v. Goodman*, 2 Q. B. 581, 597; *Shepp. Touch.* (Preston's ed.), 56 b. Cf. *McDill's Lessee v. McDill*, 1 Dall. 63, 1 L. Ed. 38; *Osby v. Reynolds*, 260 Ill. 576, 581, 103 N. E. 556.

⁹ *Rutland v. Paige*, 24 Vt. 181; *Ver-*

mont Accident Ins. Co. v. Fletcher, 87 Vt. 394, 89 Atl. 480.

¹⁰ *Institutes*, Book III, 169.

¹¹ *Tasker v. Bartlett*, 5 Cush. 359. Apparently the relaxation was first brought about by presuming from the recitals in the deed that an impression with the finger was made on the wafer.

¹² *In re Sandilands*, L. R. 6 C. P. 411, 412; *National Provincial Bank v. Jackson*, 33 Ch. D. 1, 11; *Hendee v. Pinkerton*, 14 Allen, 381; *Royal Bank v. Grand*

seems logically difficult starting from these recognized extensions of the early rule to deny validity to any written or printed addition to a document which was in fact intended as a seal, since ink is superimposed on the paper and an impression is also made on it; and many courts seem prepared to accept this consequence. Thus a scroll or scrawl has been held enough.¹³ So the word "seal,"¹⁴ or the letters L. S. (standing for *locus sigilli*).¹⁵

Perhaps the extreme limit was reached in a Pennsylvania case¹⁶ where it was held that a horizontal dash less than an eighth of an inch long was a sufficient seal. A few courts, however, still maintain a stricter rule; and while not denying the sufficiency of wafers or of such impressions on paper as are made by notaries' seals, decline to accept as seals a mere written or printed word or device.¹⁷ In many States

Junction Co., 100 Mass. 444, 97 Am. Dec. 115; *Beardsley v. Knight*, 4 Vt. 471, 479.

¹³ *United States v. Stephenson's Exec.*, 1 McLean, 462; *Anderson v. Wilburn*, 8 Ark. 155; *Williams v. Greer*, 12 Ga. 459; *Harden v. Webster*, 29 Ga. 427, 429; *Eames v. Preston*, 20 Ill. 389; *Trasher v. Everhart*, 3 G. & J. 234; *Line v. Line*, 119 Md. 403, 86 Atl. 1032; *Thompson v. Poe*, 104 Miss. 586, 61 So. 656; *Michenor v. Kinney*, *Wright*, 459; *Parks v. Duke*, 2 McCord, 380; *Whitley v. Davis' Lessee*, 1 Swan, 333, 335; *Jones v. Logwood*, 1 Wash. (Va.) 56. But see *Adam v. Kerr*, 1 B. & P. 360.

¹⁴ *Jackson v. Security Mut. Life Ins. Co.*, 233 Ill. 161, 84 N. E. 198; *Quincy Horse Ry. Co. v. Omer*, 109 Ill. App. 238; *Jeffery v. Underwood*, 1 Ark. 108; *Comerford v. Cobb*, 2 Fla. 418; *Bacon v. Green*, 36 Fla. 325, 18 So. 870; *Pierce v. Lacy*, 23 Miss. 193; *Groner v. Smith*, 49 Mo. 318; *Lorah v. Nissley*, 156 Pa. St. 329, 27 Atl. 242; *McClamroch, etc., Co. v. Bristow*, 94 S. C. 252, 77 S. E. 923; *Philip v. Stearns*, 20 S. D. 220, 105 N. W. 467; *Whitley v. Davis' Lessee*, 1 Swan, 333; *English v. Helms*,

4 Tex. 228; *Conner v. Autrey*, 18 Tex. 427.

¹⁵ *Jacksonville, etc., Nav., Co. v. Hooper*, 160 U. S. 514, 40 L. Ed. 515, 16 S. Ct. 379; *G. V. B. Min. Co. v. First Nat. Bank*, 95 Fed. 23, 36 C. C. A. 633; *Bertrand v. Byrd*, 4 Ark. 195; *Hastings v. Vaughn*, 5 Cal. 315; *Langley v. Owens*, 52 Fla. 302, 42 So. 457; *Stansell v. Corley*, 81 Ga. 453, 8 S. E. 868; *Ankeny v. McMahon*, 4 Ill. 12; *Lorah v. Nissley*, 156 Pa. St. 329, 27 Atl. 242; *Osborn v. Kistler*, 35 Ohio St. 99; *McKain v. Miller*, 1 McMull. (S. C.) 313; *Buckner v. Mackay*, 2 Leigh, 488. But see *Woodbury v. United States Casualty Co.*, 284 Ill. 227, 120 N. E. 8.

¹⁶ *Hacker's Appeal*, 121 Pa. 192, 15 Atl. 500, 1 L. R. A. 861.

¹⁷ *Woodbury v. United States Casualty Co.*, 284 Ill. 227, 120 N. E. 8 (letters [L. S.] held insufficient at common law and therefore in another State where the instrument was executed to the law of which was not proved); *McLaughlin v. Randall*, 66 Me. 266 (scroll insufficient); *Manning v. Perkins*, 106 Me. 419, 29 Atl. 1114 (printed word [seal] insufficient); *Bates v. New York*

statutes have declared that written or printed additions to the paper are sufficient.¹⁸

Under statutes which allow the use of a scroll or scrawl for a seal, all kinds of informal written or printed substitutes for sealing are permissible; as, for instance, the written or printed word seal.¹⁹ As long as the question whether an instrument was under seal depended on whether a piece of wax impressed with the obligor's seal was attached, intention

Central R. Co., 10 Allen, 251 (*facsimile* of corporate seal printed on document insufficient. This was held sufficient in *Woodman v. York, etc.*, R. Co., 50 Me. 549); *Bishop v. Globe Co.*, 135 Mass. 132 (printed word [seal] insufficient); *Providence, etc., Co. v. Crahan Engraving Co.*, 24 R. I. 175, 52 Atl. 804 (written scroll containing the word *seal*, insufficient); *Beardsley v. Knight*, 4 Vt. 471 (written word *seal* insufficient).

¹⁸ *Alabama*, Code (1907), § 3363. An instrument purporting to be under seal has the same effect as if a seal were affixed.

California, Civ. Code, § 193. A scroll or the word seal after the signature is sufficient.

Colorado, Mills Stat. (1912), § 824. A scroll is enough.

Connecticut, Gen. Stat. (1918), § 5742. The word *seal* or the letters L. S. are sufficient.

Florida, Comp. Laws (1914) § 2484. A scrawl or scroll written or printed is sufficient.

Georgia, Code, § 5. "A scrawl or any other mark intended as a seal shall be held as such.

Idaho, Rev. Stat. (1908), §§ 13, 5989. Impression on the paper is enough, or a scroll, or the word *seal*.

Illinois, Jones & Addington's Stat. (1913), § 2223. A scrawl, affixed by way of a seal, has the same effect as a seal.

Michigan, Comp. Laws (1916),

§ 11740. A scroll or device used as a seal has the same effect as a seal.

New Jersey, Comp. Stat. (1911), pp. 1540, 3776. A scroll or other device is sufficient.

New Mexico, Comp. Laws (1897), § 3932. A scroll is sufficient.

New York, Gen. Const. Law, § 44. A seal shall consist of a wafer, wax, or other similar adhesive substance or of paper or other similar substance, affixed thereto by mucilage or other adhesive substance, or of the word seal or the letters L. S. opposite the signature.

Oregon, Lord's Oreg. Laws (1910), § 775. Impression, wafer, wax, paper, scroll, or other sign made with a pen, constitutes a seal.

Rhode Island, General Laws (1909), c. 32, § 14. An impression is sufficient.

South Dakota, Comp. Laws (1913), § 2473. Like Rhode Island.

Utah, Comp. Laws (1917), §§ 5726, 7105. A scroll, printed or written, or the word seal is sufficient.

Virginia, Code (1904), §§ 5 (12), 2841. A scroll is sufficient.

West Virginia, Code (1913), § 344. A scroll written or printed is sufficient.

Wisconsin, Stat. (1915), § 2215. A scroll or device as a seal is sufficient.

¹⁹ *Bertrand v. Byrd*, 4 Ark. 195; *Jackson v. Security Mut. L. I. Co.*, 233 Ill. 161, 84 N. E. 198; *Whittington v. Clarke*, 16 Miss. 480; *Buckner v. Mackay*, 2 Leigh, 488; *Lewis v. Overby*, 28 Gratt. 627; *Osborn v. Kistler*, 35 Ohio St. 99.

played no part in the determination of the question; but it will be observed that the extensions of the common law result in making the intention of the obligor of vital importance, for when almost anything may serve as a seal whether or not it is in fact a seal depends upon whether it was affixed or adopted as such, that is, upon whether it was intended to be a seal.²⁰ If, however, a wafer or something appropriate for a seal was on the paper at the time of execution or was subsequently attached thereto by the signer in the place customary for a seal there is at least *prima facie* proof of the requisite intention.²¹

§ 208. Adoption of a seal.

It was early established that the maker of a deed need not himself attach the seal.²² And one seal may serve for

²⁰ Thus a piece of ribbon attached to parchment for the purpose of keeping the wax of a seal on the parchment was held insufficient, there being no trace of wax having actually been attached. But Cotton, L. J., said: "It is true that if the finger be pressed on the ribbon, that may amount to sealing, but no such inference can be drawn here." *National Provincial Bank v. Jackson*, 33 Ch. D. 1, 11. Such a ribbon was similarly held insufficient in *Duncan v. Duncan*, 1 Watts, 322. Similarly though a scrawl or flourish may be a seal in Pennsylvania, in *Taylor v. Glaser*, 2 S. & R. 502, it was held a flourish was not a seal because put under the signature, and apparently intended merely as part of it.

²¹ In *Langley v. Owens*, 52 Fla. 302, 309, 310, 42 So. 457, the court said: "It is not contended that the defendant did not in fact adopt and use the character or device (L. S.) as it appears to the right of his signature in the notes, but that he did not adopt and intend it as a seal. Where there is no dispute as to the character or device used in the execution of a written instrument it is for the court to determine whether the

device as used constitutes a seal. See *Beardsley v. Knight*, 4 Vt. 471; *Jacksonville M. P. Ry. & Nav. Co. v. Hooper*, 160 U. S. 514, 16 S. Ct. 379, 40 L. Ed. 515.

"Under this statute [Acts of 1893, c. 4148], a scrawl or scroll, affixed as a seal, to the signature of the maker of a promissory note is as effectual as a seal, and when such scrawl or scroll, printed or written, appears affixed to the maker's signature in the place usually occupied by the seal it is, in the absence of fraud, sufficient to give it effect as a seal. See *Hudson v. Poindexter*, 42 Miss. 304; *Barnard v. Gantz*, 140 N. Y. 249, 35 N. E. 430; *Hacker's Appeal*, 121 Pa. St. 192, 15 Atl. 500, 1 L. R. A. 861."

²² Perkins's Profitable Book, § 130, "But it is nothing to charge, whether it be sealed with the seal of the grantor or not, or by a stranger, or by the grantor, if the grantor deliver the writing, &c. as his deed." See also *Ankeny v. McMahon*, 4 Ill. 12; *Line v. Line*, 119 Md. 403, 86 Atl. 1032; *Underwood v. Dollins*, 47 Mo. 259; *Osborn v. Kistler*, 35 Oh. St. 99; *Lorah v.*

several persons. It was formerly thought necessary that each should make an impression upon the seal,²³ but this was ultimately held unnecessary. If, therefore, an instrument signed by several persons has seals opposite less than all the signatures, it may, nevertheless, be the sealed instrument of all; and if there is a general recital of sealing, it will be presumed that those who signed without affixing an individual seal adopted any seal which was already upon the instrument;²⁴ though parol evidence to the contrary is admissible.²⁵ If the instrument contains no recital or other statement tending to show that all the signers executed it under seal, it has been held that the mere fact that the signature to which no seal is affixed follows a signature which is followed by a seal is no evidence that the subsequent signers adopted the seal of the prior signer;²⁶ but parol evidence might show such adoption.²⁷

It has been said that if "the first sign without a seal, and the others add seals to their names, without the direction or consent of the first, then he cannot be presumed to adopt their seals as his, and it continues, as to him, a simple instrument, as it was when he first executed it."²⁸ It is to be observed, however, that the question is whether the instrument was sealed when it was delivered. If the first signer, therefore, delivered the instrument or authorized its delivery

Nissley, 156 Pa. 329, 27 Atl. 242; *McKain v. Miller*, 1 McMull. 313.

²³ *Shepard's Touchstone*, 57. "And if there be twenty to seal one deed, and they seal all upon one piece of wax and with one seal, yet if they make distinct and several prints; this is a very sufficient sealing, and the deed is good enough."

²⁴ *Bacon v. Green*, 36 Fla. 325, 18 So. 870; *Davis v. Burton*, 4 Ill. 41, 36 Am. Dec. 511; *McLean v. Wilson*, 4 Ill. 50; *Ryan v. Cooke*, 172 Ill. 302, 50 N. E. 213; *Tasker v. Bartlett*, 5 Cush. 359; *Lunsford v. LaMotte Lead Co.*, 54 Mo. 426; *Burnett v. McCluey*, 78 Mo. 676, 688; *Pequawket Bridge v. Mathes*, 7 N. H. 230, 26 Am. Dec. 737; *Bowman v. Robb*, 6 Pa. 302. But see

contra *Stabler v. Cowman*, 7 G. & J. 284; *State v. Humbird*, 54 Md. 327, which held general recitals of sealing no evidence of adoption.

²⁵ *Yarborough v. Monday*, 3 Dev. 420; *Hollis v. Pond*, 7 Humph. 222; *Lambden v. Sharp*, 9 Humph. 224.

²⁶ *Cooch v. Goodman*, 2 Q. B. 580, 598; *Hess's Estate*, 150 Pa. 346, 24 Atl. 676. But see apparently contrary statements in *Eames v. Preston*, 20 Ill. 389; *Muckleroy v. Bethany*, 23 Tex. 163.

²⁷ *Ball v. Dunsterville*, 4 T. R. 313; and see cases cited in the preceding two notes.

²⁸ *Eames v. Preston*, 20 Ill. 389; *Rankin v. Roler*, 8 Gratt. 63.

after a seal had to his knowledge been attached by subsequent parties, there seems as much reason to infer an adoption of the seal from recitals in the instrument as if the unsealed signature were the last on the instrument.

A corporation as well as an actual person may adopt as its seal to a document anything which is capable of being adopted as a seal by a natural person, even though the corporation have a special seal which it ordinarily uses.²⁹

§ 209. Recital of sealing is unnecessary.

It is usual at the close of a deed to state that it has been "signed, sealed and delivered," or that "in witness whereof the maker hereunto sets his hand and seal," or similar words. Such a recital, however, though desirable as evidence of the signer's intent, is not essential to the validity of the instrument as a covenant. Under the earliest common-law view an instrument necessarily showed whether it was sealed with the obligor's seal, and if such an instrument so sealed were outstanding, the obligor was liable. And even after some actual delivery by the obligor had become necessary, and also after it may be supposed to have become necessary that the seal should be actually affixed or adopted by the obligor, it was still true in the main that it could be determined on inspection whether a document was sealed or not without reference to any recitals. Such recitals accordingly were held unnecessary.³⁰

²⁹ *G. V. B. Mining Co. v. First Nat. Bank*, 95 Fed. 23, 33, 36 C. C. A. 633, and cases cited.

³⁰ Anonymous, 1 Dyer, 19 a, pl. 113; *Goddard's Case*, 2 Coke, 4 b, 5 a; *Bedow's Case*, 1 Leon. 25; *Peters v. Field*, Hetly, 75; *Thompson v. Butcher*, 3 Bulstr. 300, 302 (but see *Clement v. Gunhouse*, 5 Esp. 83); *Burton v. LeRoy*, 5 Sawy. 510; *Jeffery v. Underwood*, 1 Ark. 108; *Bertrand v. Byrd*, 4 Ark. 195; *Cummins v. Woodruff*, 5 Ark. 116; *Conine v. Junction, etc., R. Co.*, 3 Houst. 288; *Eames v. Preston*, 20 Ill. 389; *Jackson v. Security Mutual Life Ins. Co.*, 233 Ill. 161, 84 N. E. 198;

Hubbard v. Beckwith, 1 Bibb, 492; *Wing v. Chase*, 35 Me. 260; *Trasher v. Everhart*, 3 G. & J. 234, 246; *Mill Dam Foundry v. Hovey*, 21 Pick. 417, 428; *Brown v. Jordhal*, 32 Minn. 135, 19 N. W. 650; *Sticknoth's Estate*, 7 Nev. 223, 234; *Ingram v. Hall*, 1 Hayw. 193, 209; *Osborn v. Kistler*, 35 Ohio St. 99; *Osborne v. Hubbard*, 20 Oreg. 318, 25 Pac. 1021, 11 L. R. A. 833; *Taylor v. Glaser*, 2 S. & R. 502; *Frevall v. Fitch*, 5 Whart. 325, 34 Am. Dec. 558; *Biery v. Haines*, 5 Whart. 563; *Hopkins v. Cumberland R. Co.*, 3 W. & S. 410; *Lorah v. Nissley*, 156 Pa. 329, 27 Atl. 242; *Relph v. Gist*, 4 McCord. 267;

In Virginia and a few other States, however, a different rule prevails, and whether the seal attached to the instrument is one which would have been regarded as such by the early common law or not, a recital that the instrument is sealed must be made.³¹

Under the extension of the common-law definition of what constitutes a seal,³² a distinction is taken in some jurisdictions. It is held that to give a scroll or similar modern substitute for a seal the effect of one, requires a recital, but that a real or unmistakable seal is effectual without a recital.³³ But no such requirement is generally made.³⁴ It seems, therefore, that in most jurisdictions whether an instrument is under seal or not must frequently be open to determination by extrinsic parol evidence of the intention with which some scroll or dash was affixed to the signature of the maker.³⁵ Though if statements

McKain v. Miller, 1 McMull. 313; *Scruggs v. Brackin*, 4 Yerg. 528. See also *McRaven v. McGuire*, 17 Miss. 34; *Hudson v. Poindexter*, 42 Miss. 304.

³¹ *Bradley Salt Co. v. Norfolk Importing Co.*, 95 Va. 461, 28 S. E. 567. Also *Lee v. Adkins*, Minor, 187; *Carter v. Penn.*, 4 Ala. 140; *Moore v. Leseur*, 18 Ala. 606; *Blackwell v. Hamilton*, 47 Ala. 470; *Breitling v. Marx*, 123 Ala. 222, 26 So. 203; *McDonald v. Bear River, etc., Mining Co.*, 13 Cal. 220; *Echols v. Phillips*, 112 Ga. 700, 37 S. E. 977; *Barnes v. Walker*, 115 Ga. 108, 41 S. E. 243; *Bohannon v. Hough*, 1 Miss. 461 (but see *McRaven v. McGuire*, 17 Miss. 34); *Austin's Adm. v. Whitlock's Ex'rs*, 1 Munf. 487, 4 Am. Dec. 550; *Keller's Adm'r v. McHuffman*, 15 W. Va. 64, 85. See also *Buckingham v. Orr*, 6 Col. 587.

³² See *supra*, § 207.

³³ *Alt v. Stoker*, 127 Mo. 466, 30 S. W. 132, and cases cited; *Winter v. Kansas City Ry. Co.*, 160 Mo. 159, 61 S. W. 606; *Newbold v. Lamb*, 2 South. (N. J.) 449; *Corlies v. Van Note*, 1 Harr. (N. J.) 324; *Flemming v. Powell*, 2 Tex. 225 (compare *English v. Helms*, 4 Tex. 228;

Muckleroy v. Bethany, 23 Tex. 163). See also *Brown v. Jordhal*, 32 Minn. 135, 19 N. W. 650, 50 Am. Rep. 560; *Merritt v. Cornell*, 1 E. D. Smith, 335; *Osborne v. Hubbard*, 20 Oreg. 318, 25 Pac. 1021. In Missouri and Texas seals are now abolished altogether. See *infra*, § 218. In some jurisdictions at least the mere presence of a seal is not sufficient evidence that the instrument is sealed. There must be either a recital or extrinsic evidence of sealing by the obligor. *In re Pirie*, 198 N. Y. 209, 91 N. E. 587; *Taylor v. Glaser*, 2 Serg. & R. 502; *Smith v. Henning*, 10 W. Va. 596, 631, *cf.* *Jackson v. Security L. Ins. Co.*, 233 Ill. 161, 84 N. E. 198.

³⁴ See cases cited *supra*, n. 30.

³⁵ It is indeed said in *Jacksonville, etc., Nav. Co. v. Hooper*, 160 U. S. 514, 519, 40 L. Ed. 515, 16 S. Ct. 379, "Whether an instrument is under seal or not is a question for the court upon inspection; whether a mark or character shall be held to be a seal depends upon the intention of the executant, as shown by the paper" citing *Hacker's Appeal*, 121 Penn. St. 192, 15 Atl. 500, 1 L. R. A. 861; *Pillow v. Roberts*, 13

or recitals are made in an instrument to which is affixed something capable of being a seal if intended as such, that it is sealed, such statements are doubtless evidence and perhaps conclusive evidence of the obligor's intent.³⁶

§ 210. Delivery.

The final requisite for the validity of a deed is delivery. Until delivery it is ineffectual though signed, sealed, and assented to by the parties as an expression of the bargain between them; and when once delivered it is binding though redelivered for safe keeping.³⁷ It matters not when the instrument is dated; it becomes effectual when delivered,³⁸ though

How. 472, 474, 14 L. Ed. 228. But it is hard to see, if recitals are unnecessary, and anything may serve for a seal which is so intended, how "the intention of the executant, as shown by the paper" can be decisive. *Non constat* that any intention appears from the paper. In *Jeffery v. Underwood*, 1 Ark. 108, 111, the court said: "The scrawl must appear on the face of the instrument; the proof that it was placed there by way of seal may be by evidence *dehors* the instrument." In *National Provincial Bank v. Jackson*, 33 Ch. D. 1, 11, the court referred as important, to evidence of an attesting witness as to whether the finger of the maker was pressed upon the ribbon attached to the document, or anything of the sort. And see cases at the end of the preceding note.

³⁶ In *Metropolitan Life Ins. Co. v. McCoy*, 124 N. Y. 47, 26 N. E. 345, 11 L. R. A. 708, a penal bond was signed which recited that it was sealed, but which in fact was not sealed at the time when one of the obligors signed it, seals being afterwards affixed by the other obligor. It was held that the first obligor was estopped to deny the validity of the sealing. In *State v. Humbird*, 54 Md. 327, and *Taylor v. Glaser*, 2 S. & R. 502, it was held that a recital of sealing does not estop the maker of a penal bond delivered with-

out seals from denying that it is sealed. See also *Hudson v. Webber*, 104 Me. 429, 72 Atl. 184. In *Barnet v. Abbot*, 53 Vt. 120, it was held that a recital in a bond that it was sealed is evidence that it was sealed when delivered but not conclusive proof. See further as to the general conclusiveness of recitals, *supra*, § 115. In *Brown v. Jordhal*, 32 Minn. 135, 19 N. W. 650, 50 Am. Rep. 560, the court said: "Such words in the *testimonium* clause as 'witness my hand and seal,' or 'sealed with my seal,' would establish that the scroll or device was used as a seal. . . . It would be difficult to conceive how the party could express that the device was intended for a seal more clearly than by the word 'seal' placed within and made a part of it." To the same effect is *Osborne v. Hubbard*, 20 Oreg. 318, 25 Pac. 1021. In *Whittington v. Clarke*, 16 Miss. 480, 485, *Thatcher, J.*, said: "Whenever it is manifest that a scroll is intended to be used 'by way of seal,' it must have that effect whether it appears from the body of the instrument, or from the scroll itself."

³⁷ *King v. Fragley*, 19 Cal. App. 735, 127 Pac. 813. In the early law this result would doubtless not have been reached.

³⁸ *Stone v. Bale*, 3 Lev. 348; *Osbourne v. Rider*, Cro. Jac. 135; *Cromwell v.*

the execution is presumed in the absence of evidence to the contrary to have taken place on the day on which the deed is dated.³⁹ It should be observed, however, that though no obligation arises until delivery, the terms of the instrument may be such that it then binds the obligor for occurrences prior to delivery, for example from the date of the instrument;⁴⁰ and it is also possible to have a preliminary simple contract to execute in the future a formal contract.⁴¹ The primary idea of delivery was concerned with the surrender of possession of the instrument as a fact, rather than with any intent on the part of the obligor to make the deed immediately operative;⁴² but at a comparatively early day it was recognized as a necessity that the obligor should surrender possession voluntarily;⁴³ and thereby the obligor's real or apparent attitude of mind became a factor in the problem, though the

Grunsdén, 2 Salk. 462; *Thompson v. Thompson*, 9 Ind. 323, 68 Am. Dec. 638; *Lee v. Mass. Ins. Co.*, 6 Mass. 208, 219; *Banning v. Edes*, 6 Minn. 402; *Jackson v. Schoonmaker*, 2 Johns. 230; *Geiss v. Odenheimer*, 4 Yeates, 278, 2 Am. Dec. 407; *Swan v. Hodges*, 3 Head, 251; *McMichael v. Carlyle*, 53 Wis. 504, 10 N. W. 556.

³⁹ *Oshey v. Hicks*, Cro. Jac. 263; *Savery v. Browing*, 18 Ia. 246; *Lyon v. McIlvaine*, 24 Ia. 9; *M'Connell v. Brown*, Litt. Sel. Cas. 459; *Banning v. Edes*, 6 Minn. 402; *Colquhoun v. Atkinsons*, 6 Munf. 550; *Raines v. Walker*, 77 Va. 92; *Wheeler v. Single*, 62 Wis. 380, 22 N. W. 569. See also *Anderson v. Weston*, 6 Bing. N. C. 296.

⁴⁰ In *Aetna Life Ins. Co. v. American Surety Co.*, 34 Fed. 291, 300, speaking of a surety's obligation, the court said: "It was not delivered or accepted until July 29th, but when accepted it took effect in accordance with its express terms, and if, by its terms, it commenced on June 15th, and was to continue for 12 months thereafter, the bond, if delivered and if accepted during the 12 months, related back to June 15th. *Dawes v. Edes*, 13 Mass. 177;

Hatch v. Attleborough, 97 Mass. 533." See also *Rose v. Mutual L. Ins. Co.*, 240 Ill. 45, 88 N. E. 204.

⁴¹ *Langdell*, Summ. Cont., § 119. Not uncommonly a contract to issue a policy of insurance is made in this way. See, e. g., *Taylor v. Merchants F. Ins. Co.*, 9 How. 390, 13 L. Ed. 187; *Union Central L. Ins. Co. v. Phillips*, 102 Fed. 19, 41 C. C. A. 263; *Devine v. Federal L. Ins. Co.*, 250 Ill. 203, 95 N. E. 174; *New York L. Ins. Co. v. McIntosh (Miss.)*, 41 So. 381.

⁴² This is shown by the authorities referred to *supra*, § 205, that a man might be bound by a deed sealed with his seal even though attached by another without authority.

⁴³ *Perkins's Profitable Book*, § 137. "And although a deed be sufficiently written in my name, and sealed by me, but is not delivered by me, or another by my assent, or agreement or commandment, the same shall not bind me; for all this time it is but an escrow. And if I make such an escrow, and let it lie by me, and a stranger gets it, it shall not bind me, for it is not yet my deed."

intent of the obligee or grantee was not equally important, since delivery for his use made to a third person who had not at the time been appointed by the obligee or grantee as his agent, sufficed.⁴⁴ Intent to deliver is unquestionably now essential;⁴⁵ but the rule which still persists that a deed can not be delivered as an escrow to the obligee or grantee⁴⁶ is evidence of an early doctrine that so long as there was a voluntary surrender of possession to the obligee or to some one acting as agent not for the obligor but for the obligee, the intent with which the surrender was made was immaterial, and that even though an intent was expressed and assented to, that the obligor should not be bound, he nevertheless would be so bound.

A deed may be unilateral or bilateral in its operation. In the former case it need be executed only by the obligor and is customarily called a deed poll. If the obligations are bilateral it would normally be executed by both parties and is called an indenture.⁴⁷ Though one part only of an indenture is executed, the deed will nevertheless be binding if that part is delivered; but if there was no intent to deliver any part

⁴⁴ *Butler & Baker's Case*, 3 Co. 25a, 26 b; *Renahan v. McAvoy*, 116 Md. 356, 81 Atl. 586; *Roepke v. Nutzmann*, 95 Neb. 589, 146 N. W. 939; *Buchanan v. Clark*, 164 N. C. 56, 80 S. E. 424, and see *infra*, § 212. It is immaterial that the grantor is dead when the deed is delivered by the third person to the grantee. *Schooler v. Schooler*, 258 Mo. 83, 167 S. W. 444 *infra* n. 58.

⁴⁵ *Cobban v. Cobban*, 208 Fed. 231, 125 C. C. A. 431; *Piercy v. Piercy*, 18 Cal. App. 751, 124 Pac. 561; *Elliott v. Merchants' Bank*, 21 Cal. App. 536, 132 Pac. 280; *Miles v. Robertson*, 258 Mo. 717, 167 S. W. 1000; *Thrush v. Thrush*, 63 Or. 143, 126 Pac. 994; and see cases in the following section.

⁴⁶ See *infra*, § 212.

⁴⁷ In 2 Blackstone Comm. 295, it is said: "If a deed be made by more parties than one, there ought to be regularly as many copies of it as there are

parties, and each should be cut or indented (formerly in acute angles *indentium* (like teeth), like the teeth of a saw, but at present in a waving line) on the top or side, to tally or correspond with the other; which so deed so made, is called an indenture."

"When the several parts of an indenture are interchangeably executed by the several parties, that part or copy which is executed by the grantor is usually called the *original*, and the rest are *counterparts*; though of late it is most frequent for all the parties to execute every part; which renders them all originals. A deed made by one party only is not indented, but *polled* or shaved quite even; and therefore called a *deed-poll*, or a single deed." See *infra*, § 214, as to the obligation of one who accepts a deed so executed by a grantor or obligor.

until all the parts were executed, there is no obligation until this condition is fulfilled.⁴⁸

§ 211. How far intent to deliver must be accompanied with actual delivery.

The English law has gone in modern times to an extreme directly opposite to that of the early law. In the early law the vital matter was actual surrender of possession irrespective of intent. In the modern English law intent seems sufficient without surrender of possession, and without any agreement between the parties that the obligor shall hold possession as bailee for the obligee. The House of Lords has held that a policy of insurance was delivered and therefore operative, though still in the possession of the insurance company, on the ground that the evidence showed an intention on the part of the company to execute the policy as an immediately binding obligation.⁴⁹ Though generally the cases in the United States do not seem to have gone quite to the extreme of the English decisions, some cases at least seem to have accepted without question the English statement that the only thing essential to delivery is some manifestation by word or act on the part of the obligor that the instrument is to be immediately binding;⁵⁰ but other authorities require

* In *Diebold Safe & Lock Co. v. Morse*, 226 Mass. 342, 115 N. E. 431, 432., the court said: "It is unnecessary to consider . . . the cases cited in the plaintiff's brief deciding that if one party executes its part of the indenture it shall be his deed, though the other party does not execute his part. These cases are to be distinguished from the case at bar, for the reason that it was here found as a fact that the contract was not binding until all parties had exchanged, executed and delivered both the indentures. The delivery of an instrument in writing does not make it operative, if delivered on a condition not fulfilled."

⁴⁸ *Xenos v. Wickman*, L. R. 2 H. L. 296, followed in *Roberts v. Security Co.*, [1897] 1 Q. B. 111. One may guess

that study of the civil law was responsible for the substitution of the subjective test of that law for the objective standard of the common law.

⁴⁹ See for instance *Stephens v. Stephens*, 108 Ark. 53, 156 S. W. 837; *Moore v. Trott*, 162 Cal. 268, 122 Pac. 462; *New York Life Ins. Co. v. Babcock*, 104 Ga. 67, 30 S. E. 273, 42 L. R. A. 88, 69 Am. St. Rep. 134; *Rode-meir v. Brown*, 169 Ill. 347, 48 N. E. 468, 61 Am. St. Rep. 176; *Rose v. Mutual L. Ins. Co.*, 240 Ill. 45, 88 N. E. 204; *Hoyt v. Northup*, 256 Ill. 604, 100 N. E. 164; *Thurston v. Tubbs*, 257 Ill. 465, 100 N. E. 947; *Hathaway v. Cook*, 258 Ill. 92, 101 N. E. 227; *Little v. Eaton*, 287 Ill. 623, 108 N. E. 727; *Johnson v. Gerald*, 169 Mass. 500, 48 N. E. 764; *Mitchell v. Ryan*, 8

not only an appropriate intent but an actual relinquishment by the grantor of the custody or control of the instrument.⁵¹ Most of the cases on this subject relate to conveyances of real estate, or to policies of insurance. The question of delivery, however, seems identical whatever the character of the deed or covenant.⁵²

§ 212. Delivery in escrow.

The manual surrender of a sealed instrument to a third person does not necessarily create an immediate obligation. The instrument may be delivered in escrow.⁵³ Acquisition by the grantee of the escrow before the performance of the condition upon which it was to be delivered, will not make the instrument binding, whether the fault was due to the person in whose hands the deed was put as an escrow or to the fraud of the grantee.⁵⁴ It was the rule of the common law that though delivery could thus be made to a third person

Oh. St. 377; *Henry v. Phillips*, 105 Tex. 459, 151 S. W. 533; *Douthat v. Roberts*, 73 W. Va. 358, 80 S. E. 819; *Devlin*, *Real Estate* (3d ed.), § 262.

⁵¹ *Storey v. Storey*, 214 Fed. 973, 131 C. C. A. 269; *Renehan v. McAvoy*, 116 Md. 356, 81 Atl. 586, 38 L. R. A. (N. S.) 941; *Clark v. Cresswell*, 112 Md. 339, 76 Atl. 579; *Satterly v. Dewick*, 197 N. Y. 590, 91 N. E. 1120; *Rountree v. Rountree*, 85 S. C. 383, 67 S. E. 471; *Butts v. Richards*, 152 Wis. 318, 140 N. W. 1, 44 L. R. A. (N. S.) 528.

⁵² The numerous authorities on the delivery of deeds are collected in *Devlin on Real Estate* (3d ed.) §§ 260 *et seq.*

⁵³ *Perkins Profitable Book*, § 138, "And if I make a deed and deliver it to a stranger as an escrow, to keep until such a day, &c. upon condition, that if before that day he to whom the escrow is made shall pay to me ten pounds, give me a horse, enfeoff me of a manor, or perform any other condition, then the stranger shall deliver this escrow to him as my deed; in this

case, if he deliver the same to him as my deed before the conditions or condition fulfilled, it is not my deed *simpliciter*. But if the conditions or condition be fulfilled, and the escrow delivered by him (after the conditions performed) as my deed, then it is my deed and shall bind me."

⁵⁴ *Wood v. French*, 39 Okl. 685, 136 Pac. 734; *Sharp v. Kilborn*, 64 Or. 371, 130 Pac. 735; *Devlin on Real Estate*, § 322.

In *Sheppard's Touchstone*, p. * 59, it is said, "where the deed is delivered to a stranger, and apt words are used in the delivery thereof, it is of no more force until the conditions be performed, than if I had made it and laid it by me, and not delivered it all; and therefore in that case, albeit the party get it into his hands before the conditions be performed, yet he can make no use of it at all, neither will it do him any good." But see *infra*, §§ 1244 *et seq.*, and as to the possible rights of a purchaser of value from the grantee, see *Tiffin on Real Property*, § 406.

as an escrow⁵⁵ it could not be so made to the grantee and the rule still seems generally accepted that a delivery to the grantee necessarily makes a deed immediately effective though there are occasional inconsistent decisions,⁵⁶ and the distinction is somewhat fine between delivering in escrow to the obligee and entrusting the manual possession to him without the intention necessary to constitute a delivery. Delivery to a third person to hold merely as the grantor's agent does not constitute a delivery even in escrow, since the deed may be recalled,⁵⁷ whereas when a deed is delivered in escrow, the interest of the grantee or obligee is irrevocable by the grantor's death or otherwise.⁵⁸

§ 213. How far acceptance by the obligee is necessary.

The English law has never required an assent on the part of the obligee in order to make a deed binding.⁵⁹ The obligee may decline to accept the estate or obligation conferred upon him by the deed, but until and unless he declines, the instrument is operative. On the other hand, many American authorities following the analogy of simple contracts, deny effect to a deed until there has been some acceptance by the

⁵⁵ Even though he is the obligee's attorney. *Nichols v. Rosenfeld*, 181 Mass. 525, 63 N. E. 1063.

⁵⁶ *Elliott v. Merchants Bank*, 21 Cal. App. 536, 132 Pac. 280; *Newman v. Baker*, 10 Dist. Col. App. 187; *Whitney v. Dewey*, 10 Idaho, 633, 80 Pac. 1117, 69 L. R. A. 572; *Ryan v. Cooke*, 172 Ill. 302, 50 N. E. 213; *McClendon v. Brockett*, 32 Tex. Civ. App. 150, 73 S. W. 854; *Blair v. Security Bank*, 103 Va. 762, 50 S. E. 262; *Devlin on Real Estate*, §§ 314-317. But see *Wilson v. Powers*, 131 Mass. 539; *Diebold Safe & Lock Co. v. Morse*, 226 Mass. 342, 115 N. E. 431; *Holbrook v. Truesdell*, 100 N. Y. App. Div. 9, 90 N. Y. S. 1034.

⁵⁷ *Seeley v. Curtis*, 180 Ala. 445, 61 So. 807; *Stevens v. Stevens*, 256 Ill. 140, 99 N. E. 917; *Hoyt v. Northup*, 256 Ill. 604, 100 N. E. 164; *Spurlock v.*

Spurlock, 149 Ky. 822, 149 S. W. 1132; *Thrush v. Thrush*, 63 Or. 143, 126 Pac. 994.

⁵⁸ *Thurston v. Tubbs*, 257 Ill. 465, 100 N. E. 947; *Wheeler v. Loesch*, 51 Ind. App. 262, 99 N. E. 502; *Luscombe v. Peterson*, 173 Mich. 165, 138 N. W. 1057; *Henry v. Phillips*, 105 Tex. 459, 151 S. W. 533.

⁵⁹ In *Butler & Baker's Case*, 3 Coke, 25 a, 26 b. it is said: "If A makes an obligation to B and delivers it to C to the use of B, this is the deed of A presently; but if C offers it to B, there B may refuse it *in pais*, and thereby the obligation will lose its force (but perhaps in such case A in an action brought on this obligation cannot plead *non est factum*, because it was once his deed." See also *Thompson v. Leach*, 2 Vent. 198; *Malott v. Wilson*, [1903] 2 Ch. 494.

grantee or obligee.⁶⁰ In many of these jurisdictions, however, any nominal requirement of acceptance is virtually nullified by the rule that acceptance of a deed if beneficial will be presumed.⁶¹ Especially where infants and persons incapable of giving effective assent are obligees or grantees the presumption of acceptance has been indulged;⁶² and it has been held that acceptance after the death of the grantor or obligor is sufficient.⁶³

§ 214. Acceptance of a sealed instrument containing promises by the acceptor does not bind him as a covenantor.

It has already been seen⁶⁴ that assent to a contract may be inferred from the acceptance of a document which states that something is to be done by the person who accepts the document. On no principle can this doctrine be properly extended so as to make the acceptor of an instrument under seal, a covenantor. He has not sealed and delivered the instrument as his obligation.⁶⁵

An exceptional doctrine, however, has widely prevailed to the effect that the acceptance of a deed implies a covenant on the part of the acceptor to do whatever is stated in the deed to be done by him; especially where the deed con-

⁶⁰ *Bank of Healdsburg v. Bailhache*, 65 Cal. 327, 4 Pac. 106; *Moore v. Flynn*, 135 Ill. 74, 25 N. E. 844; *Jefferson County Building Assoc. v. Heil*, 81 Ky. 513; *Cates v. Cates*, 152 Ky. 47, 153 S. W. 10; *Ward v. Rittenhouse Coal Co.*, 152 Ky. 228, 153 S. W. 217; *Meigs v. Dexter*, 172 Mass. 217, 52 N. E. 75; *Schooler v. Schooler*, 258 Mo. 83, 167 S. W. 444; *Ford v. Gale*, 140 N. Y. S. 541, 155 N. Y. App. Div. 675; *Couch v. Addy*, 35 Okla. 355, 129 Pac. 709; *Tuttle v. Turner*, 28 Tex. 759, 773.

⁶¹ *Tibbals v. Jacobs*, 31 Conn. 428; *Ross v. Campbell*, 73 Ga. 309; *Wilenou v. Handlon*, 207 Ill. 104, 112, 69 N. E. 892; *Jones v. Swayze*, 42 N. J. L. 279; *Diefendorf v. Diefendorf*, 132 N. Y. 100, 30 N. E. 375; *Larisey v. Larisey*, 93

S. C. 450, 77 S. E. 129. See also *Devlin on Real Estate*, § 287.

⁶² *Eastham v. Powell*, 51 Ark. 530; *Hayes v. Boylan*, 141 Ill. 400, 30 N. E. 1041, 33 Am. St. Rep. 326; *Palmer v. Palmer*, 62 Iowa, 204, 17 N. W. 463; *Hall v. Hall*, 107 Mo. 101, 17 S. W. 811; *Davis v. Garrett*, 91 Tenn. 147, 18 S. W. 113. And see *Devlin on Real Estate*, § 286.

⁶³ *Burkey v. Burkey* (Mo.), 175 S. W. 623.

⁶⁴ *Supra*, § 90.

⁶⁵ *Lock v. Wright*, 1 Strange, 569; *Moore v. Jones*, 2 Ld. Ray. 1536; *Hinsdale v. Humphrey*, 15 Conn. 431; *Parish v. Whitney*, 3 Gray, 516; *Martin v. Drinan*, 128 Mass. 515; *Gale v. Nixon*, 6 Cow. 445; *Maule v. Weaver*, 7 Pa. 329; *Johnson v. Johnson*, 45 Vt. 419, 12 Am. Rep. 214.

veys an estate and the acceptor takes possession of the estate.^{65a}

§ 215. Requirements in regard to the obligee of a sealed instrument.

The common law made the technical rule that though a deed poll might create a covenantee who was not a party to the instrument (for indeed a deed poll would otherwise be an impossibility) yet in an indenture no one not a party to the deed could sue upon it as covenantee.⁶⁶ Therefore where an agent purporting to act on behalf of his principal entered into an indenture with another person, but executed the indenture in such a way as to bind himself and not his principal, the principal could not sue on the indenture though the covenant was in terms made to the principal;⁶⁷ and for the same reason an instrument executed by A and B purporting to release an obligation due to A by C was ineffectual.⁶⁸ It may perhaps be questioned whether this rule of the common law would be generally followed to-day, even where seals still have their common-law effect. If a plaintiff is expressed as a covenantee of a promise sealed by the defendant, it may be thought that the real essentials of a covenant exist. The case is not like that where a plaintiff seeks to sue on a covenant made to another because he is a beneficiary of the covenant. In such a case the covenant does not run to the plaintiff, and clearly the common law would deny recovery.⁶⁹ A further requisite in regard to the covenantee is that he must be fixed at the time the covenant is delivered, for it

^{65a} *Staines v. Morris*, 1 V. & B. 8; *Wilkins v. Fry*, 1 Meriv. 244; *Georgia Southern Ry. v. Reeves*, 64 Ga. 492; *Midland Ry. Co. v. Fisher*, 125 Ind. 19, 24 N. E. 756, 21 Am. St. Rep. 189; *Burbank v. Pillsbury*, 48 N. H. 475, 97 Am. Dec. 633. See also *Harrison v. Vreeland*, 38 N. J. L. 366; *Sparkman v. Gove*, 44 N. J. L. 252; *Bowen v. Beck*, 94 N. Y. 86, 46 Am. Rep. 124.

⁶⁶ *Scudamore v. Vandenstene*, 2 Coke's Inst. 673; *Gilby v. Copley*, 3 Lev. 138; *Storer v. Gordon*, 3 M. & S.

308; *Berkeley v. Hardy*, 5 N. & C. 355; *O'Grady v. Howe & Rogers Co.*, 166 N. Y. App. Div. 552, 152 N. Y. S. 79. Covenants running with land to which they related are an exception to the rule.

⁶⁷ *Berkeley v. Hardy*, 5 B. & C. 355. The doctrines of undisclosed principal are inapplicable to sealed contracts. *Infra*, § 296.

⁶⁸ *Storer v. Gordon*, 3 M. & S. 308.

⁶⁹ See *infra*, § 401.

must take effect then if at all. There must then be a complete promise which requires both a promisor and a promisee. The parties need not be named, it is enough if they are described in the instrument so that at the time of its delivery they are capable of identification. But there cannot be a floating covenant corresponding to a public or general offer of a simple contract. A promise under seal to such a person as shall in the future fulfil a given description is therefore not a valid covenant when delivered, and does not later become so when the promisee becomes identified.⁷⁰

§ 216. An agent cannot bind his principal by deed unless he has authority under seal.

Unless an agent acts in the presence and under the direction of his principal, or unless the principal is a corporation, the agent cannot effectively make a sealed contract on behalf of his principal without authority under seal or subsequent ratification under seal. The authorities upon these propositions and some consequences involved in them are subsequently considered.⁷¹

§ 217. A covenant needs no consideration.

As the law of covenants long antedates the law requiring consideration for the formation of contracts, it is necessarily true that, in the early law, no consideration in the modern sense was required to support a covenant; and though Pollock and Maitland "doubt whether in the thirteenth century a purely gratuitous promise made in a sealed instrument would have been enforced if its gratuitous character was quite clear," certainly long before the origin of the action of assumpsit such an instrument must have been binding.⁷² After the action of assumpsit had been developed, the somewhat unfortunate mode of expression became usual that a sealed instrument "imported" a consideration.⁷³ It would

⁷⁰ *Saunders v. Saunders*, 154 Mass. 337, 28 N. E. 270. But see *Nelson Coke & Gas Co. v. Pellatt*, [1902] 4 Ontario, 481, with which compare *Hudson Real Est. Co. v. Tower*, 156 Mass. 82, 30 N. E. 465, 32 Am. St. Rep. 434.

⁷¹ See *infra*, § 275.

⁷² See *Bellewe*, 32; *Fitzherbert Abr. Annuities*, pl. 54, *supra*, § 109.

⁷³ *Bromley, Arguendo*, in *Sharington v. Strotton*, 1 Plowden, 298, 309, said in 1565: "For every deed imports in

have been more accurate to have said that no consideration was needed for such a document.⁷⁴ But however expressed the law has always been clear that apart from changes made by statute, a sealed promise, whether absolute or in the form of an offer, is binding without consideration.⁷⁵ It should be mentioned, however, that equity will not specifically enforce or otherwise aid the covenantee of a voluntary covenant, but will leave him to his remedy at law,⁷⁶ except in a few cases, thus enumerated by a learned writer:⁷⁷

1. A gratuitous declaration of trust without transmutation of possession.

2. A covenant to hold real property in trust for another in "consideration" of natural love and affection.

itself a consideration, viz., the will of him that made it; and therefore where the agreement is by deed, it shall never be called a *nudum pactum*." So in Bacon on Uses, 13, about the beginning of the seventeenth century, it was said: "I would have one case shewed by men learned in the law, where there is a deed, and yet there needs a consideration; as for parol, the law adjudgeth it too light to give action without consideration; but a deed ever in law imports a consideration, because of the deliberation and ceremony in the confection of it." There is here evidently a juggling with a double meaning of the word "consideration."

⁷⁴ The matter is accurately stated, that "consideration is not necessary" by Lord Eldon in *Cock v. Richards*, 10 Ves. 429, 438.

⁷⁵ *Ex parte Tindal*, 8 Bing. 402; *Willard v. Tayloe*, 8 Wall. 557, 19 L. Ed. 501; *Dunlop v. Baker*, 239 Fed. 193, 152 C. C. A. 181; *Brewer v. Sowers*, 118 Md. 681, 86 Atl. 228; *Krell v. Codman*, 154 Mass. 454, 28 N. E. 578, 14 L. R. A. 860, 26 Am. St. Rep. 260; *Lodi v. Goyette*, 219 Mass. 72, 106 N. E. 601; *Aller v. Aller*, 40 N. J. L. 446; *Wain v. Wain*, 58 N. J. L. 640, 34 Atl. 1068; *Harrell v. Watson*, 63 N. C. 454; *Ducker v. Whitson*, 112

N. C. 44, 16 S. E. 854; *Burris v. Starr*, 165 N. C. 657, 81 S. E. 929; *Thomason v. Bescher*, 176 N. C. 622, 97 S. E. 654, 2 A. L. R. 626; *Miles v. Hemenway*, 59 Ore. 318, 117 Pac. 273; *Burkholder's Ex'r v. Plank*, 69 Pa. 225; *Harris v. Harris' Ex'r*, 23 Gratt. 737; *Walterman v. Village of Norwalk*, 145 Wis. 663, 130 N. W. 479, and see *supra*, § 109. But this rule has been held in Georgia inapplicable to a negotiable promissory note under seal. *Lacey v. Hutchinson*, 5 Ga. App. 865, 64 S. E. 205; *Toller v. Hewitt*, 12 Ga. App. 496, 77 S. E. 650.

⁷⁶ *Kekewich v. Manning*, 1 De G. M. & G. 176, 188; *Barrett v. Geisinger*, 179 Ill. 240, 249, 53 N. E. 576; *Crandall v. Willig*, 166 Ill. 233, 46 N. E. 755; *Selby v. Case*, 87 Md. 459, 39 Atl. 1041; *Black v. Cord*, 2 H. & G. 100; *Lamprey v. Lamprey*, 29 Minn. 151, 12 N. W. 514; *Vasser v. Vasser*, 23 Miss. 378, 382; *Tunison v. Bradford*, 49 N. J. Eq. 210, 22 Atl. 1073; *Hayes v. Kershow*, 1 Sandf. Ch. 258, 261; *Short v. Price*, 17 Tex. 397; *Graybill v. Brugh*, 89 Va. 895, 17 S. E. 558, 21 L. R. A. 133, 37 Am. St. Rep. 894.

⁷⁷ Pound, 13 Ill. L. Rev. 435, 436, giving some discussion of each of the categories.

3. Cases of executory gift which the courts torture into cases of contract in order to enforce the gift.

4. Parol gifts of land where the donee takes possession and acts upon the gift.

5. Defective conveyances to a creditor by way of security, to a wife by way of settlement, or to a child by way of advancement, where there was no legal duty but on the basis of the moral duty equity gives reformation under circumstances amounting to specific performance of the promise; and

6. Options under seal.

§ 218. Statutes changing the common law of sealed instruments.

In many States the distinction between sealed and unsealed written contracts is in terms abolished. This is true in Alaska,⁷⁸ Arizona,⁷⁹ Arkansas,⁸⁰ California,⁸¹ Idaho,⁸² Indiana,⁸³ Iowa,⁸⁴ Kansas,⁸⁵ Kentucky,⁸⁶ Minnesota,⁸⁷ Mississippi,⁸⁸ Missouri,⁸⁹ Montana,⁹⁰ Nebraska,⁹¹ Nevada,⁹² North Dakota,⁹³ Ohio,⁹⁴ Oklahoma,⁹⁵ South Dakota,⁹⁶ Tennessee,⁹⁷ Texas,⁹⁸ Washington.⁹⁹

In most of these States it is also enacted that any written contract shall be presumed to have been made for sufficient consideration. Whether if lack of consideration is affirmatively proved the agreement is invalid is often left subject to doubt.

⁷⁸ Code Civ. Proc., § 1041. But if a seal is used it still has its common-law effect.

⁷⁹ Civ. Code (1913), § 5564.

⁸⁰ Const. of 1868, Kirby & Castle's Dig. (1916), p. 180.

⁸¹ Code Civ. Proc., § 1932.

⁸² Rev. Code (1908), § 3319.

⁸³ Burns' Ann. St. (1914), § 466.

⁸⁴ Supp. Code (1913-1915), § 3068.

⁸⁵ Gen. Stat. (1915), § 2039.

⁸⁶ Carroll's Stat. (1915), § 471.

⁸⁷ Gen. Stat. (1913), § 5704.

⁸⁸ Code (1917), § 7419.

⁸⁹ Rev. Stat. (1909), § 2773.

⁹⁰ Rev. Code (1907), § 5022.

⁹¹ Rev. Stat. (1913), § 6251.

⁹² Rev. Laws (1912), § 1095.

⁹³ Comp. Laws (1913), § 5894.

⁹⁴ Annot. Gen. Code (1912), § 32.

⁹⁵ Rev. Laws (1910), § 944.

⁹⁶ Comp. Laws (1913), Civ. Code, § 1243.

⁹⁷ Shannon's Code (1917), § 3212.

⁹⁸ McEachin's Civ. Stat. (1913), Art. 7092.

⁹⁹ Remington's Code (1915), § 8751.

Though the statute provides that the addition of a private seal to a contract "shall not affect its validity or legality in any respect," the Supreme Court, without citing the statute, says that a seal *prima facie* imports consideration. *Considine v. Gallagher*, 31 Wash. 669, 72 Pac. 469; *Gates v. Herr*, 102 Wash. 131, 172 Pac. 912.

Arizona,¹ California,² Idaho,³ Iowa,⁴ Kentucky,⁵ Mississippi,⁶ Missouri,⁷ Montana,⁸ North Dakota,⁹ South Dakota,¹⁰ Tennessee,¹¹ Texas¹² have such provisions.

In other States it is enacted only that sealed contracts shall be presumed in the absence of contrary evidence to have been made for sufficient consideration, and in such States sealed contracts differ from ordinary written contracts to this extent. This is the law in Alabama,¹³ Michigan,¹⁴ New Jersey,¹⁵ New York,¹⁶ Oregon,¹⁷ Wisconsin.¹⁸ In Illinois under a statute of different form a similar result has been reached.¹⁹

Some differences of construction of these Statutes may be noted. In New Jersey it has been held that a covenant which was and was intended to be voluntary is binding. the word "presumed" in the Statute being construed as meaning conclusively presumed.²⁰ But it may be doubted if this construction would generally be followed. It is rather to be supposed that where a Statute states that a sealed instrument is presumed to have sufficient consideration, the presumption intended to be created is disputable.²¹ The New

¹ Civ. Code (1913), § 5564.

² Civ. Code, § 1963 (39); *Vickrey v. Maier*, 164 Cal. 384, 774, 129 Pac. 273, 276; *In re Thomson's Estate*, 165 Cal. 290, 131 Pac. 1045; *Anderson v. Wickliffe*, (Cal. 1918), 172 Pac. 381; *Patterson v. Chapman*, (Cal. 1918), 176 Pac. 37, 2 A. L. R. 1467.

³ Rev. Stat. (1908), § 3314.

⁴ Code (1897), § 3069; *Gould v. Gunn*, 161 Ia. 155, 140 N. W. 380; *Mahaska County State Bank v. Brown*, 159 Ia. 577, 141 N. W. 459.

⁵ Ky. Stat. (1915), § 471.

⁶ Code (1917), §§ 7419-7421.

⁷ Rev. Stat. (1909), § 2774 (only promises to pay money).

⁸ Rev. Code (1907), § 5023.

⁹ Comp. Laws (1913), § 5881.

¹⁰ Comp. Laws (1913), Civ. Code, § 1232 (2).

¹¹ Shannon's Code (1917), § 3214.

¹² McEachin's Civ. Stat. (1913),

Art. 7093; *Panhandle &c. Ry. v. Fitts* (Tex. Civ. App.), 188 S. W. 528.

¹³ Code (1907), § 5324.

¹⁴ Comp. Laws (1916), § 12534.

¹⁵ Comp. Stat. (1911), p. 2240, § 66.

¹⁶ Code of Civ. Proc. 840.

¹⁷ Lord's Oreg. Laws (1910), § 513.

¹⁸ Stat. (1915), § 4195.

¹⁹ *Bullen v. Morrison*, 98 Ill. App. 669; *Bartholomæ Brewing Co. v. Motycka*, 163 Ill. App. 238; *Pabst Brewing Co. v. LePage*, 186 Ill. App. 468. See also *Cortelyou v. Barnsdall*, 236 Ill. 138, 86 N. E. 200; *cf. Chicago &c. Mfg. Co. v. Haven*, 195 Ill. 474, 63 N. E. 158.

²⁰ *Aller v. Aller*, 40 N. J. L. 446; *Braden v. Ward*, 42 N. J. L. 518; *Waln v. Waln*, 58 N. J. L. 640, 34 Atl. 1068.

²¹ *Gardner v. Watson*, 170 Cal. 570, 150 Pac. 994; *Danby v. Beebe*, 147 Mich. 312, 110 N. W. 1066; *Axe v. Tol-*

York Statute applies to executory contracts only; therefore a voluntary release,²² or assignment of a chose in action,²³ under seal is valid. In Idaho,²⁴ New Mexico,²⁵ and Wyoming,²⁶ while seals are abolished, unsealed written contracts are clearly given the effect which sealed contracts had at common law, so far as concerns their validity without consideration.

§ 219. The desirability of such statutes.

It is most unfortunate if no method be left in a system of law by which a confessedly voluntary promise may be binding. The seal at common law furnished such a means. It may be said that this means was arbitrary and artificial; but, nevertheless, it fulfilled the purpose, though sealed instruments were also subject to technical rules in regard to their execution by agents,²⁷ and their modification or discharge by parol,²⁸ which often worked injustice. To abolish altogether the common-law effect of the seal without substituting something in its place is a serious mistake. Such undesirable attributes as the common law attached to sealed instruments might well be abolished, but the rule that they need no consideration should not be. It is probable that the common-law rule is better even than the statutory extension to all written instruments, of the principle that no consideration is necessary.²⁹ If such statutes are construed as merely making a written promise *prima facie* evidence that consideration for it existed, they are of little value, since when a promise is without consideration it is ordinarily easy to show that fact. If, on the other hand, they are construed as establishing that there is a "conclusive presumption" of consideration for all written contracts or if they expressly state consideration

bert, 179 Mich. 556, 146 N. W. 418; *In re McLaughlin's Est.*, 182 Mich. 707, 715, 716, 151 N. W. 745.

²² *Homans v. Tyng*, 56 N. Y. App. Div. 383, 67 N. Y. S. 792; *Finch v. Simon*, 61 N. Y. App. Div. 139, 70 N. Y. S. 361. In Alabama, California, North Dakota, Oregon, South Dakota and Tennessee the express terms of their statutes give effect to an unsealed release. See *infra*, § 418.

²³ *Hull v. Hull*, 172 N. Y. App. Div. 287, 158 N. Y. S. 743.

²⁴ Rev. Stat. (1908), § 3314.

²⁵ Ann. Code (1915), §§ 2181-2182.

²⁶ Comp. Stat. (1910), §§ 3641, 3642.

²⁷ See *infra*, §§ 275, 296.

²⁸ See *infra*, §§ 1834-1836, 1849.

²⁹ See Statutes referred to, *supra*, § 218, and *First National Bank v. Home Ins. Co.*, 16 N. Mex. 66, 113 Pac. 815.

for them is unnecessary, it may be doubted whether the solution is wholly satisfactory. What is a "written contract?" Is an informal letter accepting an offer in another letter? Is an informal letter accepting an offer made orally? Is a letter containing a gratuitous promise? In any event the requisite of a written promise as distinguished from an oral promise is a technical formality as much as the requirement of a seal. Moreover, if formal writings only are to be within the protection of the Statute the distinction between such writings and informal ones will be often hard to draw (much more so than between sealed and unsealed writings). On the other hand, if all written promises are to be protected, the rule goes too far. A writing may be of a very informal character, and to make every gratuitous promise in a letter or memorandum as binding as a sealed covenant was at common law seems extreme.³⁰

§ 220. Recognizances.

Recognizances are in form like bonds, containing an acknowledgment of indebtedness subject to a condition upon which the obligation will become void. They are not executed by signing and sealing by the obligor, but by the certification of the judicial officer before whom they are taken. A recognizance, therefore, partakes of the nature of a judgment or of indisputable evidence of indebtedness; but being voluntarily entered into by the obligor and implying in fact an undertaking to perform the condition, it may be classed as a contract. At the present time where recognizances are in use, they are often required to be signed, but as all matters in connection with entering into recognizances depend upon local statutes and practice which are well understood where they are in force, further treatment of the subject is unnecessary.

§ 221. Negotiable instruments.

Though negotiable instruments are ordinarily classed as simple contracts and undoubtedly partake to some extent

³⁰ A contrary argument is ably Decker, in the Illinois Law Bulletin presented by Professor Edward H. for February, 1918, p. 166.

of the nature of simple contracts, yet they are also formal contracts. It is necessary in order to constitute a negotiable instrument that a writing shall contain an unconditional order or promise. It must be payable in money, must contain no independent order or agreement, must be certain as to parties, as to time of payment, and as to the amount payable, and, finally, it must be payable to order or to bearer.³¹ At common law it was necessary that it should be unsealed, but by the Uniform Negotiable Instruments Law, which has been enacted in most of the United States, negotiability is not destroyed by the addition of a seal.³² The points of resemblance in a negotiable instrument to a formal contract, as distinguished from a simple contract, may be thus enumerated.³³

(1) None but parties to a bill can be parties to an action thereon, whereas in simple contracts the law of undisclosed principal is applicable.³⁴

(2) A bill is treated as a speciality in pleading, that is, the instrument itself is set out and sued upon without statement of the consideration for the instrument or the circumstances out of which it arose.

(3) A negotiable instrument merges an antecedent obligation for which it is given. It is true that the antecedent obligation will not infrequently be revived if the negotiable instrument is dishonored at maturity, but until maturity the old obligation is merged and in many cases the merger is final and complete, the instrument being taken in full and unconditional satisfaction of the antecedent obligation.³⁵

(4) The law of mutual assent as applied in simple contracts is to a considerable extent inapplicable to negotiable instruments, since a negotiable instrument takes effect upon delivery and may be binding though the maker dies before the payee becomes aware of the existence of the instrument.³⁶

(5) The secondary obligations on negotiable instruments,

³¹ See Uniform Negotiable Instruments Law, Sec. 1-6, *infra*, §§ 1136-1138.

³² Negotiable Instruments Law, Sec. 6, *infra*, § 1138.

³³ The enumeration is in the main

adopted from 2 Ames' Cas. Bills and Notes, 873.

³⁴ *Infra*, § 298.

³⁵ *Infra*, §§ 1922-1924.

³⁶ *Dean v. Carruth*, 108 Mass. 242; *Worth v. Case*, 42 N. Y. 362.

even though for accommodation, are not within the scope of the Statute of Frauds relating to guarantees.³⁶

(6) A negotiable instrument is treated not simply as evidence of a contract, but the instrument is the obligation itself. Thus a negotiable instrument may be the subject of conversion and the measure of damages is the face of the instrument if collectible.³⁷ It may be assigned by delivery like a chattel rather than a chose in action.³⁸ The law of taxation and of administration also, to some extent supports the view that the document itself is the obligation. Negotiable instruments, moreover, are generally held within the section of the Statute of Frauds covering sales of goods and chattels.³⁹ Finally, the cancellation of a bill or note is appropriately made by the destruction of the document. If the holder of a negotiable instrument intentionally destroys it, the obligation of all parties to the instrument ceases;⁴⁰ whereas if any ordinary written contract were intentionally destroyed by the promisee, though he might have some difficulty in proving his case in court, his right would not be lost.

On the other hand, a negotiable instrument resembles a simple contract in its requirement of consideration. It is conceived that the doctrine is most accurately stated by saying that lack of value or consideration as between the immediate parties is a personal defence.⁴¹ The identification of negotiable instruments with simple contracts, however, so far as consideration is concerned, has been often treated as so complete except for the purpose of pleading, as to lead courts to treat consideration as a necessary element for the creation of such an instrument.⁴²

³⁶ *Jarvis v. Wilson*, 46 Conn. 90, 33 Am. Rep. 18; *Nelson v. First Bank*, 48 Ill. 36, 95 Am. Dec. 510; *Laffin v. Sinsheimer*, 48 Md. 411, 30 Am. Rep. 472; *O'Donnell v. Smith*, 2 E. B. Smith, 124; *Casey v. Brabason*, 10 Abb. Pr. 368; *Strohecker v. Cohen*, 1 Speers, 349; *Fisher v. Beckwith*, 19 Vt. 31, 46 Am. Dec. 174; and see *infra*, § 458.

³⁷ 2 Ames' Cas. Bills and Notes, 693.

³⁸ See *infra*, § 439.

³⁹ See *infra*, § 521.

⁴⁰ Neg. Inst. Law, Sec. 119 (3), *infra*, § 1189.

⁴¹ This is the form of statement in Neg. Inst. Law, Sec. 28. See *infra*, Sec. 1146.

⁴² See Neg. Inst. Law, Sec. 24-28, *infra*, § 1146; *Daniel*, Neg. Inst. §§ 160 *et seq.*

BOOK II

PARTIES TO CONTRACTS

CHAPTER VIII

CAPACITY OF PARTIES. INFANTS

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§ 222. Parties of limited capacity to contract.

The formation of contracts requires the existence of parties capable of contracting, but capacity of any person to contract is to be presumed unless he falls within one of the classes of persons who are held by the law to have no capacity, or only a limited capacity to contract. These classes are:

Infants,
 Insane Persons,
 Intoxicated Persons,
 Married Women,
 Corporations.

The extent to which agents and fiduciaries of various kinds are personally bound by the contracts which they make as such presents an analogous question which may be considered in the same connection. Whether a party has capacity to contract is determined by the law of the place of the contract,⁴³ in accordance with the general rule that the validity of a contract and its construction are determined by that law.⁴⁴

§ 223. Early law as to the validity of an infant's contract.

The law governing agreements made during infancy is of considerable antiquity. In 1292 a decision is reported regarding a guardian's account.⁴⁵ It was there said that a release by the infant would not bar him from suing when he came of age, and the court added, "for if an infant under age borrow of another twenty marks on the security of a good writing made between them, and by the twenty marks make a profit of forty marks, and the creditor, when the borrower attains his full age, bring a writ of Debt against him and put forward the writing against him, he may say that he was under age when, etc., and may pray judgment, and so bar him of his action. And although the plaintiff say that the infant has made a profit, yet thereby the infant shall not be prejudiced." But it was said that if acknowledgment of full receipt from the guardian was made by the infant in a court of record, he would be barred when he came of age.

By the fifteenth century it seems to have been well settled that an infant's bargain was in general void at his election (that is voidable), and also that he was liable for necessities.⁴⁶

⁴³ *Matthews v. Murchison*, 17 Fed. 760, 768; *Flittner v. Equitable Life Assur. Soc.*, 30 Cal. App. 209, 157 Pac. 630; *Union Trust Co. v. Knabe*, 122 Md. 584, 89 Atl. 1106.

⁴⁴ See Professor Beale's exhaustive

articles in 23 Harv. L. Rev. 1, 79, 194 260; *Netherwood v. Raymer*, 253 Fed. 515.

⁴⁵ Y. B. 20 and 21 Edw. I, p. 318.

⁴⁶ Y. B. 18 Edw. IV, pl. 7. See also 10 Hen. VI, pl. 46.

In the books after that time a number of decisions are reported.⁴⁷

About the year sixteen hundred, it was laid down by Perkins⁴⁸ that gifts or grants of an infant which are not delivered by his own hand are void, but if they take effect by delivery of his own hand they are voidable only. No one has been able to give any satisfactory explanation of the reason for such a rule, but it has furnished the basis for the doctrine that an infant's power of attorney is invalid;⁴⁹ and even that any act done by an agent on behalf of an infant is void.⁵⁰

Infants' acts were also divided into void, voidable, and binding, according as they were prejudicial to the infant, or possibly beneficial, or certainly beneficial to him as necessities.⁵¹ And these classifications have left some impression on the law.

It is unnecessary to trace here in detail the subsequent English decisions. The development of the law will sufficiently appear from the analyses in the following sections.

§ 224. Who is an infant.

The age of twenty-one has been fixed by the law for centuries as that at which either a man or woman is regarded by the law as acquiring full capacity.⁵² No distinction generally has been drawn so far as concerns contractual capacity between a minor of tender years and one, who, having nearly attained his majority, has ample intelligence in fact.⁵³ As the law disregards for many purposes fractions of a day, an infant becomes of age at the beginning of the day preceding the twenty-first

⁴⁷ See Rolle's Abr. "Enfants"; Bacon's Abr. "Infancy" and Comyns Digest "Enfant," for a collection of these cases.

⁴⁸ Profitable Book, § 12.

⁴⁹ This was so decided by Lord Mansfield in *Zouch v. Parsons*, 3 Burr. 1794. As to modern authorities, see *infra*, § 227.

⁵⁰ See *infra*, § 227.

⁵¹ *Keane v. Boycott*, 2 H. Bl. 511, 515; *Harvey v. Ashley*, 3 Atkins, 607; *Earl of Buckinghamshire v. Drury*, 2 Eden, 60, 72; *Grey v. Cooper*, 3 Doug. 65.

⁵² 2 Pollock & Maitland Hist. 438, Co. Litt. 171; 1 Bl. Com. 463.

⁵³ *Ex parte McFerren*, 184 Ala. 223, 63 So. 159, 47 L. R. A. (N. S.) 543; *McCarty v. Carter*, 49 Ill. 53, 95 Am. Dec. 572; *Baker v. Lovett*, 6 Mass. 78, 4 Am. Dec. 88; and see cases on infancy cited in this section, *passim*. In California and North Dakota by statute a minor above the age of eighteen cannot disaffirm a contract without restoring the consideration. *Hakes Inv. Co. v. Lyon*, 166 Cal. 557, 137 Pac. 911; *Casement v. Callaghan*, 35 N. Dak. 27, 159 N. W. 77.

anniversary of his birth.⁵⁴ The rules of the common law in regard to the duration of infancy still prevail unless altered by statute. By such statutes in many States a woman becomes of age at eighteen,⁵⁵ and in a few an infant becomes of age on his birthday and not on the preceding day.⁵⁶ Not infrequently the marriage of a female infant is given by statute the effect of making her of full contractual capacity,⁵⁷ and in a few States the marriage of either man or woman under the age of twenty-one years has the effect not only of emancipation, but of giving full contractual capacity.⁵⁸

§ 225. Emancipation of an infant.

By the rule of the common law, the father of an infant was entitled to his services and therefore to his earnings,⁵⁹ and generally it is held that a widowed mother succeeds to the father's rights in this respect.⁶⁰ Accordingly the right of action for wages earned by a minor is vested in the parent;⁶¹ and a payment made to the child will not discharge the employer from liability to the parent.⁶² Since, therefore, the infant

⁵⁴ *Herbert v. Turball*, 1 Keb. 589; *Fitchugh v. Dennington*, 6 Mod. 259; *Wells v. Wells*, 6 Ind. 447; *Banco De Sonora v. Bankers', etc., Co.*, 124 Ia. 576, 100 N. W. 532, 104 Am. St. Rep. 367; *United States v. Wright*, 197 Fed. 297, 116 C. C. A. 659; *Bardwell v. Purrington*, 107 Mass. 419; *Ross v. Morrow*, 85 Tex. 172, 19 S. W. 1090, 16 L. R. A. 542.

⁵⁵ This is true in Arkansas, California, Colorado, Dakota, Idaho, Illinois, Iowa, Kansas, Maryland, Minnesota, Missouri, Nebraska, Nevada, Ohio, Oregon, Vermont, Washington.

⁵⁶ So in California, So. Dakota. See *Ganahl v. Soher* (Cal.), 5 Pac. 80; *Ex parte Wood*, 5 Cal. App. 471, 90 Pac. 961.

⁵⁷ This is true in Maryland, Nebraska, Oregon, Texas. See *Ward v. Lavery*, 19 Neb. 429, 27 N. W. 393; *Grayson v. Lofland*, 21 Tex. Civ. App. 503, 52 S. W. 121.

⁵⁸ This is true in Iowa, Louisiana, Washington. See *Ex parte Hollopeter*, 52 Wash. 41, 100 Pac. 159, 21 L. R. A. (N. S.) 847, 132 Am. St. Rep. 952.

⁵⁹ 1 Bl. Com. 453; *Tiffany on Persons*, 255; *In re Riff*, 205 Fed. 406. As a bastard at common law was *nullius filius*, *Friesner v. Symonds*, 46 N. J. Eq. 521, 527, 20 Atl. 257, the father of a bastard is not entitled to his services. *State v. Byron* (N. H.), 104 Atl. 401, 402.

⁶⁰ *Tiffany on Persons*, 256; *Hollingsworth v. Swedenborg*, 49 Ind. 378, 19 Am. Rep. 687, and cases cited.

⁶¹ *Duffeld v. Cross*, 12 Ill. 397; *Hollingsworth v. Swedenborg*, 49 Ind. 378, 19 Am. Rep. 687; *Shute v. Dorr*, 5 Wend. 204; *Cloud v. Hamilton*, 11 Humph. 104, 53 Am. Dec. 778; *Monaughan v. School District*, 38 Wis. 100.

⁶² *White v. Henry*, 24 Me. 531; *Weeks v. Holmes*, 12 Cush. 215; *Sherlock v. Kimmell*, 75 Mo. 77; *Dunn v.*

may avoid his contract, and the parent cannot be deprived of the right to the infant's services, neither the minor nor the parent is bound by any contract of employment made without the parent's assent.⁶³ And even though the parent is entitled to his child's services, and the child owes obedience to the parent, the law cannot compel the child to perform a contract of employment made for him or on his behalf by his parent, nor will it attempt to do so indirectly by enjoining the child from working for any one else.⁶⁴ The parent may, however, surrender his right to the child's services by emancipating him. Such emancipation may be by express agreement or may be shown by the circumstances of the case.⁶⁵ Thus, if with his parent's express or implied consent a minor make a contract for his services, under which he is personally to receive the benefits of the contract, he is thereby emancipated.⁶⁶ The marriage of a minor also effects his emancipation;⁶⁷ as does the failure or refusal of a parent to furnish

Allman, 50 Mo. App. 231. The same principle is involved in decisions holding inconclusive a recovery of damages by a minor for personal injuries. The parent is entitled also to recover for the value of the child's services. Horgan v. Pacific Mills, 158 Mass. 402, 33 N. E. 581, 35 Am. St. Rep. 504.

⁶³ In England the minor would, it seems, be bound if such a contract were on the whole beneficial. See *infra*, § 228.

⁶⁴ Cain v. Garner, 169 Ky. 633, 185 S. W. 122, L. R. A. 1916 E. 682.

⁶⁵ *In re Riff*, 205 Fed. 406; Donegan v. Davis, 66 Ala. 362; Story & Clark Piano Co. v. Davy, (Ind. App. 1918), 119 N. E. 177; Dennyville v. Trescott, 30 Me. 470; Whiting v. Earle, 3 Pick. 201; Hall v. Hall, 44 N. H. 293; Shute v. Dorr, 5 Wend. 204, 206; Kain v. Larkin, 131 N. Y. 300, 30 N. E. 105; Chase v. Elkins, 2 Vt. 290; Penn v. Whitehead, 17 Gratt. 503, 94 Am. Dec. 478; Grotjan v. Rice, 124 Wis. 253, 102 N. W. 551.

⁶⁶ Cloud v. Hamilton, 11 Humph.

104, 53 Am. Dec. 778; Farnsworth v. Wakefield, 12 Cush. 514; cf. Monaghan v. School District, 38 Wis. 100.

⁶⁷ Mitchell's Succession, 33 La. Ann. 353; Bucksport v. Rockland, 56 Me. 22; Taunton v. Plymouth, 15 Mass. 203; State v. Lowell, 78 Minn. 166, 80 N. W. 877, 46 L. R. A. 440, 79 Am. St. 358; Aldrich v. Bennett, 63 N. H. 415, 56 Am. Rep. 529; Porch v. Fries, 3 C. E. Green, 204; Cochran v. Cochran, 196 N. Y. 86, 89, 89 N. E. 470, 24 L. R. A. (N. S.) 160, 17 Ann. Cas. 782; Burr v. Wilson, 18 Tex. 367; Northfield v. Brookfield, 50 Vt. 62. See also King v. Wilmington, 5 B. & Ald. 525; Ward v. Laverty, 19 Neb. 429, 27 N. W. 393. It has been held that unless the father consents to the marriage, the minor is not emancipated. White v. Henry, 24 Me. 531. See also Delaware & C. R. v. Petrowsky, 250 Fed. 534, 162 C. C. A. 570. But this would not be everywhere admitted. In Commonwealth v. Graham, 157 Mass. 73, 31 N. E. 706, 16 L. R. A. 578, 34 Am. St. Rep. 255, it was held that a minor

support,⁶⁸ unless the failure to support is due to the refusal of the minor to accept the support offered in his parent's home.⁶⁹ If an infant makes a contract for his services with his father, emancipation is implied and he can then recover either on the contract, or on the basis of quasi-contract for the fair value of the services.⁷⁰ Emancipation may be partial.⁷¹ Until it has been acted upon, emancipation may be revoked by the father unless made for sufficient consideration or under seal.⁷² Emancipation does not give an infant enlarged capacity to contract,⁷³ even when brought about by marriage.⁷⁴ In some States, however, it is provided that by decree of court the disabilities of an infant may be removed.⁷⁵ Such statutes go beyond mere emancipation in their effect. An attempt by a parent to relieve himself from a liability imposed by law to support his child, by emancipating the child, is contrary to public policy and ineffectual.⁷⁶

son who married without his father's consent was entitled to his wages at least so far as necessary to support himself and his wife and children. Probably a minor daughter would in any event be held emancipated by marriage without her parent's consent. See cases *supra*, and *Atwood v. Holcomb*, 39 Conn. 270, 274.

⁶⁸ *In re Riff*, 205 Fed. 406, 408; *Atwood v. Holcomb*, 39 Conn. 270, 274; *Farrell v. Farrell*, 3 Houst. 633; *Holingsworth v. Swedenborg*, 49 Ind. 378, 19 Am. Rep. 687; *Robinson v. Hathaway*, 150 Ind. 679, 50 N. E. 883; *McCarthy v. Boston & Lowell R. Co.*, 148 Mass. 550, 552, 20 N. E. 182, 2 L. R. A. 608.

⁶⁹ *White v. Henry*, 24 Me. 531.

⁷⁰ *Godfrey v. Hays*, 6 Ala. 501, 41 Am. Dec. 58; *Danley v. Rector*, 10 Ark. 211, 50 Am. Dec. 242; *Wilson v. McMillan*, 62 Ga. 16, 35 Am. Rep. 115; *Hall v. Hall*, 44 N. H. 293; *Titman's Adm'r v. Titman*, 64 Pa. 480; *cf. In re Riff*, 205 Fed. 406.

⁷¹ *Winn v. Sprague*, 35 Vt. 243.

⁷² *In re Riff*, 205 Fed. 406; *Abbott v. Converse*, 4 Allen, 530.

⁷³ *Wickham v. Torley*, 136 Ga. 594, 71 S. E. 881, 36 L. R. A. (N. S.) 57; *Mason v. Wright*, 13 Metc. 306; *Tyler v. Gallop's Est.*, 68 Mich. 185, 35 N. W. 902, 13 Am. St. Rep. 336; *Chapman v. Hughes*, 61 Miss. 339; *Genereux v. Sibley*, 18 R. I. 43, 25 Atl. 345; *Person v. Chase*, 37 Vt. 647, 88 Am. Dec. 630.

⁷⁴ *Burns v. Smith*, 29 Ind. App. 181, 64 N. E. 94, 94 Am. St. Rep. 268; *Mitchell's Succession*, 33 La. Ann. 353; *Taunton v. Plymouth*, 15 Mass. 203; *Commonwealth v. Graham*, 157 Mass. 73, 76, 31 N. E. 706, 16 L. R. A. 578. But see *Burr v. Wilson*, 18 Tex. 367.

⁷⁵ See *Boykin v. Collins*, 140 Ala. 407, 37 So. 248; *Young v. Hiner*, 72 Ark. 299, 79 S. W. 1062; *Pochelu's Emancipation*, 41 La. Ann. 331, 6 So. 541; *Marks v. McElroy*, 67 Miss. 545, 7 So. 408; *Lake v. Perry*, 95 Miss. 550, 49 So. 569; *Brown v. Wheelock*, 75 Tex. 385, 12 S. W. 111.

⁷⁶ *Snell v. Ham* (Tex. Civ. App.), 151 S. W. 1077.

§ 226. Infants' contracts are now held voidable and not void.

Though the early American decisions followed the statements in the English decisions referred to in a preceding section ⁷⁷ dividing the acts of infants into the three classes of void, voidable and binding,⁷⁸ it became clear, ultimately, that it was a very difficult question for a court to undertake to decide, whether a given contract was necessarily prejudicial to an infant; and also that even if a contract were prejudicial, the infant had sufficient protection in the right given him to avoid the contract if it were held not void but merely voidable. At the present day, therefore, the view generally maintained is that an infant's contract or transfer is with the slight exceptions hereafter noted voidable.⁷⁹

§ 227. Contracts of an infant which have been held void.

Reference may be made to some of the contracts which have most frequently been held void when made by an infant.

⁷⁷ § 223.

⁷⁸ *Tucker v. Moreland*, 10 Peters, 58, 66, 9 L. Ed. 345; *United States v. Bainbridge*, 1 Mason, 71, 82; *West v. Penny*, 16 Ala. 186, 189; *Green v. Wilding*, 59 Ia. 679, 13 N. W. 761, 44 Am. Rep. 696; *Lawson v. Lovejoy*, 8 Me. 405, 23 Am. Dec. 526; *Robinson v. Weeks*, 56 Me. 102; *Fridge v. State*, 3 G. & J. 103, 20 Am. Dec. 463; *Levering v. Heighe*, 2 Md. Ch. 81, 83, 3 *ibid.* 365, 368; *Cronise v. Clark*, 4 Md. Ch. 403; *Oliver v. Houdlet*, 13 Mass. 237, 239, 7 Am. Dec. 134; *Dunton v. Brown*, 31 Mich. 182.

⁷⁹ *Bruce v. Warwick*, 6 Taunt. 118; *Williams v. Moor*, 11 M. & W. 256; *Hyer v. Hyatt*, 3 Cranch C. C. 276, 277; *Weaver v. Jones*, 24 Ala. 420; *Bozeman v. Browning*, 31 Ark. 364, 373; *Cole v. Pennoyer*, 14 Ill. 158; *Wright v. Buchanan*, 287 Ill. 468, 123 N. E. 53; *Fetrow v. Wiseman*, 49 Ind. 148; *Rice v. Boyer*, 108 Ind. 472, 9 N. E. 420; *Cain v. Garner*, 169 Ky. 633, 185 S. W. 122, L. R. A. 1916 E. 682; *Reed v. Batchelder*, 1 Metc. 559; *Mansfield v. Gordon*, 144 Mass. 168, 169, 10

N. E. 773; *McDonald v. Sargent*, 171 Mass. 492, 51 N. E. 17; *Holmes v. Rice*, 45 Mich. 142, 7 N. W. 772; *Baker v. Kennett*, 54 Mo. 82; *Englebert v. Troxell*, 40 Neb. 195, 58 N. W. 852, 42 Am. St. Rep. 665; *Henry v. Root*, 33 N. Y. 526; *Continental Nat. Bank v. Strauss*, 137 N. Y. 148, 152, 32 N. E. 1066; *Skinner v. Maxwell*, 66 N. C. 45, 47; *Harner v. Dipple*, 31 Oh. St. 72, 27 Am. Rep. 496; *Lemmon v. Beeman*, 45 Oh. St. 505, 509, 15 N. E. 476; *Union Central Life Ins. Co. v. Hilliard*, 63 Oh. St. 478, 59 N. E. 230, 53 L. R. A. 462, 81 Am. St. Rep. 644; *Cheshire v. Barrett*, 4 McCord, 241, 17 Am. Dec. 735; *Cummings v. Powell*, 8 Tex. 80; *Mustard v. Wohlford's Heirs*, 15 Gratt. 329, 76 Am. Dec. 209. But a few cases of no remote date still preserve the divisions of the early law. *Green v. Wilding*, 59 Ia. 679, 13 N. W. 761, 44 Am. Rep. 696; *Robinson v. Weeks*, 56 Me. 102; *Dunton v. Brown*, 31 Mich. 182; *Swafford v. Ferguson*, 3 Lea, 292, 31 Am. Rep. 639; and see the English authorities cited *infra*, § 228.

Notably, it has been asserted often and decided sometimes, that an infant's power of attorney or agreement to make another his agent is void;⁸⁰ and especially a power or warrant of attorney by an infant for the confession of judgment against him has been held void;⁸¹ as has any authority given by the infant to an attorney to represent him in court.⁸² Probably courts would still hold an infant unable to authorize a confession of judgment or to appoint an attorney for judicial proceedings; but there seems no reason except the antiquity of the rulings to that effect which can support the broad proposition that an infant's power of attorney or appointment of an agent is void; and generally, in recent cases, courts have been disposed to treat the creation of an agency by an infant, like other agreements made by him, as merely voidable.⁸³ A ratification by an infant of an act done on his behalf but without his authority, stands logically on the same ground as an act originally authorized by an infant principal, and has been held binding.⁸⁴ An infant's bill or

⁸⁰ *Thomas v. Roberts*, 16 M. & W. 778, 781; *Dexter v. Hall*, 15 Wall. 9, 25, 21 L. Ed. 73; *Flexner v. Dickerson*, 72 Ala. 318, 322; *Cole v. Pennoyer*, 14 Ill. 158; *Trueblood v. Trueblood*, 8 Ind. 195, 65 Am. Dec. 756; *Fetrow v. Wiseman*, 40 Ind. 148, 155; *Burns v. Smith*, 29 Ind. App. 181, 64 N. E. 94, 94 Am. St. Rep. 268; *Pyle v. Cravens*, 4 Litt. 17; *Dana v. Coombs*, 6 Me. 89, 90, 19 Am. Dec. 194; *Wainwright v. Wilkinson*, 62 Md. 146; *Armitage v. Widoe*, 36 Mich. 124, 129; *Bool v. Mix*, 17 Wend. 119, 31 Am. Dec. 285; *Lawrence's Lessee v. McArter*, 10 Oh. 38; *Rocks v. Cornell*, 21 R. I. 532, 45 Atl. 552.

⁸¹ *Saunderson v. Marr*, 1 H. Black. 75; *Wood v. Heath*, 1 Chit. 708, note; *Oliver v. Woodroffe*, 4 M. & W. 650; *Ashlin v. Langton*, 4 Moore & S. 719; *Waples v. Hastings*, 3 Harr. 403; *Carnahan v. Allderdice*, 4 Harr. 99; *Bennett v. Davis*, 6 Cow. 393; *Knox v. Flack*, 22 Pa. St. 337.

⁸² See *infra*, § 248.

⁸³ *Hastings v. Dollarhide*, 24 Cal. 195; *Hardy v. Waters*, 38 Me. 450; *Towle v. Dresser*, 73 Me. 252; *Whitney v. Dutch*, 14 Mass. 457, 461, 7 Am. Dec. 229; *Stiff v. Keith*, 143 Mass. 224, 9 N. E. 577; *Coursolle v. Weyerhauser*, 69 Minn. 328, 72 N. W. 697; *Alsworth v. Cordtz*, 31 Miss. 32; *Patterson v. Lippincott*, 47 N. J. L. 457, 1 Atl. 506, 54 Am. Rep. 178; *Cummings v. Powell*, 8 Tex. 80, 88; *Ferguson v. Houston*, etc., Ry. Co., 73 Tex. 344, 347, 11 S. W. 347; cf. *Askey v. Williams*, 74 Tex. 294, 11 S. W. 1101, 5 L. R. A. 176. Cases on infant partnership, see *infra*, § 229, necessarily involve an assumption that an infant can delegate authority to act for him. Most of the cases cited above do not apply to formal powers of attorney, but in *Coursolle v. Weyerhauser*, 69 Minn. 328, 72 N. W. 697, such a power to convey land was held voidable only.

⁸⁴ *Ward v. Steamboat Little Red*, 8 Mo. 358; *Alexander v. Heriot*, Bailey's Eq. 223. The contrary suggestion in

note was said to be void in some early cases.⁸⁵ But it should be observed that void is often used for voidable, and at the present day there seems no doubt that the negotiable paper of an infant creates an obligation which, though voidable, may be ratified.⁸⁶ An infant's contract of suretyship has been thought necessarily injurious to him, and consequently void;⁸⁷ but the best recent authorities treat this like other contracts of an infant, as voidable only and therefore capable of ratification after the infant attains his majority.⁸⁸ A bond with a penalty was said by Coke not to bind an infant even if given for necessities,⁸⁹ and in other early authorities it is held that a bond with penalty is void;⁹⁰ and incapable of ratification.⁹¹ But there seems no reason to support a distinction between such instruments and other contracts since the penalty of a bond is unenforceable as such even against an adult; and at the present time it is not likely that the early authorities would be followed.⁹²

An infant's submission of a dispute to arbitration was early held to be void;⁹³ but it seems sufficient for the infant's

Armitage v. Widoe, 36 Mich. 124, seems incorrect.

⁸⁵ *Williamson v. Watts*, 1 Camp. 552; *Swasey v. Vanderheyden's Adm.*, 10 Johns. 33; *Bouchell v. Clary*, 3 Brev. 194; *M'Minn v. Richmonds*, 6 Yerg. 9.

⁸⁶ *Harris v. Wall*, 1 Ex. 122; *In re Hodson*, [1984] 2 Ch. 421; *Hyer v. Hyatt*, 3 Cranch C. C. 276; *Morton v. Steward*, 5 Ill. App. 533; *Heady v. Boden*, 4 Ind. App. 475, 30 N. E. 1119; *Whitney v. Dutch*, 14 Mass. 457, 462, 7 Am. Dec. 229; *Reed v. Batchelder*, 1 Met. 559; *Minock v. Shortridge*, 21 Mich. 304; *Edgerly v. Shaw*, 25 N. H. 514, 57 Am. Dec. 349; *Everson v. Carpenter*, 17 Wend. 419; *Union Central Life Ins. Co. v. Hilliard*, 63 Oh. St. 478, 59 N. E. 230, 53 L. R. A. 462, 81 Am. St. Rep. 644; *Mission Ridge Co. v. Nixon* (Tenn.), 48 S. W. 405.

⁸⁷ *West v. Penny*, 16 Ala. 186; *Hastings v. Dollarhide*, 24 Cal. 195; *Maples v. Wightman*, 4 Conn. 376; *Robinson*

v. Weeks, 56 Me. 102; *Cronise v. Clark*, 4 Md. Ch. 403; *Chandler v. McKinney*, 6 Mich. 217, 74 Am. Dec. 686; *Curtin v. Patton*, 11 S. & R. 305, 310; *Wheaton v. East*, 5 Yerg. 41, 61, 26 Am. Dec. 251.

⁸⁸ *Fetrow v. Wiseman*, 40 Ind. 148; *Owen v. Long*, 112 Mass. 403; *Harner v. Dipple*, 31 Ohio St. 72, 27 Am. Rep. 496; *Williams v. Harrison*, 11 S. C. 412; *Reed v. Lane*, 61 Vt. 481, 17 Atl. 796. See also *Hinely v. Margaritz*, 3 Pa. St. 428.

⁸⁹ *Co. Litt.* 172, a.

⁹⁰ *Ayliff v. Archdale*, Cro. Eliz. 920; *Delavel v. Clare*, Noy, 85; *Fisher v. Mowbray*, 8 East, 330.

⁹¹ *Baylis v. Dineley*, 3 M. & S. 477.

⁹² An infant's bond for title with penalty was held voidable only in *Weaver v. Jones*, 24 Ala. 420; *Mustard v. Wohlford's Heirs*, 15 Gratt. 329, 76 Am. Dec. 209.

⁹³ *Rudston & Yates Case*, March, 111, 114.

protection and more in accordance with principle to regard this agreement also as only voidable.⁹⁴

§ 228. Transactions which cannot be avoided by an infant.

A few obligations because of public policy or implications drawn from statutes are binding upon infants and cannot be disaffirmed. Though an infant may disaffirm an executory promise to marry,⁹⁵ a marriage itself contracted by him is binding.⁹⁶ A contract of apprenticeship in England has been held binding,⁹⁷ but in the United States, aside from statute, is voidable by him.⁹⁸ A contract of enlistment in the army or navy may be made by statute binding upon an infant. The matter depends in every case on the construction of the statute in question.⁹⁹ The undertaking of an infant, by bond or contract, to answer a charge of bastardy, or to support his bastard child, cannot be disaffirmed.¹ Nor can an infant's recognizance or bail bond for his personal appearance at court.² At common law a husband became liable for the antenuptial debts of his wife and an infant husband was liable for such debts of his wife, without power of disaffirmance.³ This obligation of the infant husband,

⁹⁴ *Barnaby v. Barnaby*, 1 Pick. 221; *Jones v. Phoenix Bank*, 8 N. Y. 228.

⁹⁵ *Warwick v. Bruce*, 2 M. & S. 205; *Hale v. Ruthven*, 20 L. T. (N. S.) 404; *Coxhead v. Mullis*, 3 C. P. D. 439; *Morris v. Graves*, 2 Ind. 354; *Hamilton v. Lomax*, 26 Barb. 615; *Hunt v. Peake*, 5 Cow. 475, 15 Am. Dec. 475; *Rush v. Wick*, 31 Oh. St. 521, 27 Am. Rep. 523; *Warwick v. Cooper*, 5 Sneed, 659; *Wells v. Hardy*, 21 Tex. Civ. App. 454, 51 S. W. 503; *Pool v. Pratt*, 1 Chip. 252.

⁹⁶ See cases in preceding note, also *Taylor v. Johnston*, 19 Ch. D. 603, 608. Local statutes generally fix an age below which an infant cannot contract marriage, and provision is often made requiring the consent of a parent or guardian.

⁹⁷ *Rex v. Hindringham*, 6 T. R. 557; *Lealie v. Fitzpatrick*, 3 Q. B. D. 229; and any reasonable contract of employment is held binding also, if on the

whole beneficial to the infant. *De-Francesco v. Barnum*, 45 Ch. D. 430; *Clements v. London, etc., Ry. Co.*, [1894] 2 Q. B. 482.

⁹⁸ *Clark v. Goddard*, 39 Ala. 164, 84 Am. Dec. 777; *Harney v. Owen*, 4 Blackf. 337, 30 Am. Dec. 662. See also *Kerwin v. Myers*, 71 Ind. 359.

⁹⁹ See the discussion in *Re Morrissey*, 137 U. S. 157, 34 L. Ed. 644, 11 S. Ct. 57.

¹ *Gavin v. Burton*, 8 Ind. 69; *Stowers v. Hollis*, 83 Ky. 544; *McCall v. Parker*, 13 Metc. 372, 46 Am. Dec. 735; *Bordentown v. Wallace*, 50 N. J. L. 13, 11 Atl. 267; *People v. Moores*, 4 Denio, 518, 47 Am. Dec. 272.

² *State v. Weatherwax*, 12 Kans. 463; *Fagin v. Goggin*, 12 R. I. 398; *Attorney General v. Baker*, 9 Rich. Eq. 521; *Commonwealth v. Semmes*, 38 Va. 665.

³ *Nicholson v. Wilborn*, 13 Ga. 467; *Butler v. Breck*, 7 Metc. 164, 39 Am.

however, was imposed upon him by law, not by his own contract. Such obligations must be performed, and it may be added that in any case where an infant merely carries out an obligation which the law would compel him to fulfil he cannot avoid the act.⁴ In England it has been laid down broadly that a contract which is not within the terms of the Infant's Relief Act is binding if on the whole for the benefit of the infant, though it contains some disadvantageous terms;⁵ but it seems that no such general rule obtains in the United States. The numerous unqualified statements as to infants' contracts being voidable are opposed to it;⁶ and it is specifically held in numerous cases that an infant may avoid a contract of employment and recover on a *quantum meruit* the value of the services he has rendered.⁷ It is also to be observed

Dec. 768; *Roach v. Quick*, 9 Wend. 238; *Grissom v. Beidleman*, 35 Okla. 343, 129 Pac. 853, 856; *Cole v. Seeley*, 25 Vt. 220, 60 Am. Dec. 258. Somewhat similarly an infant widow was held bound to pay the funeral expenses of her husband in *Chapple v. Cooper*, 13 M. & W. 252.

⁴ Thus a conveyance made by an infant to one to whom the infant was bound as a constructive trustee, cannot be avoided. *Zouch v. Parsons*, 3 Burr. 1794; *Elliott v. Horn*, 10 Ala. 343, 44 Am. Dec. 488; *Nordholt v. Nordholt*, 87 Cal. 552, 26 Pac. 599, 22 Am. St. Rep. 268; *Starr v. Wright*, 20 Oh. St. 97. See also *Tucker v. Moreland*, 10 Peters, 58, 9 L. Ed. 345; *Hlawaty v. Zeock*, 253 Pa. 311, 98 Atl. 557; *Clary v. Spain*, 119 Va. 58, 89 S. E. 130; *Trader v. Jarvis*, 23 W. Va. 100.

⁵ This was so ruled in *Clements v. London, etc., Ry. Co.*, [1894] 2 Q. B. 482 (citing earlier authorities), where an infant employee's agreement to accept the benefits of an insurance fund in lieu of his common-law rights in case of accident was held binding upon him. It makes little difference whether it is said, as it was by some of the court,

that such a contract binds the infant, or whether it is said as by Kay, L. J., that the court might say that the contract was for the benefit of the infant, and elect for him, while he is an infant, to confirm it.

⁶ See *supra*, § 224; but see *Young v. Sterling Leather Works*, 91 N. J. L. 289, 102 Atl. 395.

⁷ *Ray v. Haines*, 52 Ill. 485; *Van Pelt v. Corwine*, 6 Ind. 363; *Meredith v. Crawford*, 34 Ind. 399; *Derocher v. Continental Mills*, 58 Me. 217, 4 Am. Rep. 286; *Gaffney v. Hayden*, 110 Mass. 137, 14 Am. Rep. 580; *Dubé v. Beaudry*, 150 Mass. 448, 23 N. E. 222, 6 L. R. A. 146; *Lowe v. Sinklear*, 27 Mo. 308; *Lufkin v. Mayall*, 25 N. H. 82; *Medbury v. Watrous*, 7 Hill, 110; *Ramsdell v. Coombs Aeroplane Co.*, 161 N. Y. 8, 360; *Dearden v. Adams*, 19 R. I. 217, 36 Atl. 3; *Nashville & C. R. Co. v. Elliott*, 1 Cold. 611; *Hoxie v. Lincoln*, 25 Vt. 206. The plaintiff should recover only the benefit which his services have conferred upon the defendant, but no deduction should be made (as was permitted in some of these cases) of damages due to the plaintiff's failure to fulfil his contract. To make such a deduction is in effect

that England and jurisdictions in the United States which deny the right to an infant to disaffirm any executed transaction without restoring the consideration received, necessarily make such a transaction binding upon the infant if it is or becomes impossible to put the other party to the contract in *statu quo*.⁸ The obligation of an infant for necessities furnished him does not properly depend on contract and is subsequently considered.⁹ In a jurisdiction where contracts for the benefit of a third person give him a right of action upon it, an infant beneficiary cannot rescind the contract and claim what was paid as consideration for the promise for his benefit.¹⁰

§ 229. An infant's contract of partnership.

As between himself and his co-partners, an infant's contract of partnership is, like all his other contracts, voidable. He may disaffirm the contract without being liable for damages,¹¹ and such disaffirmance may be made during infancy.¹² The adult partner on the other hand cannot withdraw, and while the partnership continues the infant partner has the same powers and rights as any partner.¹³ So far as his own personal liability is concerned, an infant may also avoid partnership obligations to creditors and other persons who have contracted with the firm;¹⁴ but the capital actually contributed to the firm business by the infant partner is so far dedicated to the business of the partnership that it cannot be withdrawn until the claims of firm creditors are satisfied;¹⁵ and

holding the infant liable on his contract while nominally permitting him to rescind it.

⁸ See *infra*, § 238.

⁹ See *infra*, § 240.

¹⁰ *Stettheimer v. Wood, Harmon & Co.*, 167 N. Y. S. 1059.

¹¹ *Goode v. Harrison*, 5 Barn. & Ald. 147; *Conklin v. Ogborn*, 7 Ind. 553; *Adams v. Beall*, 67 Md. 53, 8 Atl. 664, 1 Am. St. Rep. 379; *Latrobe v. Dietrich*, 114 Md. 8, 78 Atl. 983; *Dunton v. Brown*, 31 Mich. 182; *Osburn v. Farr*, 42 Mich. 134, 3 N. W. 299; *Betts v. Carroll*, 6 Mo. App. 518; *Penn v. Whitehead*, 17 Gratt. 503, 94 Am. Dec. 478.

¹² *Adams v. Beall*, 67 Md. 53, 8 Atl. 664, 1 Am. St. Rep. 379. The decision of *Dunton v. Brown*, 31 Mich. 182, is to the contrary, but cannot be supported.

¹³ *Latrobe v. Dietrich*, 114 Md. 8, 78 Atl. 983.

¹⁴ *First Nat. Bank v. Casey*, 158 Ia. 349, 138 N. W. 897; *Mason v. Wright*, 13 Metc. 306; *Folds v. Allardt*, 35 Minn. 488, 29 N. W. 201; *Kerr v. Bell*, 44 Mo. 120.

¹⁵ *Shirk v. Shultz*, 113 Ind. 571, 15 N. E. 12; *Bush v. Linthicum*, 59 Md. 344; *Yates v. Lyon*, 61 N. Y. 344.

a fortiori if a firm transaction has been executed by the payment of firm money the infant cannot reclaim the money or any part of it.¹⁶ Even against his co-partners the infant cannot claim that partnership liabilities shall be satisfied from their share of the firm capital, leaving his intact.¹⁷ These limitations on the privilege of an infant partner can only be explained on the theory that the contract of partnership creates a status, so far as the capital actually embarked in the business is concerned, from which the infant cannot escape.

§ 230. Statutory changes in the common-law liability of infants.

In England it was enacted in 1874¹⁸ that all contracts of infants for the repayment of money lent or for goods supplied other than necessities, and all accounts stated with infants should be absolutely void. A few of the United States have passed statutes upon the subject, but generally the liability of the parties is that which is fixed by the common law.

§ 231. Voidable means valid until avoided.

Most of the disputed questions in the law of infancy turn upon the legal meaning of the word "voidable" as applied to an infant's acts. The natural meaning of the word imports a valid act which may be avoided, rather than an invalid act which may be confirmed, and the weight of authority as well as reason point in the same direction. Moreover, so far as executed transfers of property are concerned the authority of the decisions clearly supports this view.

Thus the deed of an infant it is universally agreed transfers a title though the title is voidable.¹⁹ So the indorsement

¹⁶ *Latrobe v. Dietrich*, 114 Md. 8, 78 Atl. 983.

¹⁷ *Moley v. Brine*, 120 Mass. 324; *Page v. Morse*, 128 Mass. 99. See also *Conary v. Sawyer*, 92 Me. 463, 43 Atl. 27, 69 Am. St. Rep. 524.

¹⁸ *Infants' Relief Act*, 37 and 38 Vict., c. 62, § 1.

¹⁹ *Zouch v. Parsons*, 3 Burr. 1794;

Irvine v. Irvine, 9 Wall. 617, 627, 19 L. Ed. 800; *Manning v. Johnson*, 28 Ala. 446, 62 Am. Dec. 732; *Beauchamp v. Bertig*, 90 Ark. 351, 119 S. W. 75, 23 L. R. A. (N. S.) 659; *Hastings v. Dolahide*, 24 Cal. 195 (otherwise by statute if the minor was under eighteen, *Hakes Inv. Co. v. Lyons*, 166 Cal. 557, 137 Pac. 911); *Kline v. Beebe*, 6 Conn.

of negotiable paper by an infant payee or indorsee transfers title; and, therefore, the infancy of the indorser is no defence to an action by the holder against the maker.²⁰ As to executory contracts, a distinction sometimes has been taken, and the doctrine laid down that such bargains are wholly invalid until confirmed.²¹ This distinction has been severely criticised,²² and must be regarded as unfounded. Probably the courts which first adopted it meant little more than this: An executed sale transfers title and a transfer of title is an important thing even though it may be avoided; on the other hand an executory contract is only important if it is ultimately performed or creates a liability for nonperformance. Now inasmuch as the performance of the contract by the infant or his liability for nonperformance are wholly dependent upon his own choice until and unless he ratifies the contract after coming of age, it seems accurate to say that there is until then no contract. But though the distinction is doubtless fine between no contract and a contract which the promisor may perform or not at his pleasure, it is of legal importance. In the case of a note or formal document this is obvious. If the note has no validity until confirmed it is hard to explain how it can

494; *Scranton v. Stewart*, 52 Ind. 68; *Tunison v. Chamblin*, 88 Ill. 378; *Green v. Wilding*, 59 Iowa, 679, 13 N. W. 761, 44 Am. Rep. 696; *Vallandigham v. Johnson*, 85 Ky. 288, 3 S. W. 173; *Davis v. Dudley*, 70 Me. 236, 35 Am. Rep. 318, 319; *Ridgeley v. Crandall*, 4 Md. 435; *Kendall v. Lawrence*, 22 Pick. 540; *Allen v. Poole*, 54 Miss. 323, 330; *Ferguson v. Bell's Adm'r*, 17 Mo. 347, 351; *Parrish v. Treadway*, 267 Mo. 91, 183 S. W. 580; *Gillet v. Stanley*, 1 Hill, 121; *Lessee of Drake v. Ramsay*, 5 Oh. * 251, 253; *Ihley v. Padgett*, 27 S. C. 300, 3 S. E. 468; *Scott v. Buchanan*, 11 Humph. 468; *Cummings v. Powell*, 8 Tex. 80; *Birch v. Linton*, 78 Va. 584, 49 Am. Rep. 381; *Gillespie v. Bailey*, 12 W. Va. 70, 29 Am. Rep. 445.

So a transfer of personal property is valid until avoided. *Roof v. Stafford*, 7

Cow. 179; *Johnson v. Packer*, 1 Nott & McC. 1.

²⁰ *Grey v. Cooper*, 3 Doug. 65; *Jones v. Darch*, 4 Price, 300; *Taylor v. Croker*, 4 Esp. 187; *Frazier v. Massey*, 14 Ind. 382; *Nightingale v. Withington*, 15 Mass. 272, 8 Am. Dec. 101; *Dulty v. Brownfield*, 1 Pa. St. 497; *Hardy v. Waters*, 38 Me. 450; *Neg. Inst. Law*, Sec. 22 (*infra*, § 1145). See also *Hastings v. Dollarhide*, 24 Cal. 195; *Garner v. Cook*, 30 Ind. 331; *Murray v. Thompson*, 136 Tenn. 118, 188 S. W. 578.

²¹ *Morton v. Steward*, 5 Ill. App. 533, 535; *Minock v. Shortridge*, 21 Mich. 304, 315; *Edmunds v. Mister*, 58 Miss. 765; *Edgerly v. Shaw*, 25 N. H. 514, 516, 57 Am. Dec. 349; *State v. Plaisted*, 43 N. H. 413. But see *Gillenwaters v. Campbell*, 142 Ind. 529, 534, 41 N. E. 1041.

²² See the able note in 18 Am. St. Rep. 573, 579.

be negotiated, and similarly a covenant if it has any validity as such, must derive it from the sealing and delivery when it was made, not from a subsequent parol ratification. An agent's covenant on behalf of his principal can neither be authorized nor ratified except by a sealed instrument,^{22a} and if an infant's covenant had no validity until ratified, that ratification also would have to be made under seal. But parol ratification may deprive the infant of a right to avoid his deed.²³ Even in the case of simple contracts, though the matter is less obvious the same principle holds. If an infant's executory promise amounts to nothing until ratified it is impossible to see how it can be consideration for the counter-promise of an adult, but that it is so, was early and conclusively settled.²⁴ Again, the defence to an infant's promise can be taken advantage of only by special plea.²⁵ If that promise were wholly without validity this practice is not defensible. For other reasons, as will be seen from what follows, it is important to make the distinction in question.

§ 232. Infant's privilege is personal.

The right to avoid his contracts and conveyances is given an infant for his protection, and should not be stretched beyond what his needs require. Therefore, the right is confined to the infant himself or his legal representatives.²⁶ Creditors,²⁷ trustees or assignees in bankruptcy,²⁸ assignees by purchase,²⁹

^{22a} See *infra*, § 275.

²³ *Irvine v. Irvine*, 9 Wall. 617, 19 L. Ed. 800; *Damron v. Ratliff*, 123 Ky. 758, 97 S. W. 401; *Kinard v. Proctor*, 68 S. C. 279, 47 S. E. 390; *Darraugh v. Blackford*, 84 Va. 509, 5 S. E. 542.

Though the foregoing decisions relate to conveyances not to executory covenants, it is a fair inference from them that parol ratification of an executory covenant would be effectual. See also *Ashfield v. Ashfield*, W. Jones, 157.

²⁴ See *supra*, § 105.

²⁵ 2 Chitty, Pleading (16th Am. Ed. 406.

²⁶ *Trustees v. Anderson*, 63 Ind. 367; *Holmes v. Rice*, 45 Mich. 142, 7 N. W. 772; *Monaghan v. Agricultural Ins. Co.*, 53 Mich. 238, 18 N. W. 797; *Harvey v. Briggs*, 68 Miss. 60, 8 So. 274, 10 L. R. A. 62; *Shaffer v. Detie*, 191 Mo. 377, 90 S. W. 131; *Bordentown v. Wallace*, 50 N. J. L. 13, 11 Atl. 267; *Beardsley v. Hotchkiss*, 96 N. Y. 201, and cases cited in the following notes.

²⁷ *Kingman v. Perkins*, 105 Mass. 111; *Yates v. Lyon*, 61 N. Y. 344.

²⁸ *Mansfield v. Gordon*, 144 Mass. 168, 10 N. E. 773; *Sayles v. Christie*, 187 Ill. 420, 438, 58 N. E. 480.

²⁹ *Riley v. Dillon*, 148 Ala. 283, 41 So. 768.

sureties,³⁰ or persons collaterally interested in the existence of the contract or conveyance,³¹ are not included in this designation; but heirs,³² or executors or administrators³³ are, and probably guardians also.³⁴ It was said in an early book³⁵ that the deed of an infant is voidable not only by himself or his heirs, but "by those who have his estate" but at the present day it is clear that mere privity of estate will not suffice for an avoidance of an infant's act.³⁶ The other party to a contract cannot avoid it on the ground that the infant's promise or conveyance is voidable;³⁷ but after an infant has exercised his right of avoidance, any one may thereafter assert the nullity of the transaction.³⁷

§ 233. Whether the privilege may be exercised against a subsequent purchaser in good faith.

Though a transaction with an infant is merely voidable, it is unlike contracts voidable for fraud or other equitable ground in this respect; even a *bona fide* purchaser for value of property formerly belonging to an infant, without notice that the seller acquired title directly or indirectly from an infant, cannot retain the property if the infant elects to rescind his transfer of title,³⁸ and a purchaser for value of even an

³⁰ *Hesser v. Steiner*, 5 Watts & S. 476.

³¹ *Keane v. Boycott*, 2 H. Bl. 511; *Nightingale v. Withington*, 15 Mass. 272, 8 Am. Dec. 101.

³² *Illinois Land & Loan Co. v. Bonner*, 75 Ill. 315; *Gillenwaters v. Campbell*, 142 Ind. 529, 41 N. E. 1041; *Harvey v. Briggs*, 68 Miss. 60, 8 So. 274, 10 L. R. A. 62; *O'Rourke v. Hall*, 38 N. Y. App. Div. 534, 56 N. Y. S. 471; *Walton v. Gaines*, 94 Tenn. 420, 29 S. W. 458; *Veal v. Fortson*, 57 Tex. 482; *Blake v. Hollandsworth*, 71 W. Va. 387, 76 S. E. 814, 43 L. R. A. (N. S.) 714.

³³ *Jefford v. Ringgold*, 6 Ala. 544; *Shropshire v. Burns*, 46 Ala. 108; *Parsons v. Hill*, 8 Mo. 135; *Tillinghast v. Holbrook*, 7 R. I. 230.

³⁴ *Chandler v. Simmons*, 97 Mass. 508, 93 Am. Dec. 117. In *Hughes v.*

Murphy, 5 Ga. App. 328, 63 S. E. 231, a guardian was held entitled to set aside an infant's sale though the infant objected. Cf. *Irvine's Heirs v. Crockett*, 4 Bibb, 437; *Oliver v. Houdlet*, 13 Mass. 237, 7 Am. Dec. 134.

³⁵ *Perkins' Profitable Book*, § 12.

³⁶ *Whittingham's Case*, 8 Coke, 42 b, 43 a; *Levering v. Heighe*, 2 Md. Ch. 81; *Austin v. Trustees of the Charlestown Female Seminary*, 8 Metc. 196, 41 Am. Dec. 497; *Singer Mfg. Co. v. Lamb*, 81 Mo. 221. See also *Riley v. Dillon*, 148 Ala. 283, 41 So. 768.

³⁷ See *supra*, § 105. Specific performance, however, will not be granted at suit of the infant. See *infra*, § 1438.

³⁸ *Grissom v. Beidleman*, 35 Okl. 343, 129 Pac. 853. See also *Baker v. Kennett*, 54 Mo. 82.

³⁹ So held in regard to sales of goods

infant's negotiable note will be defeated by a plea of infancy,³⁹ since the personal privilege of the infant is a legal right, which can be exercised against any one.⁴⁰ This rule has, however, been changed in the Uniform Sales Act,⁴¹ which makes no exception in favor of infants to the rule that a *bona fide* purchaser for value from one who has a voidable title acquires a good title. No statutory change, however, has been made in the rule that an infant may avoid his obligation on a negotiable instrument in the hands of a holder in due course.

§ 234. How disaffirmance may be made.

Any act which clearly shows an intent to disaffirm a contract or sale is sufficient for the purpose. Thus a notice by the infant of his purpose to disaffirm,⁴² a resale of goods,⁴³ a second conveyance of land previously sold or conveyed by him,⁴⁴ or even a tender to another of goods previously

in *Hill v. Anderson*, 13 Miss. 216; *Downing v. Stone*, 47 Mo. App. 144. Similarly in the case of real estate. *Harrod v. Myers*, 21 Ark. 592, 76 Am. Dec. 409; *Barker v. Fuestal*, 103 Ark. 312, 147 S. W. 45; *Buchanan v. Hubbard*, 96 Ind. 1; *Jenkins v. Jenkins*, 12 Iowa, 195, 200; *Brantley v. Wolf*, 60 Miss. 420; *Oneida County Sav. Bank v. Saunders*, 179 N. Y. App. D. 282, 166 N. Y. S. 280; *Jackson v. Beard*, 162 N. C. 105, 78 S. E. 6; *Conn v. Boutwell*, 101 Miss. 353, 58 So. 105; *McMorris v. Webb*, 17 S. C. 558, 43 Am. Rep. 629.

³⁹ *Howard v. Simpkins*, 70 Ga. 322; *Murray v. Thompson*, 136 Tenn. 118, 188 S. W. 578, L. R. A. 1917 B, 1172.

⁴⁰ This principle was carried so far in *Gage v. Menczer* (Tex. Civ. App.), 144 S. W. 717, as to allow an infant buyer to recover the money paid by him to the seller, from a bank to which the seller had transferred it in payment of a debt.

⁴¹ Sec. 24. See Williston on Sales, § 348. The jurisdictions which have enacted this statute are enumerated *infra*, § 506.

⁴² *Long v. Williams*, 74 Ind. 115; *Roberts v. Wiggin*, 1 N. H. 73, 75, 8 Am. Dec. 38; *Danziger v. Iron Clad Realty Co.*, 80 N. Y. Misc. 510, 141 N. Y. S. 593.

⁴³ *State v. Plaisted*, 43 N. H. 413; *Chapin v. Shafer*, 49 N. Y. 407; *State v. Howard*, 88 N. C. 650. These were cases where an infant sold personal property which he had previously mortgaged.

⁴⁴ *Frost v. Wolveston*, 1 Stra. 94; *Tucker v. Moreland*, 10 Pet. 58, 9 L. Ed. 345; *Beauchamp v. Bertig*, 90 Ark. 351, 119 S. W. 75, 23 L. R. A. (N. S.) 659; *Hastings v. Dollarhide*, 24 Cal. 195; *Harris v. Cannon*, 6 Ga. 382; *Losey v. Bond*, 94 Ind. 67, 70; *Vallandingham v. Johnson*, 85 Ky. 288, 3 S. W. 173; *Corbett v. Spencer*, 63 Mich. 731, 30 N. W. 385; *Norcrum v. Sheahan*, 21 Mo. 25, 64 Am. Dec. 214; *Dawson v. Helmes*, 30 Minn. 107, 14 N. W. 462; *Jackson v. Burchin*, 14 Johns. 123; *Cresinger v. Welch's Lessee*, 15 Ohio, 156, 45 Am. Dec. 565; *Tolar v. Marion County Lumber Co.*, 93 S. Car. 274, 75 S. E. 545. But in order to have this effect, the second conveyance must be

sold by him,⁴⁵ or a plea of infancy in an action upon the infant's obligation,⁴⁶ is sufficient. An action to recover goods transferred is, however, probably insufficient without previous demand or other indication of disaffirmance,⁴⁷ though a sale voidable for fraud may be thus avoided.⁴⁸ That case may be distinguished on the ground that the fraud is itself a wrong, and if a remedy is practically convenient and gives effectual relief, a wrongdoer should not be heard to complain. If the infant is himself sued on his contract, a plea of infancy is a sufficient disaffirmance.⁴⁹ There are some expressions in the old books to the effect that an act of disaffirmance must be of as high and solemn a nature as the act disaffirmed⁵⁰—a doctrine particularly appropriate to feoffments and deeds, but this is not

inconsistent with the first. Therefore, a subsequent mortgage does not necessarily avoid a prior one, *McGan v. Marshall*, 7 Humph. 121; and a quitclaim deed of an estate does not avoid a prior mortgage. *Singer Mfg. Co. v. Lamb*, 81 Mo. 221. See also *Tolar v. Marion County Lumber Co.*, 93 S. C. 274, 75 S. E. 545. Though a warranty deed would do so. *Dixon v. Merritt*, 21 Minn. 196; *Allen v. Poole*, 54 Miss. 323.

⁴⁵ *Hoyt v. Wilkinson*, 57 Vt. 404.

⁴⁶ *Sparr v. Florida Southern Ry.*, 25 Fla. 185, 6 So. 60; *Strain v. Wright*, 7 Ga. 568; *Schrock v. Crowl*, 83 Ind. 243; *Freeman v. Nichols*, 138 Mass. 313, 314.

⁴⁷ It is the prevailing though not uniform rule in regard to real estate conveyed by an infant that he may bring ejectment or other proceeding to regain possession without previous demand. 18 Am. St. Rep. 667, 668; *Smith v. Ryan*, 191 N. Y. 452, 84 N. E. 402, 19 L. R. A. (N. S.) 461. So in *Stack v. Cavanaugh*, 67 N. H. 149, 155, 30 Atl. 350, an action for the recovery of money, the action was held maintainable without previous demand. And an infant was allowed to disaffirm a release given by him by merely

bringing an action on the claim released in St. Louis, etc., *Ry. v. Higgins*, 44 Ark. 293. But in *Betts v. Carroll*, 6 Mo. App. 518, it was held that replevin of personal property would not lie unless there had been some act of disaffirmance before the action. This decision is questioned in 18 Am. St. Rep. 668, but as to actions sounding in tort it seems sound on principle and reasonable from a practical standpoint. An action of tort should not lie until a tort has been committed; and until the disaffirmance by the infant retention of the property is not wrongful. It is anomalous if bringing the action itself gives rise to the cause of action, or an essential element of it. Nor should the fiction of relation be pressed so far as to enable the infant to make the defendant a tort-feasor in the past. See *Drude v. Curtis*, 183 Mass. 317, 67 N. E. 317, 62 L. R. A. 755.

⁴⁸ See *infra*, § 1525.

⁴⁹ *Schrock v. Crowl*, 83 Ind. 243; *Freeman v. Nichols*, 138 Mass. 313, 314; *Yeager v. Knight*, 60 Miss. 730.

⁵⁰ See also *Tucker v. Moreland*, 10 Pet. 58, 9 L. Ed. 345; *Irvine v. Irvine*, 9 Wall. 617, 19 L. Ed. 800.

the modern law. An act of disaffirmance requires no special form.⁵¹

§ 235. When the privilege may be exercised.

It was early settled that an infant's conveyance of realty can be avoided only after he has attained his majority, though it has been said that he may enter during his minority and receive the rents and profits.⁵²

Contracts relating to personal property, however, it is well settled may be avoided by him during his minority. Thus in a sale or a contract to sell, an infant seller⁵³ or buyer,⁵⁴ may repudiate his agreement while still an infant. The transitory nature of personal property makes this rule essential to his protection. And the rule is the same as to all other contracts which do not relate to real estate.⁵⁵ Avoidance

⁵¹ *Phillips v. Green*, 5 T. B. Mon. 344; *Haynes v. Bennett*, 53 Mich. 15, 18 N. W. 539; *Allen v. Poole*, 54 Miss. 323; *Singer Mfg. Co. v. Lamb*, 81 Mo. 221, 225; *White v. Flora*, 2 Overt. 426.

⁵² *Zouch v. Parsons*, 3 Burr. 1794; *McCarthy v. Nicrosi*, 72 Ala. 332, 335, 47 Am. Rep. 418; *Harrod v. Myers*, 21 Ark. 592, 76 Am. Dec. 409; *Hastings v. Dollarhide*, 24 Cal. 195; *Watson v. Ruderman*, 79 Conn. 687, 66 Atl. 515; *Nathans v. Arkwright*, 66 Ga. 179; *Welch v. Bunce*, 83 Ind. 382; *Singer Mfg. Co. v. Lamb*, 81 Mo. 221; *Shipley v. Bunn*, 125 Mo. 445, 28 S. W. 754; *Emmons v. Murray*, 16 N. H. 385; *Bool v. Mix*, 17 Wend. 119, 31 Am. Dec. 285; *Kilgore v. Jordan*, 17 Tex. 341; *Wallace v. Leroy*, 57 W. Va. 263, 267, 50 S. E. 243, 110 Am. St. Rep. 777. But see *Chandler v. Simmons*, 97 Mass. 508, 510, 93 Am. Dec. 117; *Grissom v. Beidleman*, 35 Okla. 343, 129 Pac. 853, 44 L. R. A. (N. S.) 411.

⁵³ *Shipman v. Horton*, 17 Conn. 481; *Shipley v. Smith*, 162 Ind. 526, 528, 70 N. E. 803; *Beickler v. Guenther*, 121 Iowa, 419, 422, 96 N. W. 895; *Bailey v. Barnberger*, 11 B. Mon. 113; *Towle v. Dresser*, 73 Me. 252; Bloom-

ingdale v. Chittenden, 74 Mich. 698, 42 N. W. 166; *Star v. Watkins*, 78 Neb. 610, 111 N. W. 363; *Carr v. Clough*, 26 N. H. 280, 59 Am. Dec. 345; *Stafford v. Roof*, 9 Cow, 626; *Bool v. Mix*, 17 Wend. 119, 31 Am. Dec. 285; *Bartholomew v. Finnemore*, 17 Barb. 428; *Gage v. Menczer* (Tex. Civ. App.), 144 S. W. 717; *Hoyt v. Wilkinson*, 57 Vt. 404. See also *Miller v. Smith*, 26 Minn. 248, 2 N. W. 942, 37 Am. Rep. 407; *Chapin v. Shafer*, 49 N. Y. 407.

⁵⁴ *Riley v. Mallory*, 33 Conn. 201; *Rice v. Boyer*, 108 Ind. 472, 9 N. E. 420, 58 Am. Rep. 53; *Robinson v. Weeks*, 56 Me. 102, 107; *Edgerton v. Wolf*, 6 Gray, 453; *McCarthy v. Henderson*, 138 Mass. 310; *Hall v. Butterfield*, 59 N. H. 354, 357, 47 Am. Rep. 209; *Wooldridge v. Lavoie* (N. H.), 104 Atl. 346; *Hoyt v. Wilkinson*, 57 Vt. 404.

⁵⁵ *Ex parte McFerren*, 184 Ala. 223, 63 So. 159, 47 L. R. A. (N. S.) 543; *Gonackey v. General Accident Fire & Life Assur. Corp.*, 6 Ga. App. 381, 65 S. E. 53 (a settlement of a claim under a life insurance policy); *Adams v. Beall*, 67 Md. 53, 8 Atl. 664, 1 Am. St. Rep. 379; *Gillis v. Goodwin*, 180 Mass.

may be made by the infant after action brought against him at any time before judgment.⁵⁶ Though an infant may thus avoid his sales, purchases, or contracts during infancy he can make no effective ratification until he becomes of age,⁵⁷ for an infant's ratification clearly can be no more effectual than his original bargain.

§ 236. The whole transaction must be disaffirmed.

An infant cannot disaffirm so much of a transaction as is unfavorable to him and treat the remainder as effectual. If he disaffirms his obligation to pay an agreed price, he thereby necessarily disaffirms his title to the consideration he received for that obligation.⁵⁸ If he disaffirms his obligation to pay for goods delivered to him upon a conditional sale, he thereby forfeits any title and right to the possession of the goods

140, 61 N. E. 813, 91 Am. St. Rep. 265; *Simpson v. Prudential Ins. Co.*, 184 Mass. 348, 68 N. E. 673, 63 L. R. A. 741, 100 Am. St. Rep. 580; *Pippen v. Mutual Benefit Life Ins. Co.*, 130 N. C. 23, 40 S. E. 822, 57 L. R. A. 505; *Covault v. Nevitt*, 157 Wis. 113, 146 N. W. 1115, 51 L. R. A. (N. S.) 1092. In Michigan the exceptional doctrine prevails that an infant cannot avoid any of his contracts while still an infant. *Dunton v. Brown*, 31 Mich. 182; *Armitage v. Widoe*, 36 Mich. 124; *Lansing v. Michigan Central R. Co.*, 126 Mich. 663, 86 N. W. 147, 86 Am. St. Rep. 567. But an infant purchaser was allowed while still an infant to rescind his contract on account of fraud in *Stoll v. Hawks*, 179 Mich. 571, 146 N. W. 229, 51 R. A. (N. S.) 28.

⁵⁶ *Wooldridge v. Lavoie* (N. H.), 104 Atl. 346.

⁵⁷ *Chandler v. Simmons*, 97 Mass. 508, 510, 93 Am. Dec. 117. And see *infra*, § 234.

⁵⁸ *Strain v. Wright*, 7 Ga. 568; *Thomason v. Phillips*, 73 Ga. 140; *Carpenter v. Carpenter*, 45 Ind. 142; *Shirk v. Shultz*, 113 Ind. 571, 15 N. E. 12; *Badger v. Phinney*, 15 Mass. 359,

8 Am. Dec. 105; *Fitts v. Hall*, 9 N. H. 441; *Heath v. West*, 28 N. H. 101; *Skinner v. Maxwell*, 66 N. C. 45; *Wallace v. Leroy*, 57 W. Va. 263, 267, 50 S. E. 243, 110 Am. St. Rep. 777. In *Evans v. Morgan*, 69 Miss. 328, 12 So. 270, an infant engaged in trade became indebted for merchandise and when sued for the price avoided liability by pleading infancy. Thereafter he made a fraudulent sale of his property including the merchandise in question to his father. The sellers of the merchandise were allowed in a suit to equity to reclaim the property and being unable to identify it, because mingled with other property to subject the whole to a lien for its value. So in *Betts v. Carroll*, 6 Mo. App. 518, creditors of the seller were allowed to attach property in the infant's hands after disaffirmance. In *Drude v. Curtis*, 183 Mass. 317, 67 N. E. 317, 62 L. R. A. 755, both parties were infants. The buyer who had paid a portion of the price sued to recover it and attached the goods which had been the subject of the sale. It was held that the defendant's privilege excused him from liability either in tort or contract.

which the bargain gave to him.⁵⁹ Similarly if he purchases property and mortgages it back for the price, an avoidance of the mortgage avoids his title to the property,⁶⁰ and if he sells property so mortgaged, the purchaser necessarily takes it subject to the mortgage.⁶¹ If he enters into any contract subject to conditions or stipulations, he cannot take the benefit of the contract without the burden of the conditions or stipulations.⁶² An infant no more than an adult can recover the value of services voluntarily rendered by him as a gratuity.⁶³ He might, however, it seems, reclaim a gift of tangible property which was still in existence, and if return was refused, recover its value.

§ 237. Other consequences of disaffirmance.

When an infant exercises his privilege and rescinds a sale of personal property made to or by him, the title and rights of the parties in the goods are restored to the original status, as if no sale had taken place. Thus if an infant while still

⁵⁹ *Bennett v. McLaughlin*, 13 Ill. App. 349; *Robinson v. Berry*, 93 Me. 320, 45 Atl. 34; *Drude v. Curtis*, 183 Mass. 317, 67 N. E. 317, 62 L. R. A. 755.

⁶⁰ *Heath v. West*, 28 N. H. 101. See also *MacGreal v. Taylor*, 167 U. S. 688, 17 S. Ct. 961, 42 L. Ed. 326; *Ready v. Pinkham*, 181 Mass. 351, 63 N. E. 887; *United States Corp. v. Ulrickson*, 84 Minn. 14, 86 N. W. 613, 87 Am. St. Rep. 326; *Uecker v. Koehn*, 21 Neb. 559, 32 N. W. 583; *Skinner v. Maxwell*, 66 N. C. 45.

⁶¹ *Ottman v. Moak*, 3 Sandf. Ch. 431; *Curtiss v. McDougal*, 26 Ohio St. 66; *Knaggs v. Green*, 48 Wis. 601, 4 N. W. 760, 33 Am. Rep. 838. And see *Weed v. Beebe*, 21 Vt. 495. In *Ross P. Curtrice Co. v. Kent*, 89 Neb. 496, 131 N. W. 944, an infant buyer under a conditional sale was held entitled to retain the goods until repaid the portion of the price which had been paid by him and to the return of which he had be-

come entitled by disaffirming the transaction.

⁶² Thus an infant who brought suit for breach of the contract of a telegraph company to transmit a telegram, was held bound by the stipulation that suit must be brought within sixty days. *Western Union Tel. Co. v. Greer*, 115 Tenn. 368, 89 S. W. 327, 1 L. R. A. (N. S.) 525. And similar stipulations in insurance policies have been held binding on an infant promisee, *Mead v. Phoenix Ins. Co.*, 68 Kans. 432, 75 Pac. 475, 64 L. R. A. 79, 104 Am. St. Rep. 412, or beneficiary. *O'Laughlin v. Union Central Life Ins. Co.*, 11 Fed. Rep. 280; *Suggs v. Travelers' Ins. Co.*, 71 Tex. 579, 9 S. W. 676, 1 L. R. A. 847; *Fey v. Independent Order, etc., Ins. Soc.*, 120 Wis. 358, 98 N. W. 206. An infant cannot avoid a single provision of a lease. *Goin v. Cincinnati Realty Co.*, 200 Fed. 252, 118 C. C. A. 438.

⁶³ *Ramsdell v. Coombs Aeroplane Co.*, 161 N. Y. S. 360.

a minor disaffirms a purchase made by him and restores the property, he cannot thereafter reclaim it on the ground that he avoids his disaffirmance.⁶⁴ The disaffirmance is not regarded as a new contract of rescission or transfer of title by the infant, but rather as a destruction or wiping out of the original contract or transfer.⁶⁵ If an infant acquires property which is subject to certain burdens, he can only avoid the burdens by giving up the property. Thus while he retains leased property he must pay the rent;⁶⁶ and if he is a stockholder and retains his stock, he is liable for calls or assessments upon it.⁶⁷

⁶⁴ *Edgerton v. Wolf*, 6 Gray, 453. But see *Newry, etc., Ry. v. Coombe*, 3 Ex. 565; *Northwestern Ry. v. McMichael*, 5 Ex. 114, 127. See also *infra*, § 250 *ad fin.*

⁶⁵ "The disaffirmance of a contract made by an infant nullifies it and renders it void *ab initio*; and the parties are returned to the same condition as if the contract had never been made." *Grissom v. Beidleman*, 35 Okla. 343, 129 Pac. 853, 857, 44 L. R. A. (N. S.) 411. See also cases cited *infra*, § 238, n. 68. Whether such a destruction of an infant's transfer of real estate by deed can be accomplished without a new transfer may be questioned. In *McCarty v. Woodstock Iron Co.*, 92 Ala. 463, 8 So. 417, 12 L. R. A. 136, an infant grantee disaffirmed his purchase and the court held this did not divest his title but that the grantor could compel a reconveyance by bill in equity.

In *Pippen v. Mutual Benefit Life Ins. Co.*, 130 N. C. 23, 40 S. E. 822, 57 L. R. A. 505, the administrator of an infant policy holder who had surrendered his policy of life insurance and received its cash surrender value sued for the face of the policy after the death of the insured. The court held the original contract had been de-

stroyed on the principle stated in the text. It would seem, however, that the plaintiff's contention was sound that the surrender of the policy for its cash surrender value (not for the total premiums which the infant had paid) was the making of a new contract not a disaffirmance of the original one. *Cf. Gonackey v. General Accident Fire & Life Assur. Corp.*, 6 Ga. App. 381, 65 S. E. 53; *Lansing v. Michigan C. R. Co.*, 126 Mich. 663, 86 N. W. 147. In *McCarty v. Woodstock Iron Co.*, 92 Ala. 463, 8 So. 417, 12 L. R. A. 136, the court said of a disaffirmed contract: "The contract having been void cannot be revived, except by mutual consent."

⁶⁶ *Ketsey's Case*, Cro. Jac. 320; *Kirton v. Elliott*, 2 Bulst. 69; *Northwestern Ry. Co. v. M'Michael*, 5 Exch. 114, 123, 124. But see *Flexner v. Dickerson*, 72 Ala. 318.

⁶⁷ *Northwestern Railway Co. v. M'Michael*, 5 Exch. 114. The infant, either before he becomes of age or within a reasonable time thereafter, may avoid liability by repudiating the transfer of stock to himself. See *Cork, etc., Ry. v. Casenove*, 10 Q. B. 935; *Mitchell's Case*, L. R. 9 Eq. 363; *Ebbetts's Case*, 5 Ch. App. 302.

§ 238. Restoration of consideration.

From what has been said it is evident that if an infant has received consideration for a transfer of money or goods by him, and still has that consideration, he cannot disaffirm his transfer without vesting a right in the other party to recover the consideration. It does not logically follow, however, that the infant must tender it back as a condition precedent of his right to disaffirm. Rather it would seem that his privilege allows him to disaffirm the whole transaction, leaving upon each party the burden of demanding and regaining what he has parted with.⁶⁸ A number of decisions, however, require the infant to offer to surrender so much of the consideration, as is still in his possession, as a condition of disaffirmance.⁶⁹ If the infant, having used or parted with

⁶⁸ *Eureka Co. v. Edwards*, 71 Ala. 248, 46 Am. Rep. 314 (unless the suit is in equity); *Sanger v. Hibbard*, 104 Fed. 455, 43 C. C. A. 635; *Strain v. Wright*, 7 Ga. 568; *Carpenter v. Carpenter*, 45 Ind. 142; *Clark v. Van Court*, 100 Ind. 113, 50 Am. Rep. 774; *Chandler v. Simmons*, 97 Mass. 508, 514, 93 Am. Dec. 117; *Drude v. Curtis*, 183 Mass. 317, 318, 67 N. E. 317, 62 L. R. A. 755; *Dawson v. Helmes*, 30 Minn. 107, 14 N. W. 462; *Tower-Doyle Commission Co. v. Smith*, 86 Mo. App. 490; *Fitts v. Hall*, 9 N. H. 441; *Oneonta Grocery Co. v. Preston*, 167 N. Y. S. 641; *Millsaps v. Estes*, 137 N. C. 535, 50 S. E. 227, 70 L. R. A. 170, 107 Am. St. Rep. 476. See also *St. Louis, etc., Ry. v. Higgins*, 44 Ark. 293; *Wright v. Buchanan*, 287 Ill. 468, 123 N. E. 53; *Ross P. Curtice Co. v. Kent*, 89 Neb. 496, 131 N. W. 944, 52 L. R. A. (N. S.) 723; *Chandler v. Jones*, 172 N. C. 569, 90 S. E. 580, and cases in the two following notes. But in *Lamkin v. Ledoux*, 101 Me. 581, 64 Atl. 1048, 8 L. R. A. (N. S.) 104, the court not only held a repudiating infant not liable for the price of goods which he retained after attaining his majority, because the Me. Rev. St., c. 113, § 2, provides

that no action shall be maintained against an infant on any contract not relating to necessities or real estate unless after reaching twenty-one years he ratifies the contract in writing, but said "The merchandise became the defendant's property upon the unconditional sale and delivery to him and it all remained his property though he failed or refused to pay for it."

⁶⁹ *Re Huntenberg*, 153 Fed. 768; *Towle v. Dresser*, 73 Me. 252; *Brantley v. Wolf*, 60 Miss. 420; *Lake v. Perry*, 95 Miss. 550, 566, 49 So. 569; *Berry v. Stigall*, 253 Mo. 690, 162 S. W. 126, 50 L. R. A. (N. S.) 489; *Zuck v. Turner Harness Co.*, 106 Mo. App. 566, 80 S. W. 967; *Star v. Watkins*, 78 Neb. 610, 111 N. W. 363; *Lemmon v. Bee-man*, 45 Ohio St. 505, 509, 15 N. E. 476; *Price v. Furman*, 27 Vt. 268, 65 Am. Dec. 194; *Jones v. Valentines' School*, 122 Wis. 318, 320, 99 N. W. 1043. So in *Lane v. Dayton, etc., Co.*, 101 Tenn. 581, 48 S. W. 1094, it was held that an infant could not avoid an accord and satisfaction without first offering to return the consideration he had received, if he still had it. But see *Gilkinson v. Miller*, 74 Fed. 131; *Gonackey v. General Acci-*

the property while still an infant, no longer possesses it, by the weight of authority, and as a logical consequence of his incapacity, he may avoid either an executory promise,⁷⁰ or an executed transfer,⁷¹ or a release of a cause of action⁷²

dent, *Fire & Life Assur. Corp.*, 6 Ga. App. 381, 65 S. E. 53. See also decisions in note 73, *infra*. In *Star v. Watkins*, 78 Neb. 610, 111 N. W. 363, it was held that the infant need not make a formal tender before the action. Readiness to surrender at the trial sufficed.

⁷⁰ *MacGreal v. Taylor*, 167 U. S. 688, 17 Sup. Ct. 961, 42 L. Ed. 326; *White v. Sikes*, 129 Ga. 508, 59 S. E. 228; *Brandon v. Brown*, 106 Ill. 519, 527; *First Nat. Bank v. Casey*, 158 Ia. 349, 138 N. W. 897; *Badger v. Phinney*, 15 Mass. 359, 8 Am. Dec. 105; *Miller v. Smith*, 26 Minn. 248, 2 N. W. 942, 37 Am. Rep. 407; *Nichols, etc., Co. v. Snyder*, 78 Minn. 502, 81 N. W. 516; *Brantley v. Wolf*, 60 Miss. 420; *Kitchen v. Lee*, 11 Paige, 107, 42, Am. Dec. 101; *Mustard v. Wohlford's Heirs*, 15 Gratt. 329, 76 Am. Dec. 209; *Bedinger v. Wharton*, 27 Gratt. 857; *International Text-Book Co. v. McKone*, 133 Wis. 200, 133 N. W. 438.

⁷¹ *Tucker v. Moreland*, 10 Pet. 58, 73, 74, 9 L. Ed. 345; *MacGreal v. Taylor*, 167 U. S. 688, 17 Sup. Ct. 961, 42 L. Ed. 326; *Alfrey v. Colbert*, 168 Fed. 231, 93 C. C. A. 517; *Manning v. Johnson*, 26 Ala. 446, 62 Am. Dec. 732; *Eureka Co. v. Edwards*, 71 Ala. 248, 46 Am. Rep. 314; *American Mortgage Co. v. Dykes*, 111 Ala. 178, 18 So. 292, 56 Am. St. Rep. 38; *Ex parte McFerrer*, 184 Ala. 223, 63 So. 159, 47 L. R. A. (N. S.) 543; *Beauchamp v. Bertig*, 90 Ark. 351, 119 S. W. 75, 80, 23 L. R. A. (N. S.) 659; *Flittner v. Equitable Life Assur. Soc.*, 30 Cal. App. 209, 157 Pac. 630; *Putnal v. Walker*, 61 Fla. 720, 55 So. 844, 36 L. R. A. (N. S.) 33; *Southern Cotton Oil Co. v. Dukes*, 121 Ga. 787, 49 S. E. 788; *Carpenter v. Carpenter*, 45 Ind.

142; *Dill v. Bowen*, 54 Ind. 204; *Beickler v. Guenther*, 121 Iowa, 419, 96 N. W. 895; *Gray v. Grimm*, 157 Ky. 603, 163 S. W. 762; *Chandler v. Simmons*, 97 Mass. 508, 93 Am. Dec. 117; *Morse v. Ely*, 154 Mass. 458, 28 N. E. 577, 26 Am. St. Rep. 263; *White v. New Bedford, etc., Co.*, 178 Mass. 20, 59 N. E. 642; *Gillis v. Goodwin*, 180 Mass. 140, 61 N. E. 813, 91 Am. St. Rep. 265; *Simpson v. Prudential Ins. Co.*, 184 Mass. 348, 68 N. E. 673, 63 L. R. A. 741, 100 Am. St. Rep. 560; *Brantley v. Wolf*, 60 Miss. 420; *Harvey v. Briggs*, 68 Miss. 60, 8 So. 274, 10 L. R. A. 62; *Lake v. Perry*, 95 Miss. 550, 566, 49 So. 569; *Craig v. VanBebber*, 100 Mo. 584, 13 S. W. 906, 18 Am. St. Rep. 569; *Ridgeway v. Herbert*, 150 Mo. 606, 51 S. W. 1040, 73 Am. St. Rep. 464; *Clark v. Tate*, 7 Mont. 171, 14 Pac. 761; *Bloomer v. Nolan*, 36 Neb. 51, 53 N. W. 1039, 38 Am. St. Rep. 690; *Englebert v. Troxell*, 40 Neb. 195, 58 N. W. 852, 26 L. R. A. 177, 42 Am. St. Rep. 665; *Green v. Green*, 69 N. Y. 553, 25 Am. Rep. 233; *Cresinger v. Welsh's Lessee*, 15 Ohio, 156, 45 Am. Dec. 565; *Lemmon v. Beeman*, 45 Ohio St. 505, 15 N. E. 476; *Bullock v. Sprowls*, 93 Tex. 188, 54 S. W. 661, 47 L. R. A. 326, 77 Am. St. Rep. 849; *Price v. Furman*, 27 Vt. 268, 65 Am. Dec. 194; *Wiser v. Lockwood*, 42 Vt. 720.

⁷² *Interstate Coal Co. v. Trivett*, 155 Ky. 825, 160 S. W. 728; *Barr v. Packard Motor Car Co.*, 172 Mich. 299, 137 N. W. 697; *Britton v. South Penn. Oil Co.*, 73 W. Va. 792, 81 S. E. 525 In *Gonackey v. General Accident Fire & Life Assur. Corp.*, 6 Ga. App. 381, 65 S. E. 53, the court allowed an infant who had received \$50 in full settlement of a policy for \$300, and

without any liability for what was given him in exchange. The hardship of such a situation upon the adult has produced a number of decisions and some statutes providing that the infant cannot disaffirm a transaction executed on both sides unless he can and does put the other party *in statu quo*.⁷³ It has with more reason been held by courts of equity that equitable relief will not be given to an infant unless he himself does equity by restoring what he has received.⁷⁴ But if the infant has used, lost,

who had spent the \$50, to disaffirm the settlement and recover the full face of the policy not only without tendering the \$50, but without any deduction from the amount recovered. In *Benson v. Tucker*, 212 Mass. 60, 98 N. E. 589, 41 L. R. A. (N. S.) 1219, however, an infant speculator recovered from his stockbroker the amount of his original margin subject to deduction of sums paid, from time to time. The amount recovered, however, was all that the plaintiff claimed. Cf. *Raymond v. General Motorcycle Co.*, 230 Mass. 54, 119 N. E. 359. For the effect of the infancy of both parties, see *Drude v. Curtis*, 183 Mass. 317, 67 N. E. 317, 82 L. R. A. 755.

⁷³ See *Holmes v. Blogg*, 8 Taunt. 35, 508; *Re Taylor*, 8 De G. M. & G. 254; *Bozeman v. Browning*, 31 Ark. 364 (overruled by *St. Louis, etc., Ry. v. Higgins*, 44 Ark. 293); *Coburn v. Raymond*, 76 Conn. 484, 492, 57 Atl. 116, 100 Am. St. Rep. 1000; *Keokuk State Bank v. Hall*, 106 Ia. 540, 76 N. W. 832; *Bailey v. Barnberger*, 11 B. Mon. 113; *Johnson v. Insurance Co.*, 56 Minn. 365, 57 N. W. 934, 59 N. W. 992, 26 L. R. A. 187, 45 Am. St. Rep. 473; *Braucht v. Graves-May Co.*, 92 Minn. 116, 99 N. W. 417; *Kerr v. Bell*, 44 Mo. 120; *Stanhope v. Shambow*, 54 Mont. 360, 170 Pac. 752; *Bartlett v. Bailey*, 59 N. H. 408; *Hall v. Butterfield*, 59 N. H. 354, 47 Am. Rep. 209; *Evans v. Taylor*, 18 N. Mex. 371, 137 Pac. 583, 50 L. R. A. (N. S.) 1113; *Rice v. Butler*, 160 N. Y. 578, 55 N. E.

275, 47 L. R. A. 303, 73 Am. St. Rep. 703; *Mutual Milk Co. v. Prigge*, 112 N. Y. App. Div. 652, 98 N. Y. S. 458; *Wanisch v. Wuertz*, 79 N. Y. Misc. 610; 140 N. Y. S. 573; *Lown v. Spoon*, 158 N. Y. App. Div. 900, 143 N. Y. S. 275; *Lefler v. Oelrichs*, 173 N. Y. App. D. 759, 763, 160 N. Y. S. 119; *Smith v. Evans*, 5 Humph. 70; *Lane v. Dayton, etc., Co.*, 101 Tenn. 581, 48 S. W. 1094; *Stuart v. Baker*, 17 Tex. 417; *Folts v. Ferguson*, 77 Tex. 301, 13 S. W. 1037; *Bedinger v. Wharton*, 27 Gratt. 857. In South Dakota this rule prevails by statute, but a contract from which the infant can derive no advantage, as one of suretyship, may be rescinded without restoring the original status. *Holland v. Colton State Bank*, 20 S. Dak. 325, 106 N. W. 60. In England an infant who has used or consumed goods for which he has paid money under a contract void under the Infants' Relief Act, 1874, § 1, cannot recover back from the vendor the money so paid. *Valentini v. Canali*, 24 Q. B. D. 166.

⁷⁴ *Eureka Co. v. Edwards*, 71 Ala. 248, 46 Am. Rep. 314; *Bell v. Burkhalter*, 176 Ala. 62, 57 So. 460; *Beauchamp v. Bertig*, 90 Ark. 351, 119 S. W. 75, 23 L. R. A. (N. S.) 659; *Bryant v. Pottinger*, 6 Bush, 473; *Hillier v. Bennett*, 3 Edw. Ch. 222; *Smith v. Evans*, 5 Humph. 70; *Folts v. Ferguson*, 77 Tex. 301, 13 S. W. 1037; *Bedinger v. Wharton*, 27 Gratt. 857; *Wallace v. Leroy*, 57 W. Va. 263, 267, 50 S. E. 243, 110 Am. St. Rep. 777. But

or destroyed what he received, in many jurisdictions even equitable relief will not be denied because of the infant's failure to restore the consideration or its value.⁷⁶

It must be admitted that the prevailing rule allowing an infant to rescind an executed transaction without restoring what he has received may often work gross injustice. A few instances of this are suggested in a Minnesota case. "Suppose a minor engaged in agriculture should hire a man to work on his farm, and pay him reasonable wages for his services. According to this rule the minor might recover back what he paid, although retaining and enjoying the fruits of the other's man's labor. Or, again, suppose a man engaged in mercantile business with a capital of \$5,000 should, from time to time, buy and pay for \$100,000 worth of goods, in the aggregate, which he had sold, and had got his pay. According to this doctrine, he could recover back the \$100,000 which he had paid to the various parties from whom he had bought the goods."⁷⁶ The injustice of such results so far as the adult is concerned is not diminished by the fact that the infant has previously wasted the consideration which he received from the adult.

In Minnesota and New Hampshire the ordinary rule prevailing in regard to necessities has been extended so far as to hold an infant bound by his contracts, where he fails to restore what he has received under them, to the extent of the benefit actually derived by him from what he has received from the other party to the transaction.⁷⁷ This seems to

see *Millsaps v. Estes*, 137 N. C. 535, 546, 50 S. E. 227, 70 L. R. A. 170, 107 Am. St. Rep. 476.

⁷⁶ *Bell v. Burkhalter*, 176 Ala. 62, 57 So. 460; *Stull v. Harris*, 51 Ark. 294, 11 S. W. 104, 2 L. R. A. 741; *Reynolds v. McCurry*, 100 Ill. 356; *Barr v. Packard Motor Car Co.*, 172 Mich. 299, 137 N. W. 697; *Brantley v. Wolf*, 60 Miss. 420; *Bedinger v. Wharton*, 27 Gratt. 857. In *Millsaps v. Estes*, 137 N. C. 535, 546, 50 S. E. 227, 70 L. R. A. 170, 107 Am. St. Rep. 476, the statement is made that equity will grant relief to the infant and then the other

party "will be permitted to recover" what he has parted with if the infant still retains it or its proceeds.

⁷⁷ *Mitchell, J. in Johnson v. Northwestern Mut. Life Ins. Co.*, 56 Minn. 365, 373, 57 N. W. 934, 26 L. R. A. 187, 45 Am. St. Rep. 473.

⁷⁸ *Bergland v. Multigraph Sales Co.*, 135 Minn. 67, 160 N. W. 191; *Hall v. Butterfield*, 59 N. H. 354; *Bartlett v. Bailey*, 59 N. H. 408; *Stack v. Cavanaugh*, 67 N. H. 149, 153, 30 Atl. 350; *Wooldridge v. Lavoie* (N. H.), 104 Atl. 346.

offer a flexible rule which will prevent imposition upon the infant and also tend to prevent the infant from imposing to any serious degree upon others.

§ 239. Ratification.

If, as has been previously suggested, an infant's contract is valid until avoided, ratification does not, strictly speaking, create a right against the infant, but merely terminates the privilege which the law allows him of avoiding a bargain he made while under age.^{77a} Ratification cannot be effectually made until after the infant has come of age.⁷⁸ From that time, however, any manifestation by him of an intent to regard the bargain as binding will deprive him of his privilege.⁷⁹ Therefore, if an infant after coming of age sells, uses, or even retains for an unreasonable time goods received by him during infancy under a contract, he cannot thereafter avoid the bargain.⁸⁰

^{77a} See *supra*, § 204.

⁷⁸ *Northwestern Railway Co. v. M'Michael*, 5 Ex. 114; *Sanger v. Hibbard*, 104 Fed. 455, 456, 43 C. C. A. 635; *Ex parte McFerren*, 184 Ala. 223, 63 So. 159, 47 L. R. A. (N. S.) 543; *Chandler v. Simmons*, 97 Mass. 508, 510, 93 Am. Dec. 117; *Stack v. Cavanaugh*, 67 N. H. 149, 30 Atl. 350; *Slator v. Trimble*, 14 Ir. C. L. Rep. 342.

⁷⁹ See *supra*, § 151. In Missouri in 1879, it was enacted that no ratification of an infant's promise should be binding unless it was in writing signed by the party to be charged thereby. Mo. Rev. St. 1879, § 2516. This statute in 1895 was superseded by the present statute which provides that "no action shall be maintained whereby to charge any person or any debt contracted during infancy, unless such person shall have ratified the same by some other act than a verbal promise to pay the same; and the following acts on the part of such person after he becomes of full age shall constitute a ratification of such debt; first, an acknowledgment of or promise

to pay such a debt made in writing; second, a partial payment upon such debt; third, a disposal of part or all of the property for which such debt was contracted; fourth, a refusal to deliver property in his possession or under his control for which such debt was contracted, to the person to whom the debt is due, on demand thereof made in writing." Mo. Laws of 1895, p. 181, Rev. St. 1909, § 2786. See *Koerner v. Wilkinson*, 96 Mo. App. 510, 70 S. W. 509.

In Maine, by statute, contracts of an infant, except for necessities or land, are unenforceable unless the infant after coming of age ratifies them in writing. Rev. St., c. 113, § 2. See *Lamkin v. LeDoux*, 101 Me. 581, 64 Atl. 1048, 8 L. R. A. (N. S.) 104.

⁸⁰ *McCarthy v. Nicrosi*, 72 Ala. 332, 47 Am. Rep. 418; *Southern Cotton Oil Co. v. Dukes*, 121 Ga. 787, 49 S. E. 788; *Wickham v. Torley*, 136 Ga. 594, 71 S. E. 881, 36 L. R. A. (N. S.) 57; *Bell v. Swainsboro Fertilizer Co.*, 12 Ga. App. 81, 76 S. E. 756; *Fried v. Overland Motor Co.*, 202 Ill.

Still more clearly if the infant after attaining his majority receives performance in whole or in part from the other party to the contract, there is a ratification.⁸¹ There are numerous cases holding that in the case of real estate mere lapse of time short of the Statute of Limitations will not cut off the right to avoid a conveyance made during infancy in the absence of circumstances sufficient to raise an equitable estoppel.⁸² But the contrary decisions (also relating to land), requiring the infant to disaffirm within a reasonable time after he becomes of age state a rule sounder in theory and better in practice.⁸³ A failure for more than a reasonable time to reclaim personal property transferred during infancy, more clearly than in the case of real estate, amounts to an affirmance.⁸⁴ If the infant's bargain is wholly executory the mere failure to repu-

App. 203; *Pursley v. Hays*, 17 Iowa, 310; *Robinson v. Hoskins*, 14 Bush, 393; *Boody v. McKenney*, 23 Me. 517; *Hilton v. Shepherd*, 92 Me. 160, 42 Atl. 387; *Boyden v. Boyden*, 9 Metc. 519; *Koerner v. Wilkinson*, 96 Mo. App. 510, 70 S. W. 509; *Krbel v. Krbel*, 84 Neb. 160, 120 N. W. 935; *Robbins v. Eaton*, 10 N. H. 561; *Williams v. Mabee*, 3 Halst. Ch. 500; *Delano v. Blake*, 11 Wend. 85, 25 Am. Dec. 617; *State v. Rousseau*, 94 N. C. 355; *Mission Ridge Co. v. Nixon* (Tenn.), 48 S. W. 405. It was held otherwise, however, as to lumber built into a house in *Bloomer v. Nolan*, 36 Neb. 51, 53 N. W. 1039, 38 Am. St. Rep. 690. See also *Lynch v. Johnson*, 109 Mich. 640, 67 N. W. 908.

⁸¹ *Clark v. Kidd*, 148 Ky. 479, 146 S. W. 1097.

⁸² *Irvine v. Irvine*, 9 Wall. 617, 627, 19 L. Ed. 800; *Sims v. Everhardt*, 102 U. S. 300, 312, 26 L. Ed. 87; *Wells v. Seixas*, 24 Fed. 82; *Kountz v. Davis*, 34 Ark. 590; *Barker v. Fuestal*, 103 Ark. 312, 147 S. W. 45; *Wright v. Buchanan*, 287 Ill. 468, 123 N. E. 53; *Richardson v. Pate*, 93 Ind. 423, 47 Am. Rep. 374; *Davis v. Dudley*, 70 Me. 236, 35 Am. Rep. 318; *Prout v. Wiley*, 28 Mich. 164; *Donovan v. Ward*, 100 Mich. 601, 59

N. W. 254; *Wallace v. Latham*, 52 Miss. 291, 297; *Shipp v. McKee*, 80 Miss. 741, 92 Am. St. Rep. 616; *Watson v. Peebles*, 102 Miss. 725, 59 So. 881; *Lake v. Perry*, 95 Miss. 550, 49 So. 569; *Cresinger v. Welch's Lessee*, 15 Ohio St. 156, 45 Am. Dec. 565; *Gilliespe v. Bailey*, 12 W. Va. 70, 29 Am. Rep. 445; *Blake v. Hollandsworth*, 71 W. Va. 387, 76 S. E. 814, 43 L. R. A. (N. S.) 714.

⁸³ *Hastings v. Dollarhide*, 24 Cal. 195; *Bentley v. Greer*, 100 Ga. 35, 27 S. E. 974; *Justice v. Justice*, 170 Ky. 423, 186 S. W. 148; *Goodnow v. Empire Lumber Co.*, 31 Minn. 468, 18 N. W. 283, 47 Am. Rep. 798, and cases cited; *Robinson v. Allison*, 192 Mo. 366, 91 S. W. 115; *Parrish v. Treadway*, 267 Mo. 91, 183 S. W. 580; *Searcy v. Hunter*, 81 Tex. 644, 17 S. W. 372, 26 Am. St. Rep. 837; *Lawder v. Larkin* (Tex. Civ. App.), 94 S. W. 171; *Salser v. Barron* (Tex. Civ. App.), 146 S. W. 1039; *Stone v. Wolfe*, 50 Tex. Civ. App. 231, 109 S. W. 981. See also *Criswell v. Criswell*, 101 Neb. 349, 163 N. W. 302, L. R. A. 1917, E. 1103.

⁸⁴ *Lee v. Equitable Life Ass. Soc.*, 195 Mo. App. 40, 189 S. W. 1195; *Chandler v. Jones*, 172 N. C. 569, 90 S. E. 580.

diate the bargain until a claim is made under it, is probably insufficient to indicate that the right to avoid the contract has been given up.⁸⁵ Ignorance of the party ratifying, that his infancy gives him a legal defence is generally and rightly held to be immaterial in the more recent cases;^{85a} but ignorance of the facts on which the original obligation was based,^{85b} or of the fact that he was an infant when the transaction was originally entered into,⁸⁶ invalidates ratification. Such admission or part payment of a debt as is generally held sufficient

⁸⁵ See *Tobey v. Wood*, 123 Mass. 88, 25 Am. Rep. 27; *Tyler v. Gallop's Est.*, 68 Mich. 185, 35 N. W. 902; *Nichols, etc., Co. v. Snyder*, 78 Minn. 502, 81 N. W. 516; *Tupp v. Pederson*, 78 Minn. 524, 81 N. W. 1103; *Parsons v. Teller*, 188 N. Y. 318, 326; 80 N. E. 930; *International Text Book Co. v. Connelly*, 206 N. Y. 188, 99 N. E. 722, 42 L. R. A. (N. S.) 1115. Whether so extended a privilege should be allowed the infant maker of negotiable paper which is likely to get into the hands of innocent purchasers may be questioned. In *Darlington v. Hamilton Bank*, 63 N. Y. Misc. 289, 116 N. Y. S. 678, 680, the court said such an instrument might be repudiated "before such infant becomes of age, or within a reasonable time after becoming of age," and the same rule seems to have been applied in regard to the obligation of an infant surety on a note in *Johnson v. Storie*, 32 Neb. 610, 49 N. W. 371. In England it is held that an infant's marriage settlement can be avoided only within a reasonable time after coming of age. *Edwards v. Carter*, [1893] A. C. 360. Here it will be observed the rule requires no retention by the infant of any benefit after he comes of age.

In Iowa, by statute, disaffirmance of all contracts of an infant can only be made within a reasonable time after he comes of age. See *Leacox v. Griffith*, 76 Ia. 89, 40 N. W. 109.

^{85a} *American Mtge. Co. v. Wright*,

101 Ala. 658, 14 So. 399; *Bestor v. Hickey*, 71 Conn. 181, 41 Atl. 555; *Rubin v. Strandberg*, 288 Ill. 64, 122 N. E. 808; *Clark v. VanCourt*, 100 Ind. 113, 50 Am. Rep. 774; *Morse v. Wheeler*, 4 Allen, 570; *Taft v. Sergeant*, 18 Barb. 320; *Ring v. Jamison*, 66 Mo. 424; *Anderson v. Soward*, 40 Oh. St. 325, 48 Am. Rep. 687. *Contra*, however, are *Harmer v. Killing*, 5 Esp. 102; *Manning v. Gannon*, 44 App. D. C. 98; *Coe v. Moon*, 260 Ill. 76, 102 N. E. 1074; *Thing v. Libbey*, 16 Me. 55; *Trader v. Lowe*, 45 Md. 1; *Turner v. Gaither*, 83 N. C. 357, 35 Am. Rep. 574; *Hinely v. Margaritz*, 3 Pa. St. 428; *Reed v. Boshears*, 4 Sneed, 118; *Fletcher v. A. W. Koch Co. (Tex. Civ. App.)*, 189 S. W. 501; *Hatch v. Hatch's Est.*, 60 Vt. 160, 13 Atl. 791. See also *Sayles v. Christie*, 187 Ill. 420, 443, 58 N. E. 480. Where payments after majority were made on defendant's false representation that plaintiff must pay or go to jail, no ratification can be presumed. *Healy v. Kellogg*, 145 N. Y. S. 943.

^{85b} *Crabtree v. May*, 1 B. Mon. 289; *Tobey v. Wood*, 123 Mass. 88, 25 Am. Rep. 27. In these cases an infant's assent after he attained his majority to continue a member of a firm was held no ratification of his obligation to pay firm debts of which he was ignorant.

⁸⁶ *Ridgeway v. Herbert*, 150 Mo. 606, 614, 51 S. W. 1040, 73 Am. St. Rep. 464.

to avoid the bar of the Statute of Limitations ought more clearly in the case of infancy to determine the right to avoid an obligation. But the weight of authority is otherwise,⁸⁷ though many of the decisions are early ones, made at a time when the legal nature of an infant's contract had not yet been clearly formulated. A promise made to a third person has also been held insufficient.⁸⁸ But ratification may be conditional or partial.⁸⁹ Even though the contract of an infant in a particular case is void, it should be observed that, after coming of age, if the requirements of mutual assent and consideration can be met the infant may adopt the old contract, that is, make a new contract in terms like the original one, and such adoption may be shown by acts as well as words.⁹⁰

§ 240. Liability for necessities.

It is well settled that an infant may make himself liable for goods that are necessary, considering his position and station in life. This liability, though often treated as arising from the promise of the infant, seems to be rather a quasi-contractual obligation. This is shown by several classes of cases. An infant is not liable for any price he may promise and never for more than the value of the necessities.⁹¹ He is

⁸⁷ See *supra*, § 153.

⁸⁸ *Bigelow v. Grannis*, 2 Hill, 120; *Sayles v. Christie*, 187 Ill. 420, 441, 58 N. E. 480; *Chandler v. Glover's Adm.*, 32 Pa. St. 509.

⁸⁹ See *supra*, § 154.

⁹⁰ *Capps v. Hensley*, 23 Okla. 311, 100 Pac. 515.

⁹¹ An infant "is held on a promise implied by law, and not strictly speaking on his actual promise. The law implies the promise to pay from the necessity of his situation just as in the case of a lunatic. In other words, he is liable to pay only what the necessities were reasonably worth, and not what he may improvidently have agreed to pay for them." *Trainer v. Trumbell*, 141 Mass. 527, 530, 6 N. E. 761; *Hyer v. Hyatt*, 3 Cranch C. C. 276; *Gregory v. Lee*, 64 Conn. 407, 30 Atl. 53, 25

L. R. A. 618; *Ayers v. Burns*, 87 Ind. 245, 44 Am. Rep. 759; *Locke v. Smith*, 41 N. H. 346; *Parsons v. Keyes*, 43 Tex. 557; *Plummer v. Northern Pac. Ry. Co.*, 98 Wash. 67, 167 Pac. 73; *Jones v. Valentines' School*, 122 Wis. 318, 320, 99 N. W. 1043. It is so enacted in the Uniform Sales Act, Sec. 2. In Iowa by statute a minor is stated to be "bound" by such contracts; yet the court apparently felt it open to argument whether more than a reasonable value could be recovered. *Hickman v. McDonald*, 164 Ia. 50, 145 N. W. 322.

See also *Guthrie v. Morris*, 22 Ark. 411; *Cooper v. State*, 37 Ark. 421; *Earle v. Reed*, 10 Metc. 387; *Dubose v. Wheddon*, 4 McCord, 221; *Haines' Adm. v. Tarrant*, 2 Hill (S. C.), 400; *Askey v. Williams*, 74 Tex. 294, 11

liable even though he was too young to understand the bargain into which he entered;⁹² and even though declared by statute incapable of making a valid contract of any nature;⁹³ he is not liable upon an executory contract to buy necessities.⁹⁴ It would seem logically to follow that even though a contract for necessities is executed on both sides, the infant might rescind and recover for any excess above a reasonable value paid by him.⁹⁵ It has been urged in opposition to the theory that the infant's obligation is quasi-contractual that so to hold involves the consequence that the infant must lose the benefit of a favorable bargain if the agreed price was less than the real value.⁹⁶ This objection is without force, however. It assumes that when it is said that an infant's obligation to pay for necessities is quasi-contractual that the bargain which the parties actually made is void. But unless made so by statute such is not the case. The bargain is voidable and that only by the infant. If the infant elect to stand by the

S. W. 1101, 5 L. R. A. 176; *Bradley v. Pratt*, 23 Vt. 378. In the cases cited in this paragraph it was held that where an infant gives a note for necessities, he is liable on the note, but the recovery will be reduced to the amount the necessities were actually worth. Other jurisdictions hold that an infant is not liable on a bill, note, or bond, as such, whatever the consideration. *Re Soltykoff*, [1891] 1 Q. B. 413; *Morton v. Steward*, 5 Ill. App. 533; *Henderson v. Fox*, 5 Ind. 489; *Ayers v. Burns*, 87 Ind. 245, 44 Am. Rep. 759; *Beeler v. Young*, 1 Bibb, 519; *McCrillis v. How*, 3 N. H. 348; *Fenton v. White*, 1 Southard, 111; *Swasey v. Vanderheyden*, 10 Johns. 33; *Bouchell v. Clarey*, 3 Brev. 194; *McMinn v. Richmonds*, 6 Yerg. 9.

⁹² *Hyman v. Cain*, 3 Jones L. 111.

⁹³ N. H. Pub. St. (1901), c. 177, § 25, so enacts as to persons under guardianship, but a minor under guardianship was nevertheless held liable for necessities furnished herself and infant.

McConnell v. McConnell, 75 N. H. 385, 74 Atl. 875.

⁹⁴ *Gregory v. Lee*, 64 Conn. 407, 30 Atl. 53, 25 L. R. A. 618; *Wallin v. Highland Park Co.*, 127 Iowa, 131; *Wells v. Hardy*, 21 Tex. Civ. App. 454, 51 S. W. 503; *Pool v. Pratt*, 1 D. Chip. 252, 254; *Jones v. Valentines' School*, 122 Wis. 318, 99 N. W. 1043; *International Textbook Co. v. McKone*, 133 Wis. 200, 113 N. W. 483. If the contract is in part executed, the infant is liable for the value only of that part. *Gregory v. Lee*, 64 Conn. 407, 30 Atl. 53, 25 L. R. A. 618.

⁹⁵ It has been held, however, that where an infant bargained to give his services for support and schooling, the infant could not recover for services rendered even though he offered to deduct the value of the consideration which he had received. *Wilhelm v. Hardman*, 13 Md. 140. See also *Starke v. Storm's Ex.*, 115 Va. 651, 79 S. E. 1057.

⁹⁶ *Askey v. Williams*, 74 Tex. 294, 11 S. W. 1101, 5 L. R. A. 176. See *Mechem on Sales*, § 122.

contract he may do so as well where necessities are the subject of the contract as where they are not.⁹⁷ What is meant by saying the infant is liable only quasi-contractually for necessities is that he may avoid his contracts to pay for necessities just as he may other contracts, but that if he does so a liability will be imposed upon him by the law which he cannot avoid.

It is essential to recovery that necessities shall have been furnished on the credit of the infant. If furnished on the credit of his parent or guardian, he is not liable.⁹⁸

§ 241. What are necessities.

It depends upon the facts in each case whether goods or services contracted for by an infant are necessary. Illustrations may be given of what kinds of goods have been held necessary or the reverse, but it should be remarked that the same thing may be necessary to one person under certain circumstances and unnecessary to another person under other circumstances.⁹⁹ Necessaries seem to be limited by the courts as closely as possible, and generally come under the heads of food,¹ or clothing² of a reasonable kind, purchased for the use of the infant himself or of his family.³ In England the law seems less strict than in the United States. Jewelry to present to the betrothed of a wealthy infant,^{3a} a watch,⁴ a horse,⁵ a racing bicycle,⁶ have all been held or said, in England, to be neces-

⁹⁷ *Holt v. Ward* Clarendieux, 2 Strange, 937; *Atwell v. Jenkins*, 163 Mass. 362, 40 N. E. 178, 28 L. R. A. 694, 47 Am. St. Rep. 463; *Union Life Ins. Co. v. Hilliard*, 63 Ohio St. 478, 491, 59 N. E. 230, 81 Am. St. Rep. 644; *O'Rourke v. John Hancock Ins. Co.*, 23 R. I. 457, 462, 50 Atl. 834, 57 L. R. A. 496, 91 Am. St. Rep. 643.

⁹⁸ *Nicholson v. Wilborn*, 13 Ga. 467; *Hoyt v. Casey*, 114 Mass. 397, 19 Am. Rep. 371. See discussion of a similar question in regard to married women, *infra*, § 270.

⁹⁹ *Epperson v. Nugent*, 57 Miss. 45, 47, 34 Am. Rep. 434; *Rivers v. Gregg*, 5 Rich. Eq. 274, 278.

¹ *Barnes v. Barnes*, 50 Conn. 572;

Price v. Sanders, 60 Ind. 310, 314; *Rivers v. Gregg*, 5 Rich. Eq. 274, 278.

² *Barnes v. Toye*, 13 Q. B. D. 410; *Anderson v. Smith*, 33 Md. 465; *Lynch v. Johnson*, 109 Mich. 640, 67 N. W. 908; *Gay v. Ballou*, 4 Wend. 403, 21 Am. Dec. 158.

³ *Cantine v. Phillips*, 5 Harr. (Del.) 428; *Anderson v. Smith*, 33 Md. 465; *Chapman v. Hughes*, 61 Miss. 339.

^{3a} *Jenner v. Walker*, 19 L. T. (N. S.) 398. But see *Hewlings v. Graham*, 84 L. T. 497.

⁴ *Barnes v. Toye*, 13 Q. B. D. 410, 414; *Peters v. Fleming*, 6 M. & W. 42.

⁵ *Hart v. Prater*, 1 Jur. 623.

⁶ *Clyde Cycle Co. v. Hargreaves*, 78 L. T. 296.

saries under special circumstances. It may be doubted if American judges would generally accept these results,⁷ though it should be noticed that the American Uniform Sales Act follows the English Sale of Goods Act in its language and certainly recognizes that things may be regarded as necessary for the child of wealthy parents which would not be for others.⁸ Services of a physician or dentist are recognized to be necessary,⁹ and it may be safely assumed that medicine is also in proper cases¹⁰ as are funeral expenses of an infant's deceased husband.¹¹ It is not likely that, because a physician recommended horseback exercise, most American courts would hold, as an English court has done, that a horse thereby might become necessary in the legal sense.¹² Lodging is necessary.¹³ And since board and lodging are necessities, an infant's agreement to work in return for them, if reasonable, cannot be rescinded by him after it is executed.¹⁴ Coke stated that an infant binds himself to pay "for his teaching and instruction,"¹⁵ and a rudimentary education is clearly within the list of necessities,^{16, 17} as is training for a trade;¹⁸ but a

⁷ See the following section.

⁸ Uniform Sales Act, Sec. 2, "Necessaries in this section means goods suitable for the condition in life of such infant or other person, and to his actual requirements at the time of delivery." The States where this statute is in force are enumerated, *infra*, § 506.

⁹ See *Strong v. Foote*, 42 Conn. 203; *McLean v. Jackson*, 12 Ga. App. 51, 76 S. E. 792; *Price v. Sanders*, 60 Ind. 310, 314. See also *Williams v. Bonner*, 79 Miss. 664, 31 So. 207; *Potter v. Thomas*, 164 N. Y. S. 923.

¹⁰ *Glover v. Ott*, 1 McCord, 572. In Co. Lit. 172 a, "necessary physicke" is included among the things for which an infant may bind himself.

¹¹ *Chapple v. Cooper*, 13 M. & W. 252.

¹² *Hart v. Prater*, 1 Jur. 623. See also *Clowes v. Brooke*, 2 Strange, 1101. See, however, *Aaron v. Harley*, 6 Rich. L. 26. Cf. cases cited *infra*, n. 35.

¹³ *Gregory v. Lee*, 64 Conn. 407, 30 Atl. 53, 25 L. R. A. 618; *Price v. Sanders*, 60 Ind. 310, 314; *Watson v. Cross*, 2 Duv. 147; *Rivers v. Gregg*, 5 Rich. Eq. 274, 278.

¹⁴ *James v. Gillen*, 3 Ind. App. 472, 30 N. E. 7; *Stone v. Dennison*, 13 Pick. 1, 23 Am. Dec. 654; *Squire v. Hydliff*, 9 Mich. 274; *Ormsby v. Rhoades*, 59 Vt. 505, 10 Atl. 722; cf. *Breed v. Judd*, 1 Gray, 455; *Spicer v. Earl*, 41 Mich. 191, 1 N. W. 923. See *Genereux v. Sibley*, 18 R. I. 43, 25 Atl. 345.

¹⁵ Co. Litt. 172 a. See also Rolle's Abr. Enfants (c), pl. 10.

^{16, 17} See cases in the following notes. Likewise a board bill contracted by an infant to enable him to attend school was enforced in *Kilgore v. Rich*, 83 Me. 305, 22 Atl. 176, 12 L. R. A. 859, 23 Am. St. Rep. 780.

¹⁸ *Cooper v. Simmons*, 7 H. & N. 707. See *Mauldin v. Southern Shorthand University*, 126 Ga. 681, 55 S. E. 922, where the court held whether a

higher education in college,¹⁹ or for a profession,²⁰ or a five-year-course of instruction at a correspondence school²¹ has been held not to be. In regard to all forms of education, however, except the most rudimentary, the question must depend upon the infant's circumstances and station in life²² Whether the nature of a contract is such that it can, under any circumstances, be regarded as a contract for necessities, is a question of law;²³ but if the court decides that under some circumstances such a contract might be for necessities, it then becomes a question of fact for the jury whether it was so in the particular case.²⁴

§ 242. What are not necessities.

Under ordinary circumstances the purchase of a house is not necessary,²⁵ nor work and materials for the building of a house,²⁶ nor fire insurance,²⁷ nor life insurance.²⁸ Clothing

"course in stenography costing \$35 was necessary for a girl of seventeen years" would depend entirely upon that particular infant's condition in life which her previous education and attainments had prepared or fitted her to occupy.

¹⁹ *Middlebury College v. Chandler*, 16 Vt. 683, 42 Am. Dec. 537; *Gayle v. Hayes' Adm.*, 79 Va. 542.

²⁰ *Turner v. Gaither*, 83 N. C. 357, 35 Am. Rep. 574; *Bouchell v. Clary*, 3 Brev. 194.

²¹ *International Text Book Co. v. Connelly*, 206 N. Y. 188, 99 N. E. 722, 42 L. R. A. (N. S.) 1115. In this case the infant was under the care of a guardian able and willing to supply him with support and training suitable to his condition.

²² *Peters v. Fleming*, 6 M. & W. 42; *Mauldin v. Southern Shorthand University*, 126 Ga. 681, 55 S. E. 922.

²³ *McKanna v. Merry*, 61 Ill. 177; *Garr v. Haskett*, 86 Ind. 373; *Merriam v. Cunningham*, 11 Cush. 40; *Lynch v. Johnson*, 109 Mich. 640, 67 N. W. 908; *Decell v. Lewenthal*, 57 Miss. 331, 34 Am. Rep. 449; *Glover v. Ott*, 1 McCord, 572.

²⁴ *Maddox v. Miller*, 1 M. & S. 738; *Peters v. Fleming*, 6 M. & W. 42; *Mauldin v. Southern Shorthand University*, 126 Ga. 681, 55 S. E. 922; *Merriam v. Cunningham*, 11 Cush. 40; *Lynch v. Johnson*, 109 Mich. 640, 67 N. W. 908; *Decell v. Lewenthal*, 57 Miss. 331, 34 Am. Rep. 449; *Cobbey v. Buchanan*, 48 Neb. 391, 67 N. W. 176.

²⁵ This is clear from the fact that repairs on a house belonging to an infant, though essential to the preservation of the property, have been held not necessary. *Tupper v. Cadwell*, 12 Metc. 559, 46 Am. Dec. 704; *Wallis v. Bardwell*, 126 Mass. 366; *West v. Gregg's Adm.*, 1 Grant, 63. And see the following note.

²⁶ *Price v. Sanders*, 60 Ind. 310, 314; *Price v. Jennings*, 62 Ind. 111; *Wornack v. Loar*, 11 Ky. L. Rep. 6, 11 S. W. 438; *Horstmeyer v. Connors*, 56 Mo. App. 115; *Allen v. Lardner*, 78 Hun, 603; *Freeman v. Bridger*, 4 Jones L. 1; *Phillips v. Lloyd*, 18 R. I. 99, 25 Atl. 909.

²⁷ *New Hampshire Fire Ins. Co. v. Noyes*, 32 N. H. 345.

²⁸ *Simpson v. Prudential Ins. Co.*,

of unusual elegance is clearly not essential;²⁹ nor is jewelry,³⁰ but exceptional clothing may be treated as necessary on the marriage of an infant.³¹ Such food as confectionery and fruit,³² liquors³³ and tobacco³⁴ obviously are not necessities, nor is a horse,³⁵ a carriage,³⁶ a bicycle,³⁷ or, ordinarily, traveling expenses.³⁸

"The law does not contemplate that a minor shall open a shop and become a trader, or the proprietor of a business which involves the making of a variety of contracts." Therefore, articles essential for the conduct of a business in which the infant is engaged are not necessities,³⁹ but the judge from whom the preceding words are quoted adds, "If they had been hand tools to a reasonable amount, such as are ordinarily provided by a journeyman, and necessary for use in his trade or business, the case would be different."⁴⁰

184 Mass. 348, 68 N. E. 673, 63 L. R. A. 741, 100 Am. St. Rep. 560.

²⁹ *Makarell v. Bachelor*, Cro. Eliz. 583; *Lefils v. Sugg*, 15 Ark. 137; *Gayle v. Hayes' Adm.*, 79 Va. 542, 547.

³⁰ *Ryder v. Wombwell*, L. R. Ex. 32.

³¹ *Garr v. Haskett*, 86 Ind. 373; *Sams v. Stockton*, 14 B. Mon. 232; *Jordan v. Coffield*, 70 N. C. 110, 113.

³² *Brooker v. Scott*, 11 M. & W. 67. Compare *Wharton v. Mackenzie*, 5 Q. B. 606.

³³ *Glover v. Ott*, 1 McCord, 572.

³⁴ *Bryant v. Richardson*, L. R. 3 Ex. 93, note.

³⁵ *Beeler v. Young*, 1 Bibb, 519; *Gayle v. Hayes' Adm.*, 79 Va. 542, 547; *Skrine v. Gordon*, 9 Ir. Rep. C. L. 479. Compare cases cited in the preceding section.

³⁶ *Howard v. Simpkins*, 70 Ga. 322; *Hefington v. Jackson*, 43 Tex. Civ. App. 560, 96 S. W. 108.

³⁷ *Pyne v. Wood*, 145 Mass. 558, 14 N. E. 775; *Gillis v. Goodwin*, 180 Mass. 140, 61 N. E. 813, 91 Am. St. Rep. 265; *Rice v. Butler*, 160 N. Y. 578, 55 N. E. 275, 47 L. R. A. 303, 73 Am. St. Rep. 703. Otherwise in Eng-

land. *Clyde Cycle Co. v. Hargreaves*, 78 L. T. 296.

³⁸ *McKanna v. Merry*, 61 Ill. 177. See *Breed v. Judd*, 1 Gray, 455, 458.

³⁹ *Ryan v. Smith*, 165 Mass. 303, 43 N. E. 109. To the same effect see *Whittingham v. Hill*, Cro. Jac. 494; *Dilk v. Keighley*, 2 Esp. 480; *Sanger v. Hibbard*, 104 Fed. 455, 43 C. C. A. 635; *Lein v. Centaur Motor Co.*, 194 Ill. App. 509; *House v. Alexander*, 105 Ind. 109, 4 N. E. 891, 55 Am. Rep. 189; *Decell v. Lewenthal*, 57 Miss. 331, 34 Am. Rep. 449; *Rainwater v. Durham*, 2 Nott & McC. 524, 10 Am. Dec. 637; *Chabot v. Paulhus*, 32 R. I. 471, 79 Atl. 1103; *Wallace v. Leroy*, 57 W. Va. 263, 110 Am. St. Rep. 777, 50 S. E. 243. See also *Covault v. Nevitt*, 157 Wis. 113, 146 N. W. 1115, 51 L. R. A. (N. S.) 1092. But otherwise under the statutes of some States. *Ullmer v. Fitzgerald*, 106 Ga. 815, 32 S. E. 869; *Jimmerson v. Lawrence*, 112 Ga. 340, 37 S. E. 371; *Re Brice*, 93 Fed. Rep. 942 (Iowa). And see *Hall v. Butterfield*, 59 N. H. 354, 47 Am. Rep. 209.

⁴⁰ *Ryan v. Smith*, 165 Mass. 303, 43 N. E. 109.

There has been considerable litigation upon the question whether a contract by an infant for legal services is a contract for necessities. It has generally been held that such services rendered in protection of ordinary rights of property are not necessities,⁴¹ as a guardian should be appointed to take charge of such matters. But payment for legal services rendered for an infant's personal relief or protection is recoverable; as for defending him against a charge of crime,⁴² or for bringing an action for a tort to the person,⁴³ or for obtaining his discharge from imprisonment.⁴⁴ And where an attorney is employed by a guardian or guardian *ad litem* to protect the infant's property his "estate may be made liable for a reasonable attorney's fee, if the services rendered were for the manifest benefit of the infant, and necessary for the protection of valuable rights belonging to him."⁴⁵

§ 243. Money advanced for the purchase of necessities.

It was ruled by Buller, J., at *Nisi Prius* in 1783 that money lent, though lent for the express purpose of enabling an infant to purchase necessities, and actually expended in accordance

⁴¹ *McIsaac v. Adams*, 190 Mass. 117, 76 N. E. 654, 112 Am. St. Rep. 321; *Dillon v. Bowles*, 77 Mo. 603; *Houck v. Bridwell*, 28 Mo. App. 644; *Englebert v. Troxell*, 40 Neb. 195, 58 N. W. 852, 26 L. R. A. 177, 42 Am. St. Rep. 665; *Cobbey v. Buchanan*, 48 Neb. 391, 67 N. W. 176; *Phelps v. Worcester*, 11 N. H. 51; *New Hampshire Mutual Fire Ins. Co. v. Noyes*, 32 N. H. 345; *Barker v. Hibbard*, 54 N. H. 539, 20 Am. Rep. 160; *Watts v. Houston* (Okl.), 165 Pac. 128; *Thrall v. Wright*, 38 Vt. 494. But some decisions hold that services reasonably required for the defence of property rights are necessities. *Sutton v. Heinze*, 84 Kans. 756, 115 Pac. 560, 34 L. R. A. (N. S.) 238; *Slusher v. Weller*, 151 Ky. 203, 151 S. W. 684; *Nagel v. Schilling*, 14 Mo. App. 576; *Searcy v. Hunter*, 81 Tex. 644, 17 S. W. 372, 26 Am. St. Rep. 837. And in *Helps v. Clayton*, 17 C. B.

(N. S.) 553, a charge for the services of a solicitor who prepared a married settlement for an infant was held recoverable.

⁴² *Barker v. Hibbard*, 54 N. H. 539, 20 Am. Rep. 160; *Askey v. Williams*, 74 Tex. 294, 11 S. W. 1101, 5 L. R. A. 176.

⁴³ *Munson v. Washband*, 31 Conn. 303, 83 Am. Dec. 151; *Hickman v. McDonald*, 164 Ia. 50, 145 N. W. 322; *Crafts v. Carr*, 24 R. I. 397, 53 Atl. 275, 60 L. R. A. 128, 96 Am. St. Rep. 721; *Ex parte Smithson*, 108 Tenn. 442, 67 S. W. 864; *Hanlon v. Wheeler* (Tex. Civ. App.), 45 S. W. 821. Cf. *Phelps v. Worcester*, 11 N. H. 51; *Thrall v. Wright*, 38 Vt. 494.

⁴⁴ *People v. Mullin*, 25 Wend. 698.

⁴⁵ *Owens v. Gunther*, 75 Ark. 37, 40, 86 S. W. 851, citing:—*Munson v. Washband*, 31 Conn. 303, 83 Am. Dec. 151; *Epperson v. Nugent*, 57 Miss. 45,

with this purpose cannot be recovered,⁴⁶ "as the plaintiff thereby put it in the defendant's power to misapply the money." The same rule has been stated in a few cases in this country.⁴⁷ There are also early English cases touching the matter but these, though cited by the American decisions, fully involve the point in one instance only, and in that single instance the decision is contrary to the rule for which the case is cited.⁴⁸ If the question arose in equity, it was early

34 Am. Rep. 434; *Jones v. Yore*, 142 Mo. 38, 43 S. W. 384; *Barker v. Hibbard*, 54 N. H. 539, 20 Am. Rep. 160.

* *Probart v. Knouth*, 2 Esp. 472, note.

^a *Lein v. Centaur Motor Co.*, 194 Ill. App. 509; *Beeler v. Young*, 1 Bibb, 519, 521; *Swift v. Bennett*, 10 Cush. 436, 438; *Bradley v. Pratt*, 23 Vt. 378, 386. But see *Randall v. Sweet*, 1 Denio, 460, 461.

* The early decisions are *Rearsby and Cuffer's Case*, Godb. 219; *Darby v. Boucher*, 1 Salk. 279; *Earle v. Peale*, 1 Salk. 386; *Ellis v. Ellis*, 3 Salk. 197. In *Rearsby and Cuffer's Case*, a prohibition was granted prohibiting the Court of Requests from entertaining a suit for money which the plaintiff had laid out for necessities for the defendant, "because as it was said he might have an action of debt at the common law, upon the contract for the same, because they were things for his necessary livelihood and maintenance." In *Darby v. Boucher* the case was thus put: "One lends an infant money, who employs it in paying for necessities, whether in that case the infant be liable, and it was held clearly by the Chief Justice that the infant is not liable, for it is upon the lending that the contract must arise, and after that time there could be no contract raised to bind the infant, because after that he might waste the money, and the infant's applying it afterward for necessities will not by matter *ex*

post facto entitle the plaintiff to an action." It is to be noticed that it is not stated in this case that the money was lent for the purpose of buying necessities. In *Earle v. Peale* a replication to a plea of infancy that the money was lent for necessities was held bad. The court said: "He may buy necessities, but he cannot borrow money to buy, for he may misapply the money, and, therefore, the law will not trust him but at the peril of the lender who must lay it out for him, or see it laid out, and then it is his providing, and his laying out so much money for necessities for him." In this case the question which the court was primarily considering was that of liability for money lent for necessities and not used for that purpose—not that of liability for money both lent and spent for necessities. This further appears from another report of the case in 10 Mod. 67, where the court says: "In this case the lending for such a purpose is only put in issue, which might be maintained without showing how the money was actually laid out; that if the fact was so, the plaintiff should have declared for money so laid out, and not so lent." The only case where the question of money both lent and spent for necessities was clearly passed upon is the last of those cited above, *Ellis v. Ellis*. In this case (also reported in 12 Mod. 197, Comb. 482, 1 Ld. Raym. 344) it was held that "an infant is chargeable for money lent, if it is laid out

settled and is well established that the infant is liable.⁴⁹ In jurisdictions, therefore, where equitable rules are applicable to all actions, recovery must be allowed.⁵⁰ Moreover, if a surety for an infant's liability for necessities pays the claim, he may recover from the infant what he has paid,⁵¹ and similarly the infant has been held liable for money paid at his request to satisfy a debt for necessities.⁵² Finally, if the money is actually applied by the lender himself to the purchase of necessities for the infant it is well settled that the infant is liable.⁵³ If, therefore, the creditor cannot recover at law for money lent to an infant and expended by him for necessities, the reason must be purely technical. No sound technical reason exists. If the infant's liability for necessities is quasi-contractual the principles governing the case ought to be based on the enrichment of the infant and his duty as a matter of justice to reimburse the person to whom this enrichment is owing. Judged by these principles there is no valid distinction to be made between a case where the creditor bought the necessities for the infant and a case where he allowed the infant to do so with money lent for the purpose. The same result follows if the infant's liability for necessities be regarded as contractual. Contracts for necessities on this assumption differ from other contracts

for necessities, according to his degree, but all that is at the peril of the lender." This decision was decided before *Earle v. Peale*, though the report of it in *Salkeld's and Modern Reports* is subsequent, but there is nothing in *Earle v. Peale* which can be regarded as overruling *Ellis v. Ellis*. There are no recent English decisions on the point in courts of law. In *Bateman v. Kingston*, 6 L. R. Ir. 328, the lender was not allowed to recover on an interest-bearing note though the money had been expended by the infant for necessities, but the difficulty the court found was to allow recovery on an interest-bearing note, irrespective of what the consideration for it was. See *Re Soltyskoff*, [1891] 1 Q. B. 413.

⁴⁹ *Marlow v. Pitfield*, 1 P. Wms. 558;

Thurston v. Nottingham Soc., [1903] A. C. 6; *Price v. Sanders*, 60 Ind. 310; *Hickman v. Hall's Adm.*, 5 Litt. 338, 342; *Watson v. Cross*, 2 Duvall, 147, 149; *Bradley v. Pratt*, 23 Vt. 378, 386. See also *Ostrander v. Quin*, 84 Miss. 230, 36 So. 257, 105 Am. St. Rep. 426. ⁵⁰ *Price v. Sanders*, 60 Ind. 310.

⁵¹ *Conn v. Coburn*, 7 N. H. 368, 26 Am. Dec. 746; *Haines' Adm. v. Tarrant*, 2 Hill (S. C.), 400. See also *Ayers v. Burns*, 87 Ind. 245, 248, 249, 44 Am. Rep. 759; *Dial v. Wood*, 9 Baxt. 296.

⁵² *Randall v. Sweet*, 1 Denio, 460; *Equitable Trust Co. v. Moss*, 149 N. Y. App. Div. 615, 134 N. Y. S. 533.

⁵³ See cases *supra*, and *Clarke v. Leslie*, 5 Esp. 28; *Re Clabbon*, [1904] 2 Ch. 465.

only in this that they cannot be avoided, and the reason for not allowing them to be avoided is because it is essential for the infant's welfare that he have power to bind himself, since otherwise, if without money, he might be deprived of the necessities of life. This reason applies to the case of money lent and used for necessities as fully as to anything else. Frequently an infant can get no credit for necessities, but can borrow money from a friend wherewith to buy them. It is a harsh rule which compels the lender, who resides perhaps at a distance, to supervise the expenditure on penalty of forfeiting his claim, even though the infant keeps his word and buys only necessities. The reasoning suggested in some of the old cases that the contract must be either valid or invalid when made and that as the infant might misapply the money the contract could not be good, goes on the assumption, which cannot now be maintained, that the contracts of an infant if not for necessities are void, for there is no reason why a contract voidable when made—that is before the money is spent for necessities—should not cease to be voidable later, when the money is so expended, or that a quasi-contractual liability should not then arise.⁵⁴ In a Tennessee case ⁵⁵ it was held that a claim for payment for a telegram sent by an infant in destitute circumstances to his parents for money was a claim for necessities. This can hardly be supported unless it is admitted that money sent to relieve his destitution would be a necessary. It may be added that any "remedy by subrogation, besides being fictitious and circuitous, has two defects. If the borrower pays cash for his necessities, no debt arises to which the lender can be subrogated; yet surely he is just as worthy of relief. If the borrower becomes insolvent, and the lender happens to be subrogated to the rights of secured creditors, he receives a wholly undeserved priority."⁵⁶

⁵⁴ The further reason suggested by Redfield, J., in *Bradley v. Pratt*, 23 Vt. 378, 386, and adopted in the note to *Craig v. Van Bebber*, 18 Am. St. Rep. 658, that the difficulty is want of privity between the lender and the one who supplies the necessities, is in reality no reason but merely a state-

ment of the rule in other terms, for why should such privity be necessary? There is no rule and no analogy in the law that makes it requisite for the enforcement of a right against the infant.

⁵⁵ *Western Union Tel. Co. v. Greer*, 115 Tenn. 368, 89 S. W. 327.

⁵⁶ See 25 Harv. L. Rev. 726, citing

§ 244. Previous supply.

What are necessities is determined not simply by the nature of the thing, but by the need of that thing at that time by the particular infant in question. Accordingly if an infant is already supplied either by his guardian or by previous purchases, with sufficient food, clothing, or other necessities, no further purchase on credit of articles of the same kind can bind him.⁵⁷ Therefore, whether a minor is living with a parent or guardian who is capable of supplying him with necessities is a fact vital for determining whether a particular contract made by him is for necessities. The presumption is that the infant's wants are sufficiently met, and the court will not substitute the judgment of a jury for that of a parent or guardian unless the discretion of the latter has clearly been abused.⁵⁸ Moreover, if necessities are furnished an infant when he is living with a parent or guardian the legal inference, in the absence of evidence to the contrary, is that they are furnished, on the credit of the parent or guardian, not of the infant.⁵⁹

If an infant, when in need, purchases more of the required goods than are essential, recovery can be had by the seller for only so much as were actually needed.⁶⁰ "It is immaterial whether the plaintiffs did or did not know of the

In re Wrexham, M. & C. Q. Ry. Co., [1899] 1 Ch. 440, as illustrating a possible undeserved priority.

⁵⁷ *Burghart v. Angerstein*, 6 C. & P. 690; *Foster v. Redgrave*, L. R. 4 Ex. 35, note; *Barnes v. Toye*, 13 Q. B. D. 410; *Johnstone v. Marks*, 19 Q. B. D. 509; *Conboy v. Howe*, 59 Conn. 112, 22 Atl. 35; *Pearson v. White*, 13 Ga. App. 117, 78 S. E. 864; *McKanna v. Merry*, 61 Ill. 177, 180; *Trainer v. Trumbull*, 141 Mass. 527, 6 N. E. 761; *Decell v. Lewenthal*, 57 Miss. 331, 34 Am. Rep. 449; *Perrin v. Wilson*, 10 Mo. 451; *Nichol v. Steger*, 6 Lea, 393.

⁵⁸ *Bainbridge v. Pickering*, 2 W. Bl. 1325; *Mauldin v. Southern Shorthand University*, 126 Ga. 681, 55 S. E. 922; *McKanna v. Merry*, 61 Ill. 177; *Hoyt*

v. Casey, 114 Mass. 397, 19 Am. Rep. 331; *Decell v. Lewenthal*, 57 Miss. 331, 34 Am. Rep. 449; *Perrin v. Wilson*, 10 Mo. 451; *International Text Book Co. v. Connelly*, 206 N. Y. 188, 99 N. E. 722, 42 L. R. A. (N. S.) 1115; *Guthrie v. Murphy*, 4 Watts, 80; *Kraker v. Byrum*, 13 Rich. L. 163. This principle is said not to be affected by the poverty of the parent or guardian. *Hoyt v. Casey*, 114 Mass. 397, but this cannot be true in an extreme case. See *Trainer v. Trumbull*, 141 Mass. 527, 6 N. E. 761.

⁵⁹ *Hoyt v. Casey*, 114 Mass. 397, 19 Am. Rep. 371.

⁶⁰ *Nicholson v. Wilborn*, 13 Ga. 467; *Johnson v. Lines*, 6 Watts & S. 80, 40 Am. Dec. 542.

existing supply, just as it is immaterial whether they did or did not know that the defendant was a minor."⁶¹ It has been decided in England⁶² that an infant in receipt of an income sufficient to pay for all necessities nevertheless may bind himself by a purchase on credit; but the contrary has been held in the United States.⁶³ It would seem on principle that though the infant if he had previously wasted the money could buy on credit, otherwise he ought not to be bound, for his power to bind himself should be limited to cases where his protection requires it.⁶⁴ If it appears that an infant has been sufficiently supplied with money to provide himself with necessities the burden should be upon the creditor of producing evidence that the money had been previously misapplied.⁶⁵ So if the infant is living with his parents or guardian, the burden is upon the creditor to prove that the infant was not supplied by them.⁶⁶ It has been settled that an infant is not bound by his executory promise to buy necessities,⁶⁷ but it has not been decided whether in case of a sale where title has passed to the infant but the goods have not been delivered, the infant may repudiate the bargain. It seems reasonable to allow this, if for instance he finds that he no longer needs the goods. Though the elements of contractual liability exist, the unjust enrichment which forms the basis of quasi-contractual liability does not. If this be so the time when the infant becomes bound, if at all, is when the goods are delivered. For this reason in the Uniform Sales Act the moment of delivery is the time considered in determining whether an infant has a previous supply.⁶⁸

⁶¹ *Barnes v. Toye*, 13 Q. B. D. 410, 414; *Kline v. L'Amoureux*, 2 Paige, 419, 22 Am. Dec. 652; *Nichol v. Steger*, 6 Lea, 393.

⁶² *Burghart v. Hall*, 4 M. & W. 727.

⁶³ *Brent v. Williams*, 79 Miss. 355, 30 So. 713; *Rivers v. Gregg*, 5 Rich. Eq. 274.

⁶⁴ *Rivers v. Gregg*, 5 Rich. Eq. 274.

⁶⁵ *Rivers v. Gregg*, 5 Rich. Eq. 274.

See also *Nicholson v. Wilborn*, 13 Ga. 467.

⁶⁶ *Bainbridge v. Pickering*, 2 W. Bl. 1325; *Hoyt v. Casey*, 114 Mass. 397, 19 Am. Rep. 371; *Perrin v. Wilson*, 10 Mo. 451; *Freeman v. Bridger*, 4 Jones L. 1, 67 Am. Dec. 258; *Connolly v. Hull*, 3 McCord, 6, 15 Am. Dec. 612.

⁶⁷ See *supra*, § 240.

⁶⁸ Sec. 2. The States which have enacted this statute are enumerated *infra*, § 506.

§ 245. False representations of age.

It is everywhere agreed that the fact that an infant was trading as an adult or otherwise appeared to be of age, and that the other party contracted with him on the belief that he was an adult, does not affect the validity of the transaction or the infant's privilege either at law⁶⁹ or in equity.⁷⁰ If the infant is guilty of actual misrepresentation of his age, the authorities are not so uniform but the view is generally accepted that he is not thereby precluded in an action at law from asserting with its ordinary consequences his privilege as an infant.⁷¹

⁶⁹ *Miller v. Blankley*, 38 L. T. (N. S.) 527; *MacGreal v. Taylor*, 167 U. S. 688, 695, 42 L. Ed. 326, 17 Sup. Ct. 961; *Oliver v. McClellan*, 21 Ala. 675; *Buchanan v. Hubbard*, 96 Ind. 1; *Folds v. Allardt*, 35 Minn. 488, 499, 29 N. W. 201; *Houston v. Cooper*, 3 N. J. L. 866; *Van Winkle v. Ketcham*, 3 Caines, 323; *Curtin v. Patton*, 11 S. & R. 305, 309; *Carpenter v. Pridgen*, 40 Tex. 32, 35; *Grauman, Marx & Cline Co. v. Krienitz*, 142 Wis. 556, 126 N. W. 50.

⁷⁰ *Stikeman v. Dawson*, 1 De G. & S. 90; *Miller v. Blankley*, 38 L. T. (N. S.) 527; *Alvey v. Reed*, 115 Ind. 148, 17 N. E. 265, 7 Am. St. Rep. 418, (Code); *Baker v. Stone*, 136 Mass. 405; *Brantley v. Wolf*, 60 Miss. 420; *Rivers v. Gregg*, 5 Rich. Eq. 274, 279.

⁷¹ *Bartlett v. Wells*, 1 B. & S. 836; *De Roo v. Foster*, 12 C. B. (N. S.) 272; *Sims v. Everhardt*, 102 U. S. 300, 312, 26 L. Ed. 87; *Tobin v. Spann*, 85 Ark. 556, 109 S. W. 534, 16 L. R. A. (N. S.) 672; *Beauchamp v. Bertig*, 90 Ark. 351, 119 S. W. 75, 23 L. R. A. (N. S.) 659; *Merriam v. Cunningham*, 11 Cush. 40; *Raymond v. General Motorcycle Co. (Mass.)*, 119 N. E. 359; *Conrad v. Lane*, 26 Minn. 389, 4 N. W. 695, 37 Am. Rep. 412; *Alt v. Graff*, 65 Minn. 191, 68 N. W. 9; *United States Corp. v. Ulrickson*, 84 Minn. 14, 20, 86 N. W. 613, 87 Am. St. Rep. 326; *Miller v. St. Louis & Co. R.*, 188 Mo. App. 402, 174 S. W. 166; *Burley v. Russell*, 10

N. H. 184, 34 Am. Dec. 146; *Conroe v. Birdsall*, 1 Johns. Cas. 127, 1 Am. Dec. 105; *Brown v. McCune*, 5 Sand. 224; *International Text Book Co. v. Connelly*, 206 N. Y. 188, 99 N. E. 722, 42 L. R. A. (N. S.) 1115. But see *contra*, *First Nat. Bank v. Casey*, 158 Ia. 349, 138 N. W. 897; *Damron v. Commonwealth*, 110 Ky. 268, 61 S. W. 459, 96 Am. St. Rep. 453; *Commander v. Brazil*, 88 Miss. 668, 41 So. 497, 9 L. R. A. (N. S.) 1117; *Lake v. Perry*, 95 Miss. 550, 49 So. 569; *Cobbey v. Buchanan*, 48 Neb. 391, 67 N. W. 176; *Harsein v. Cohen* (Tex. Civ. App.), 25 S. W. 977. See also *Putnal v. Walker*, 61 Fla. 720, 55 So. 844, 36 L. R. A. (N. S.) 33; *County Board v. Hensley*, 147 Ky. 441, 144 S. W. 63, 42 L. R. A. (N. S.) 643; *Harper v. Utsey* (Tex. Civ. App.), 97 S. W. 508. In *Grauman, Marx & Cline Co. v. Krienitz*, 142 Wis. 556, 126 N. W. 50, the court held that though an infant would be estopped to avoid a contract beneficial to himself, if he fraudulently represented himself as having capacity to contract, he would not be so estopped by his fraud to avoid an obligation as a surety where he received no benefit. In *R. Leslie, Ltd., v. Sheill*, [1914] 3 K. B. 607 (C. A.), the defendant, an infant, by fraudulently misrepresenting that he was of full age induced the plaintiffs to lend him two sums of £200 each. In an action by the lender to recover the amounts advanced, the court denied

An infant who seeks equitable relief, however, is generally held to be estopped to avoid a transaction in which he has made such a misrepresentation, unless he can restore any consideration received by him.⁷² This equitable doctrine has recently been summarized in England as follows: "I think

relief, reversing the judgment of Horridge, J. Lord Sumner said in the Court of Appeal: "To the claim for return of the principal moneys paid to the infant under the contract that failed, as money had and received to the plaintiffs' use, there are at least two answers: the infancy itself was an answer before 1874 at common law, and the Infants' Relief Act, 1874, is an answer now. An action for money had and received against an infant has been sustained, where in substance the cause of action was *ex delicto*: *Bristow v. Eastman*, 1 Esp. 172; approved before 1874 in *In re Seager*, 60 L. T. 665, and cited without disapproval in *Cowern v. Nield*, [1912] 2 K. B. 419. Even this has been doubted, but where the substance of the cause of action is contractual, it is certainly otherwise. To money had and received and other indebitatus counts infancy was a defence just as to any other action in contract: *Alton v. Midland Ry. Co.*, per Willes, J., 34 L. J. (C. P.) 292, at pp. 297, 298; *In re Jones*, per Jessel, M. R., 18 Ch. D. at p. 118."

⁷² *Ex parte* Unity Association, 3 De G. & J. 63 (citing earlier authorities by which the court felt bound but of which it expressed its dislike); *Cornwall v. Hawkins*, 41 L. J. Ch. 435 [compare *Bartlett v. Wells*, 1 B. & S. 836; *DeRoo v. Foster*, 12 C. B. (N. S.) 272]; *Schmitheimer v. Eiseman*, 7 Bush, 298; *Ingram v. Ison*, 26 Ky. L. Rep. 48, 80 S. W. 787; *County Board v. Henaley*, 147 Ky. 441, 144 S. W. 63, 42 L. R. A. (N. S.) 643; *Goff v. Murphy*, 153 Ky. 634, 156 S. W. 95; *Ferguson v. Bobo*, 54 Miss. 121; *Ostrander v. Quin*, 84 Miss. 230, 36 So. 257, 105 Am. St. Rep. 426; *Ryan v. Growney*, 125 Mo.

474, 28 S. W. 189, 755; *Hayes v. Parker*, 41 N. J. Eq. 630, 7 Atl. 511; *International Land Co. v. Marshall*, 22 Okla. 693, 98 Pac. 951, 19 L. R. A. (N. S.) 1056; *Williamson v. Jones*, 43 W. Va. 562, 27 S. E. 411, 38 L. R. A. 694. See also *Davidson v. Young*, 38 Ill. 145. See further, *supra*, § 232. See, however, *Sims v. Everhardt*, 102 U. S. 300, 26 L. Ed. 87, which seems to express a contrary view, though the plaintiff's bill offered to have the consideration deducted from the amount claimed from the defendant. The force of this decision is somewhat weakened by the fact that the court was evidently ignorant of the distinction made by the English decisions between legal and equitable proceedings so far as this question of estoppel is concerned. *Sims v. Everhardt* is cited as controlling in *Sanger v. Hibbard*, 104 Fed. 455, 43 C. C. A. 635. In *Tobin v. Spann*, 85 Ark. 556, 109 S. W. 534, 16 L. R. A. (N. S.) 672, also, the court sustained a bill to set aside the deed of two infants, though the infants had stated that they were of age. The court did not refer to any distinction between cases where infants seek equitable relief and other cases.

Under Ia. Code, § 3190, the court adopts the equitable rule and holds the infant estopped. *First Nat. Bank v. Casey*, 158 Ia. 349, 138 N. W. 897. See also *Geer v. Hovy*, 1 Root, 179. In *Grauman, Marx & Cline Co. v. Krienitz*, 142 Wis. 556, 126 N. W. 50, the court said that the infant might be estopped but only in cases where the infant was a person having actual discretion, and was fraudulent, and where the transaction was beneficial to the infant.

that the whole current of decisions down to 1913, apart from *dicta* which are inconclusive, went to shew that, when an infant obtained an advantage by falsely stating himself to be of full age, equity required him to restore his ill-gotten gains, or to release the party deceived from obligations or acts in law induced by the fraud, but scrupulously stopped short of enforcing against him a contractual obligation, entered into while he was an infant, even by means of a fraud."⁷³ Such misrepresentation has, moreover, other effects. Though the infant may not lose his privilege under the bargain at law or perhaps even in equity, the adult acquires also the right to disaffirm the contract.⁷⁴ A transaction induced by fraud is voidable by the defrauded person, and it is immaterial for this purpose whether the fraudulent person is an infant or an adult.⁷⁵ Whether the infant is liable in tort for deceit in misrepresenting his age is not so clear. There is considerable authority that he is not.⁷⁶ The sounder view, however, is

⁷³ By Lord Sumner in *R. Leslie, Ltd., v. Sheill*, [1914] 3 K. B. 607, 618 (C. A.)

In *Stocks v. Wilson*, [1913] 2 K. B. 235, an infant who had obtained furniture from the plaintiffs by falsely stating that he was of age, and had sold part of it for £30 was judged liable in a personal judgment by Lush, J., to pay this £30. Whether this decision was based on a liability to restore what was in the infant's possession, or was a personal judgment irrespective of property in the infant's hands is possibly doubtful. If the latter is the effect of the decision, it is overruled by the later case of *R. Leslie, Ltd., v. Sheill*.

⁷⁴ This suggests the inquiry as to the right to rescind a bargain with an infant and reclaim from him what had been transferred if the reason of disaffirmance is not based on any wrong of the infant, but, *e. g.*, on mutual mistake; or if the plaintiff also is an infant and seeks to rescind on that ground. Here it seems that the infant would be freed not only from liability on his contract but also from quasi-

contractual liability unless he had still in hand the property or its proceeds by which he was originally enriched.

⁷⁵ *Lemprière v. Lange*, 12 Ch. D. 675; *Pritchett v. Fife*, 8 Ala. App. 462, 62 So. 1001; *Badger v. Phinney*, 15 Mass. 359. So where the infant obtains goods with fraudulent intent not to pay for them. *Ashlock v. Vivell*, 29 Ill. App. 314; *Wallace v. Morss*, 5 Hill, 391; *Kilgore v. Jordan*, 17 Tex. 341, 351.

⁷⁶ The "earlier authorities are clear to this point that no such action can be maintained. *Johnson v. Pie*, 1 Lev. 169, and 1 Keb. 905; *Grove v. Nevill*, 1 Keb. 778; *Green v. Greenbank*, 2 Marsh. 485." *Merriam v. Cunningham*, 11 Cush. 40. To the same effect are *Liverpool Assoc. v. Fairhurst*, 9 Ex. 422; *R. Leslie, Limited, v. Sheill*, [1914] 3 K. B. 607 (C. A.), (discrediting *Stocks v. Wilson*, [1913] 2 K. B. 235); *Slayton v. Barry*, 175 Mass. 513, 56 N. E. 574, 49 L. R. A. 560, 78 Am. St. Rep. 510; *Brooks v. Sawyer*, 191 Mass. 151, 76 N. E. 953; 114 Am. St. Rep. 594; *Raymond v.*

that the infant is liable.⁷⁷ It is conceded in all the cases that an infant is as a rule liable for his torts⁷⁸ and there is no valid reason why he should not be liable for false and fraudulent representations as fully as for other torts, nor if he is in general liable for his deceits is there any reason to distinguish the case where the injurious consequence of the deceit is entering into an unenforceable contract from cases where the injurious consequences are of a different nature. The reasoning generally given in cases which protect the infant, "that infants are liable for their torts, yet the form of action does not determine their liability, and they cannot be made liable when the cause of action arises from a contract, although the form is *ex delicto*,"⁷⁹ does not meet the difficulty. The infant is not held liable on his contract either in form or substance if he is held liable for deceit.

§ 246. Other false representations.

Even more difficult questions have arisen in regard to other false statements of infants—especially warranties of quality or title. The action upon a warranty is older than the action of assumpsit, deceit being regarded as the gist of the action. In modern times a warranty has been regarded as contractual in its nature, but the right to bring an action sounding in tort upon it, having been early established has persisted. Undoubtedly many, perhaps most, warranties are representations of fact as well as promises, but in other cases

General Motorcyle Co., 230 Mass. 54, 119 N. E. 359; *Brown v. McCune*, 5 Sandf. 224, 229; *Nash v. Jewett*, 61 Vt. 501, 18 Atl. 47, 4 L. R. A. 561, 15 Am. St. Rep. 931. See also *Price v. Hewett*, 8 Ex. 146; *Bartlett v. Wells*, 1 B. & S. 836; *Brown v. Dunham*, 1 Root, 272; *Geer v. Hovy*, 1 Root, 179; *Conrad v. Lane*, 26 Minn. 389, 4 N. W. 695, 37 Am. Rep. 412; *United States Corp v. Ulrickson*, 84 Minn. 14, 20, 86 N. W. 613, 87 Am. St. Rep. 326; *Ferguson v. Bobo*, 54 Miss. 121, 131; *Keen v. Hartman*, 48 Pa. St. 497, 88 Am. Dec. 472.

⁷⁷ *Davidson v. Young*, 38 Ill. 145;

Rice v. Boyer, 108 Ind. 472, 9 N. E. 420, 58 Am. Rep. 53; *Yeager v. Knight*, 60 Miss. 730; *Fitts v. Hall*, 9 N. H. 441 (the leading case); *Eckstein v. Frank*, 1 Daly, 334; *Kilgore v. Jordan*, 17 Tex. 341; *Carpenter v. Pridgen*, 40 Tex. 32.

⁷⁸ He is not, however, liable for the torts of his agents, under the doctrine of *respondeat superior*. *Covault v. Nevitt*, 157 Wis. 113, 146 N. W. 1115, 51 L. R. A. (N. S.) 1092.

⁷⁹ *Nash v. Jewett*, 61 Vt. 501, 503, 18 Atl. 47, 4 L. R. A. 561, 61 Am. St. Rep. 931.

the warrantor's liability is wholly based on a promise, and so far as there is any representation to be implied from the warranty, it is one of opinion. Even where a warranty contains a false representation of fact, the seller may be unaware that his representation is false, and in such a case what is usually held to be an essential element of a right of action for deceit is lacking. If an action of tort is allowed under such circumstances against an adult, the gist of the action may fairly be regarded as contractual or quasi-contractual, and if the warrantor is an infant, his privilege should protect him from liability. If, however, an infant makes representations of fact, known to him to be false, and these representations are relied on, the fact that the infant has also warranted the truth of his statements should not protect him. This reasoning agrees with that in a South Carolina decision,⁸⁰ and finds some support from other cases, not directly in point, for instance, the decisions cited in the preceding section holding an infant liable for misrepresenting his age, and other decisions in which it was held that an infant who obtains property with the intent not to pay for it is liable in tort.⁸¹ The broad statement sometimes made⁸² that an infant is not liable for a tort which grows out of contractual relations is also discredited by another class of cases which hold that if property is bailed to an infant for one purpose and in viola-

⁸⁰ *Word v. Vance*, 1 Nott & McC. 197, 9 Am. Dec. 683. The court in view of the finding of the jury that the infant knew of the falsity of his representations held the plea of infancy ineffectual, saying: "This is an action, as well in form as in substance, *ex delicto*, and when such is the cause of action, even where the form is *ex contractu*, the defense of infancy will not avail. *Bristow v. Eastman*, 1 Esp. 172." In *Bristow v. Eastman*, the action of money had and received was allowed against an infant to recover money embezzled by him. To the same effect are *Shaw v. Coffin*, 58 Me. 254, 4 Am. Rep. 290; *Elwell v. Martin*, 32 Vt. 217.

⁸¹ *Mathews v. Cowan*, 59 Ill. 341; *Ashlock v. Vivell*, 29 Ill. App. 388; *Wallace v. Morss*, 5 Hill, 391. See also *Badger v. Phinney*, 15 Mass. 359, 8 Am. Dec. 105; *Walker v. Davis*, 1 Gray, 506; *Gaunt v. Taylor*, 15 N. Y. S. 589; *Harseim v. Cohen* (Tex. Civ. App.), 25 S. W. 977.

⁸² See, *e. g.*, *Cooley on Torts*, *106; 2 Kent's Com. *241; *Collins v. Gifford*, 203 N. Y. 465, 96 N. E. 721, 38 L. R. A. (N. S.) 202; *Lowery v. Cate*, 108 Tenn. 54, 64 S. W. 1068, 57 L. R. A. 673, 91 Am. St. Rep. 744. The authorities on the liability of an infant for a tort are collected in a note in 57 L. R. A. 673.

tion of his contract he uses it for another he is guilty of conversion;⁸³ and that a negligent infant bailee is liable for his negligence.⁸⁴ Nevertheless there are decisions holding without qualification that an infant warrantor is not liable in any form of action or under any circumstances.⁸⁵ The distinction is not observed in these cases between holding the infant to make good the warranty and holding him responsible for damage caused by fraudulently inducing the plaintiff to contract with him. The former ought not to be allowed even though the action is in tort; the latter ought to be.⁸⁶

§ 247. Infants' agency to bind parent.

The relation of parent and child does not of itself give any authority to the child to bind the parent.⁸⁷ In contracts other than those for the purchase of necessities the liability of a parent on contracts made by the child depends on the ordinary rules of agency; each case presents its own question of fact.⁸⁸

How far an infant is empowered by law to impose liability on the parent for the purchase of necessities, depends in large measure on whether the parent is under a legal obliga-

⁸³ *Burnard v. Haggis*, 14 C. B. (N. S.) 45; *Walley v. Holt*, 35 L. T. 631; *Homer v. Thwing*, 3 Pick. 492; *Churchill v. White*, 58 Neb. 22, 78 N. W. 369, 76 Am. St. Reports, 64; *Eaton v. Hill*, 50 N. H. 235, 9 Am. Rep. 189; *Stack v. Cavanaugh*, 67 N. H. 149, 30 Atl. 350; *Campbell v. Stakes*, 2 Wend. 137, 19 Am. Dec. 561; *Fish v. Ferris*, 5 Duer, 49; *Moore v. Eastman*, 1 Hun, 578; *Freeman v. Boland*, 14 R. I. 39, 51 Am. Rep. 340; *Green v. Sperry*, 16 Vt. 390, 42 Am. Dec. 519; *Towne v. Wiley*, 23 Vt. 355, 56 Am. Dec. 85; *Ray v. Tubbs*, 50 Vt. 688, 28 Am. Rep. 519. See, however, the contrary decisions, *Fawcett v. Smethurst*, 31 T. L. Rep. 85; *Jennings v. Rundall*, 8 T. R. 335; *Schenk v. Strong*, 1 Southard (N. J.), 87; *Penrose v. Curren*, 3 Rawle, 351, 24 Am. Dec. 356; *Wilt v. Welsh*, 6 Watts, 9.

⁸⁴ *Daggy v. Miller*, 180 Ia. 1146, 162

N. W. 854. But see *contra* *Brunhœl v. Brandes*, 90 N. J. L. 31, 100 Atl. 163.

⁸⁵ *Grove v. Nevill*, 1 Keb. 778; *Green v. Greenbank*, 2 Marsh. 485; *Prescott v. Norris*, 32 N. H. 101; *Collins v. Gifford*, 203 N. Y. 465, 96 N. E. 721, 38 L. R. A. (N. S.) 202; *Gilson v. Spear*, 38 Vt. 311; *Doran v. Smith*, 49 Vt. 353.

⁸⁶ The fact that in many jurisdictions damages in deceit for an adult's misrepresentations are measured by what the plaintiff would have gained had the misrepresentation been true rather than what he lost from its falsity (see *infra*, § 1392) may partially account for the indisposition of courts to hold the infant liable.

⁸⁷ *Habegger v. King*, 149 Wis. 1, 135 N. W. 166, 39 L. R. A. (N. S.) 881.

⁸⁸ For cases on this subject see 29 Cyc. 1664, 39 L. R. A. 881, note.

tion to support the child. If the parent is under no legal duty in the matter, the child has no power to bind the parent even for necessities.⁸⁹ The existence of such a legal duty frequently depends upon the age and capacity of the minor child to take charge of his own affairs,⁹⁰ and also upon whether the child is emancipated.⁹¹ If in a given case the parent is under an obligation to support and educate a child, one who furnishes on the credit of the parent necessities to the child which should have been furnished by the parent can recover from the parent;⁹² but there must be some special need of immediate action or some clear failure on the part of the parent to perform his duty in order to justify furnishing a minor even with necessities without the parent's assent,⁹³ and if the necessities are not furnished on the credit of the parent the creditor it seems can in no case recover from him.⁹⁴

§ 248. Actions by and against infants.

An infant cannot personally prosecute an action in court. An action on his behalf must be brought either by his guardian or by a next friend.⁹⁵ It is a good plea in abatement that a plaintiff who sues without a guardian or next friend is an infant.⁹⁶ And if a judgment is entered against an infant plaintiff who sues without being thus represented, the judgment will not bind him.⁹⁷ The practice of allowing an infant

⁸⁹ *Baker v. Keer*, 2 Stark. 501; *Mortimore v. Wright*, 6 M. & W. 482; *Shelton v. Springett*, 11 C. B. 452; *Freeman v. Robinson*, 38 N. J. L. 383, 20 Am. Rep. 399.

⁹⁰ On the question of the liability in any given State, of the parent to support and educate the child, see 19 Cyc. 1605, 1606. See also *Tiffany on Persons*, 2d ed., p. 251.

⁹¹ See *supra*, § 225.

⁹² *Smith v. Gilbert*, 80 Ark. 525, 98 S. W. 115, 8 L. R. A. (N. S.) 1098; *Lamson v. Varnum*, 171 Mass. 237, 50 N. E. 615; *Finn v. Adams*, 138 Mich. 258, 101 N. W. 533; *Farmington v. Jones*, 36 N. H. 271, 272.

⁹³ *Owen v. White*, 5 Porter, 435, 30

Am. Dec. 572; *Keaton v. Davis*, 18 Ga. 457; *Brown v. Deloach*, 28 Ga. 486; *Pidgin v. Cram*, 8 N. H. 350; *Ketchum v. Marsland*, 18 N. Y. Misc. 450, 42 N. Y. S. 7; *Peacock v. Linton*, 22 R. I. 328, 47 Atl. 887, 53 L. R. A. 192.

⁹⁴ See *infra*, § 270, where the corresponding question as to married women is discussed.

⁹⁵ 1 Bl. Comm. 464; *Guild v. Cranstons*, 8 Cush. 506; *Williams v. Cleaveland*, 76 Conn. 426, 56 Atl. 850.

⁹⁶ *Young v. Young*, 3 N. H. 345; *Taylor v. Superior Court*, 30 R. I. 200, 560, 76 Atl. 644.

⁹⁷ *Hanlin v. Burk Bros. Co.*, 174 Mo. App. 462, 160 S. W. 547.

to sue by his next friend instead of by guardian is derived from an early English statute.⁹⁸ The general guardian "is usually the proper person to represent the infant plaintiff in such action. But there are frequently cases when the infant may properly sue by next friend, notwithstanding the existence of such guardian, as when the guardian is absent or is unwilling or unable to institute or prosecute the required action or appeal, and especially when, though declining to take such action himself, he does not forbid such proceeding, or when he is disqualified by interest hostile to that of the infant, or is for other reasons an improper or unsuitable person to prosecute such actions in behalf of the ward."⁹⁹ Though the next friend is not appointed by the court, his authority to prosecute an action may be revoked by the court.¹ The action is properly brought in the name of the infant with the statement that he is represented by a stated next friend or guardian, not in the name of such next friend or guardian.² In most jurisdictions if an infant is sued it is the duty of his general guardian, if he has one, not adversely interested to appear and defend the action.³ If the infant has no general guardian, or if the general guardian has an adverse interest,

⁹⁸ Westminster 2d, c. 15. See *Guild v. Cranston*, 8 Cush. 506.

⁹⁹ *Williams v. Cleaveland*, 76 Conn. 426, 432, 56 Atl. 850. See further: *Hooks v. Smith*, 58 Ala. 238, 29 Am. Rep. 745; *Baltimore & P. R. Co. v. Taylor*, 6 App. Cas. (D. C.) 259; *Holmes v. Field*, 12 Ill. 424; *Chudleigh v. Chicago, R. I. & P. Ry. Co.*, 51 Ill. App. 491; *Patterson v. Pullman*, 104 Ill. 80; *Deford v. State*, 30 Md. 179; *French v. Marshall*, 136 Mass. 564; *Segelken v. Meyer*, 94 N. Y. 473; *Robson v. Osborn*, 13 Tex. 298; *Martin v. Weyman*, 26 Tex. 460; *Thomas v. Dike*, 11 Vt. 273, 34 Am. Dec. 690; *Hicks v. Hicks*, 79 Wis. 465, 470, 48 N. W. 495.

¹ *Guild v. Cranston*, 8 Cush. 506. In this case the court stayed proceedings in a suit, brought on behalf of a minor without his consent, on the peti-

tion of the minor, being satisfied that his interests would not suffer from a delay in the suit until he attained his majority.

² *Sandeen v. Tschider*, 205 Fed. 252, 123 C. C. A. 456; *Emeric v. Alvarado*, 64 Cal. 593, 2 Pac. 418; *Bradley v. Amidon*, 10 Paige, 235. In *Sandeen v. Tschider*, *supra*, however, it was held that the defect could be and had been waived.

³ *Nunn v. Robertson*, 80 Ark. 350; *Smith v. McDonald*, 42 Cal. 484; *Hughes v. Sellers*, 34 Ind. 337; *Mansur v. Pratt*, 101 Mass. 60; *Cowan v. Anderson*, 7 Coldw. 284. In some jurisdictions it seems to be the practice to appoint a guardian *ad litem* in every case. See *Colt v. Colt*, 111 U. S. 566, 28 L. Ed. 520, 4 Sup. Ct. 553; *Cowan v. Anderson*, 7 Coldw. 284.

the court will appoint a guardian *ad litem*.⁴ The infant has no power to bind himself by an appearance on his own behalf, or by an attorney of his own appointment, or by a next friend;⁵ and a judgment obtained against an infant without the appearance of a guardian, or guardian *ad litem*, is voidable;⁶ as is a judgment against an infant who was represented only by a guardian whose interests were adverse.⁷

⁴ O'Hara v. MacConnell, 93 U. S. 150, 23 L. Ed. 840; Conway v. Clark, 177 Ala. 99, 58 So. 441; Owens v. Gunther, 75 Ark. 37, 86 S. W. 851; Nicholson v. Wilborn, 13 Ga. 467; Stinson v. Pickering, 70 Me. 273; Austin v. Trustees of the Charlestown Female Seminary, 8 Metc. 196, 41 Am. Dec. 497.

⁵ Frescobaldi v. Kinaston, 2 Strange, 783; Nicholson v. Wilborn, 13 Ga. 467;

Marshall v. Wing, 50 Me. 62; Mitchell v. Spaulding, 206 Pa. 220, 55 Atl. 968.

⁶ O'Hara v. MacConnell, 93 U. S. 150, 23 L. Ed. 840; Colt v. Colt, 111 U. S. 566, 28 L. Ed. 520; Austin v. Trustees of the Charlestown Female Seminary, 8 Metc. 196, 41 Am. Dec. 497; England v. Garner, 90 N. C. 197; Weaver v. Glenn, 104 Va. 443, 51 S. E. 835.

⁷ Pearce v. Heyman (Tex. Civ. App.), 158 S. W. 242.

CHAPTER IX

CAPACITY OF PARTIES. INSANE AND INTOXICATED PERSONS

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§ 249. Insane persons; early law.

Lord Coke laid down the rule that a lunatic could not be permitted by plea to show the invalidity of his acts because to do so would be to stultify himself.¹ This reasoning would probably prevail nowhere at the present time, and may therefore be disregarded. There are, however, still several theories in regard to the effect of a lunatic's agreement or deed. Most of the cases relate to deeds, but there seems here no distinction in principle between the case of a deed or conveyance of real estate and a contract or sale of personal property, except that if the transaction is wholly executory on both sides, there is less danger of hardship to the sane party, if the lunatic is allowed to treat the agreement as void or voidable, than where the transaction is wholly or partly executed. Decisions, therefore, in regard to deeds, may be taken as establishing a rule of decision for other transactions in the absence of authority to the contrary. The several theories may now be considered.

¹ *Beverley's Case*, 4 Co. Rep. 123 b.

§ 250. Lunatics' transactions void.

It seems a natural consequence of lunacy that any transaction which requires actual mutual assent cannot be effectually made by a lunatic. As was said in a decision of the Supreme Court of the United States: "The fundamental idea of a contract is that it requires the assent of two minds; but a lunatic or a person *non compos mentis* has nothing which the law recognizes as a mind."² And though the English law of contracts during most of its history, has concerned itself rather with the acts of the parties than with their views as to the meaning of their acts, it has been true from an early day and still is true that no act can bind a party unless it can be regarded as his act,³ and whether the motions of a lunatic could be so regarded seemed more than doubtful. Accordingly it was decided in early English cases that a lunatic could not execute a deed,⁴ nor a bond,⁵ nor indorse a bill of exchange.⁶ And so a family settlement made by a lunatic was set aside, although it was reasonable and for the convenience of the family.⁷ In accordance with this view it is held in many cases, especially those of not very recent times, that a lunatic's contract⁸ or deed⁹ is absolutely void. It should be noticed,

² *Dexter v. Hall*, 15 Wall. 9, 21 L. Ed. 73.

³ See *infra*, § 1488.

⁴ *Yates v. Boen*, 2 Strange, 1104.

⁵ *Faulder v. Silk*, 3 Campb. 126.

⁶ *Alcock v. Alcock*, 3 M. & Gr. 268.

⁷ *Clerk v. Clerk*, 2 Vern. 323.

⁸ *Edwards v. Davenport*, 4 McCrary, 34; *Henry v. Fine*, 23 Ark. 417; *Caulkins v. Fry*, 35 Conn. 170; *American Trust & Banking Co. v. Boone*, 102 Ga. 202, 20 S. E. 182, 40 L. R. A. (N. S.) 250; *Reinskopf v. Rogge*, 37 Ind. 207; *Atwell v. Jenkins*, 163 Mass. 362, 40 N. E. 178, 28 L. R. A. 694, 47 Am. St. Rep. 463; *Burke v. Allen*, 29 N. H. 106, 61 Am. Dec. 642; *Berkley v. Cannon*, 4 Rich. L. 136; *Hunter v. Tolbard*, 47 W. Va. 258, 34 S. E. 737; *Bursinger v. Bank of Watertown*, 67 Wis. 75, 30 N. W. 290, 58 Am. Rep. 848. See also *Chicago, etc., Ry. v. Lewis*, 109 Ill. 120.

⁹ *German Savings Soc. v. Lashmuth*, 67 Fed. 399; *Thompson v. New England Co.*, 110 Ala. 400, 18 So. 315, 55 Am. St. Rep. 29; *Dougherty v. Powe*, 127 Ala. 577, 30 So. 524; *Wilkins v. Wilkinson*, 129 Ala. 279, 30 So. 578; *Van Deusen v. Sweet*, 51 N. Y. 378; *Sander v. Savage*, 75 N. Y. App. Div. 333 (but see *Blinn v. Schwarz*, 177 N. Y. 252, 69 N. E. 542, 101 Am. St. Rep. 806); *Farley v. Parker*, 6 Or. 105, 25 Am. Rep. 504; *Estate of Desilver*, 5 Rawle, 111; *Rogers v. Walker*, 6 Pa. St. 371, 47 Am. Dec. 470. And see *Dexter v. Hall*, 15 Wall. 9, 21 L. Ed. 73; *Jacks v. Estee*, 139 Cal. 507, 73 Pac. 247; *Edwards v. Davenport*, 4 McCrary, 34; *Waller v. Julius*, 68 Kan. 314, 74 Pac. 157; *Valpey v. Rea*, 130 Mass. 384; *Brigham v. Fayerweather*, 144 Mass. 48, 10 N. E. 735.

however, that the word "void" is used with very different meanings by judges and law writers;¹⁰ and it may be doubted whether most of the courts which have said that the acts of a lunatic are void would follow that doctrine to its logical conclusion. Thus: If the contracts of a lunatic are void they cannot be ratified; third persons may effectually deny the title of an insane person's grantee; and a sane party to a bargain with a lunatic may repudiate it although the lunatic has performed on his side, or is ready to perform. That all these consequences would be admitted by courts which speak of the contracts of a lunatic as void is at least not clear.

The somewhat illogical doctrine applied by some courts to infants,¹¹ holding that an infant's power of attorney is void, though infants' contracts in general are voidable only, has been suggested by a few courts as applicable also to contract of an insane person.¹² There seems no reason, however, to distinguish a power of attorney from any contractual agreements. It should be voidable to the same extent and no further than other agreements of an insane person.¹³ It is occasionally said also that a contract with an insane person is void if his condition is known to the contracting party.¹⁴ But the word void in such cases must be used as meaning void at the option of the insane person, or his representatives, that is, voidable. It is doubtless a fraud to enter into a contract with an insane person knowing his condition.¹⁵ It should be observed, however, that the discharge of a contract by performance to the promisee does not involve the formation of a new contract, and, therefore, a repayment by a bank to an insane person of money deposited by him when sane is a valid discharge though made upon check or

¹⁰ See *Blinn v. Schwarz*, 177 N. Y. 252, 259, 69 N. E. 542, 101 Am. St. Rep. 806; *State v. Richmond*, 26 N. H. 232, 239; Markby, *Elements on Law* (3d ed.), §§ 274, 651.

¹¹ See *supra*, § 227.

¹² *Plaster v. Rigney*, 97 Fed. 12, 38 C. C. A. 25; *Clay v. Hammond*, 199 Ill. 370, 65 N. E. 352; *Wolcott v. Insurance Co.*, 137 Mich. 309, 100 N. W. 569; *Eaton v. Eaton*, 37 N. J. L. 108.

¹³ See *Williams v. Sapieha*, 94 Tex. 430, 61 S. W. 115.

¹⁴ *Henry v. Fine*, 23 Ark. 417; *Bethany Hospital Co. v. Philippi*, 83 Kans. 64, 107 Pac. 530, 30 L. R. A. (N. S.) 194; *Matthiessen v. McMahon's Adm'r*, 38 N. J. L. 536; *Lincoln v. Buckmaster*, 32 Vt. 652.

¹⁵ *Helbreg v. Schumann*, 150 Ill. 12, 37 N. E. 99, 41 Am. St. Rep. 339; *Fecal v. Guinault*, 32 La. Ann. 91.

order drawn by the depositor after he became insane;¹⁶ and the result is the same where payment is made on such an order to one whom the depositor while sane had held out as his agent.¹⁷

§ 251. Lunatics' transactions voidable.

According to the view more commonly expressed, a lunatic's transactions are voidable. An analogy with infant's contracts, confessedly not perfect, inasmuch as an infant may be, in fact, mentally competent, whereas a lunatic generally, at least, is incompetent in fact to understand the force of his bargain, has been followed both as to contracts¹⁸ and deeds.¹⁹

¹⁶ *Reed v. Mattapan &c. Trust Co.*, 198 Mass. 306, 84 N. E. 469.

¹⁷ *Leighton v. Haverhill Sav. Bank*, 227 Mass. 67, 116 N. E. 414. See also *supra*, § 237.

¹⁸ *Wright v. Waller*, 127 Ala. 557, 29 So. 57, 54 L. R. A. 440; *Coburn v. Raymond*, 76 Conn. 484, 100 Am. St. Rep. 1000; *Orr v. Equitable Mortgage Co.*, 107 Ga. 499, 33 S. E. 708; *Woolley v. Gaines*, 114 Ga. 122, 39 S. E. 892, 88 Am. St. Rep. 22; *Mead v. Stegall*, 77 Ill. App. 679; *Joest v. Williams*, 42 Ind. 565, 13 Am. St. Rep. 377; *Musselman v. Cravens*, 47 Ind. 1; *Louisville, etc., Ry. Co. v. Herr*, 135 Ind. 591, 35 N. E. 556; *Mansfield v. Watson*, 2 Iowa, 111; *Allen v. Berryhill*, 27 Iowa, 534, 1 Am. Rep. 309; *Van Patten v. Beals*, 46 Iowa, 62; *Seaver v. Phelps*, 11 Pick. 304, 22 Am. Dec. 372; *Reed v. Mattapan Deposit & Trust Co.*, 198 Mass. 306, 84 N. E. 469; *Sutcliffe v. Heatley (Mass.)*, 122 N. E. 317; *Carpenter v. Rodgers*, 61 Mich. 384, 28 N. W. 156, 1 Am. St. Rep. 595; *De Vries v. Crofoot*, 148 Mich. 183, 111 N. W. 775; *Broadwater v. Darne*, 10 Mo. 277; *Ingraham v. Baldwin*, 9 N. Y. 45; *Bush v. Breinig*, 113 Pa. St. 310, 6 Atl. 86, 57 Am. Rep. 469.

¹⁹ *Luhre v. Hancock*, 181 U. S. 567,

574, 21 S. Ct. 726, 44 L. Ed. 1005; *Woolley v. Gaines*, 114 Ga. 122, 39 S. E. 892, 88 Am. St. Rep. 22; *Scanlan v. Cobb*, 85 Ill. 296; *Walton v. Malcolm*, 264 Ill. 389, 106 N. E. 211; *Nichol v. Thomas*, 53 Ind. 42; *Freed v. Brown*, 55 Ind. 310; *Schuff v. Ransom*, 79 Ind. 458; *Boyer v. Berriman*, 123 Ind. 451, 24 N. E. 249; *Harrison v. Otley*, 101 Iowa, 652, 70 N. W. 724; *Gribben v. Maxwell*, 34 Kans. 8, 7 Pac. 584; *Smith's Committee v. Forsythe*, 28 Ky. L. Rep. 1034, 90 S. W. 1075; *Wathen v. Skaggs*, 161 Ky. 600, 171 S. W. 193; *Hovey v. Hobson*, 53 Me. 451, 89 Am. Dec. 705; *Allis v. Billings*, 6 Metc. 415, 39 Am. Dec. 744; *Riley v. Carter*, 76 Md. 581, 25 Atl. 667, 19 L. R. A. 489; *Arnold v. Richmond Iron Works*, 1 Gray, 434; *Gibson v. Soper*, 6 Gray, 279, 66 Am. Dec. 414; *Howe v. Howe*, 99 Mass. 88, 98; *Rogers v. Blackwell*, 49 Mich. 192, 13 N. W. 512 (*semble*); *Moran v. Moran*, 106 Mich. 8, 63 N. W. 989, 58 Am. St. Rep. 462; *Thorpe v. Hanscom*, 64 Minn. 201, 66 N. W. 1; *Miller v. Barber*, 73 N. J. L. 38, 62 Atl. 276; *Blinn v. Schwarz*, 177 N. Y. 252, 69 N. E. 542, 101 Am. St. Rep. 806; *Riggan v. Green*, 80 N. C. 236, 30 Am. Rep. 77; *Elston v. Jasper*, 45 Tex. 409; *Porter v. Brooks (Tex. Civ. App.)*, 159 S. W.

§ 252. Voidable against bona fide purchaser.

Though a lunatic's contracts are regarded as voidable only, they may at common law, if voidable at all, be avoided against a subsequent purchaser who paid value for the property which was originally sold by the lunatic, though the purchaser bought in ignorance of the insanity of the prior owner.²⁰ This rule, however, so far as concerns sales of chattel property has been changed by the Uniform Sales Act²¹ which makes no exception to the rule that a *bona fide* purchaser for value from one who has a voidable title acquires a good title. In jurisdictions which require restoration of the consideration received by a lunatic as a condition of his avoidance of his acts as against an immediate purchaser in good faith "it is clear that subsequent grantees who take the title in like good faith and ignorance of the incompetent's disability are entitled to be restored to their original position before they can be deprived of their property by the intervention of a court of equity."²²

192; *Smith v. Guerre* (Tex. Civ. App.), 159 S. W. 417. See also *Hardy v. Dyas*, 203 Ill. 211, 67 N. E. 852; *Sheehan v. Allen*, 67 Kans. 712, 74 Pac. 245. In *Patton v. Washington*, 54 Ore. 479, 103 Pac. 60, personal property was transferred by an insane person to one who did not then know of the insanity but learned of it soon afterwards. The court held that the lunatic on regaining his sanity might demand the property and that the transferee on learning of the insanity was bound to take ordinary care of the property with a view to returning it on request.

²⁰ *Hull v. Louth*, 109 Ind. 315, 10 N. E. 270, 58 Am. Rep. 405; *Hovey v. Hobson*, 53 Me. 451, 89 Am. Dec. 705; *Rogers v. Blackwell*, 49 Mich. 192, 13 N. W. 512; *McKenzie v. Donnell*, 151 Mo. 431, 52 S. W. 314; *Dewey v. Allgire*, 37 Neb. 6, 55 N. W. 279, 40 Am. St. Rep. 568; *Gingrich v. Rogers*, 69 Neb. 527, 98 N. W. 156; *Burgedorff v. Hamer*, 95 Neb. 113, 145 N. W. 250; *Schanck v. Hooper*, 160 N. Y. S.

627. But see *Ashcraft v. De Armond*, 44 Iowa, 229; *Odom v. Riddick*, 104 N. C. 515, 10 S. E. 609, 7 L. R. A. 118, 17 Am. St. Rep. 686, where it was held that a *bona fide* purchaser of land who had paid full value for it could not be deprived thereof unless the consideration paid was restored. It should be observed that wherever it is held that a lunatic cannot avoid a contract made by him with one who is ignorant of his lunacy and who pays him full value as consideration, unless the original status is restored, it necessarily follows that property if recoverable from a *bona fide* purchaser can be recovered only upon the same conditions.

²¹ Sec. 24. See *supra*, § 233, as to similar effect on an infant's privilege, and *infra*, § 506, for the States which have enacted the Sales Act.

²² *Coburn v. Raymond*, 76 Conn. 484, 492, 57 Atl. 116, 100 Am. St. Rep. 1000.

§ 253. Ratification and disaffirmance.

If a lunatic's contracts are voidable only, they may be ratified and the authorities almost uniformly support the validity of such ratification if the lunatic was not under guardianship.²³ Any conduct on the part of the lunatic who has regained his reason which clearly indicates assent to his previous acts, ratifies and validates them.²⁴ Such conduct will amount to ratification in spite of ignorance of the right to avoid the transaction and of the effect of the subsequent conduct as a relinquishment of that right.²⁵ Whether a mere failure to disaffirm a bargain made during insanity will suffice for ratification has not been as much discussed as the corresponding question in regard to infants. It seems, however, that if the lunatic on recovering his reason was aware of the bargain which he had made while insane, delay without more would preclude him from disaffirming the transaction.²⁶ The lunatic's representatives may ratify after his death a contract made

²³ *Matthews v. Baxter*, L. R. 8 Ex. 132; *Baldwyn v. Smith*, [1900] 1 Ch. 588; *Ætna L. I. Co. v. Sellers*, 154 Ind. 370, 56 N. E. 97, 77 Am. St. Rep. 481; *Arnold v. Richmond Works*, 1 Gray, 434; *Wolcott v. Conn. L. I. Co.*, 137 Mich. 309, 100 N. W. 569; *Cochran Timber Co. v. Fisher*, 190 Mich. 478, 157 N. W. 282; *Gingrich v. Rogers*, 69 Neb. 527, 96 N. W. 156; *Blinn v. Schwarz*, 177 N. Y. 252, 69 N. E. 542, 101 Am. St. Rep. 806; *Lawrence v. Morris*, 167 N. Y. App. D. 186, 152 N. Y. S. 777; *Smith v. Guerre* (Tex. Civ. App.), 159 S. W. 417. And see cases in the following notes. But see *Oakley v. Shelley*, 129 Ala. 467, 470, 29 So. 385.

²⁴ *Barry v. St. Joseph's Hospital* (Cal.), 48 Pac. 68; *Strodder v. Southern Granite Co.*, 99 Ga. 595, 27 S. E. 174; *Beasley v. Beasley*, 180 Ill. 163, 54 N. E. 187; *Louisville, etc., Ry. Co. v. Herr*, 135 Ind. 591, 35 N. E. 556; *Allis v. Billings*, 6 Metc. 415, 39 Am. Dec. 744; *Arnold v. Richmond Works*, 1 Gray, 434; *Weickgenant v. Eccles*, 173 Mich. 695, 140 N. W. 513; *Whit-*

comb v. Hardy, 73 Minn. 285, 76 N. W. 29; *Gibson v. Western, etc., R. Co.*, 164 Pa. 142, 30 Atl. 308, 44 Am. St. Rep. 586.

²⁵ *Arnold v. Richmond Works*, 1 Gray, 434. But see *Alabama, etc., Ry. v. Jones*, 73 Miss. 110, 19 So. 105, 55 Am. St. Rep. 488.

²⁶ *Cockrill v. Cockrill*, 92 Fed. 811, 34 C. C. A. 254; *Barry v. St. Joseph's Hospital* (Cal.), 48 Pac. 68; *Strodder v. Southern Granite Co.*, 99 Ga. 595, 27 S. E. 174; *Bunn v. Postell*, 107 Ga. 490, 33 S. E. 707; *Weber v. Bottger*, 172 Ia. 418, 154 N. W. 579; *Spicer v. Holbrook*, 29 Ky. L. Rep. 865, 96 S. W. 571; *Morris v. Gt. Northern Ry. Co.*, 67 Minn. 74, 69 N. W. 628. See also *Wright v. Fisher*, 65 Mich. 275, 284, 32 N. W. 605, 8 Am. St. Rep. 886. In *Weickgenant v. Eccles*, 173 Mich. 695, 140 N. W. 513, an insane person sold his business and covenanted not to compete with the buyer. On his recovery no attempt was made to avoid the sale nor was it complained of as unfair; and it was held that he was bound by the covenant.

by him;²⁷ and so they may disaffirm the bargain.²⁸ In England ratification by a guardian has been upheld;²⁹ and in the United States the converse proposition, that the guardian of a lunatic may disaffirm his contracts, has been accepted.³⁰ It has been held in Nebraska, however, that the acts of a lunatic cannot be ratified by his guardian or even by the court having jurisdiction over the lunatic.³¹ The party with whom the lunatic dealt cannot avoid the contract because of the lunacy.³² And so far as third persons are concerned the contract before it has been avoided is valid.³³ Therefore, a creditor of an insane person cannot attack a transfer of property made by his debtor for the sole reason that the grantor was a lunatic at the time of the transfer.³⁴ If a contract has been ratified it is obvious that it cannot thereafter be avoided.³⁵ It has been held that a lunatic's contracts cannot be effectively avoided by him while insane,³⁶ but the decisions on this question in regard to infants should be compared.³⁷

²⁷ *Bunn v. Postell*, 107 Ga. 490, 33 S. E. 707; *Bullard v. Moor*, 158 Mass. 418, 33 N. E. 928.

²⁸ *Langley v. Langley*, 45 Ark. 392, 397; *Orr v. Equitable Mortgage Co.*, 107 Ga. 499, 33 S. E. 708; *Downham v. Holloway*, 158 Ind. 626, 64 N. E. 82, 92 Am. St. Rep. 330.

²⁹ *Baldwyn v. Smith*, [1900] 1 Ch. 588.

³⁰ *Eldredge v. Palmer*, 185 Ill. 618, 57 N. E. 770, 76 Am. St. Rep. 59; *Hull v. Louth*, 109 Ind. 315, 10 N. E. 270, 58 Am. St. Rep. 405; *Louisville, etc., Ry. Co. v. Herr*, 135 Ind. 591, 35 N. E. 556; *Alexander v. Haskins*, 68 Iowa, 73, 25 N. W. 935; *Reason v. Jones*, 119 Mich. 672, 78 N. W. 899.

³¹ *Gingrich v. Rogers*, 69 Neb. 527, 96 N. W. 156. See also *Rannells v. Gerner*, 80 Mo. 474.

³² *Harmon v. Harmon*, 51 Fed. 113; *Allen v. Berryhill*, 27 Iowa, 534; *Breckenridge v. Ormsby*, 1 J. J. Marsh. 236, 239, 19 Am. Dec. 71; *Atwell v. Jenkins*, 163 Mass. 362, 40 N. E. 178, 28 L. R. A. 694, 47 Am. St. Rep. 463. Compare *Ashley v. Hol-*

man, 15 S. C. 97, where the court seemed to regard any liability of the other party to be quasi-contractual.

³³ *Atwell v. Jenkins*, 163 Mass. 362, 40 N. E. 178, 28 L. R. A. 694, 47 Am. St. Rep. 463. See, however, *Waller v. Julius*, 68 Kans. 314, 74 Pac. 157, where it was held that one in possession of land might set up the invalidity of a deed made by an insane owner, in view of the facts that no consideration was paid by the grantee and he knew of the insanity.

³⁴ *Brumbaugh v. Richcreek*, 127 Ind. 240, 26 N. E. 664, 22 Am. St. Rep. 649. Cf. *Riley v. Carter*, 76 Md. 581, 25 Atl. 667, 19 L. R. A. 489, 35 Am. St. Rep. 443, where it was held that creditors might attack a general assignment made by their debtor for the benefit of his creditors on the ground that he was insane.

³⁵ *Bunn v. Postell*, 107 Ga. 490, 33 S. E. 707.

³⁶ *Louisville, etc., Ry. Co. v. Herr*, 135 Ind. 591, 35 N. E. 556.

³⁷ See *supra*, § 235.

§ 254. Lunatics' contracts valid in some cases.

In comparatively recent times many courts have made a still farther departure from the view that a lunatic's contract is void because of his inability to give intelligent assent. In the leading case of *Molton v. Camroux*,³⁸ the rule was stated: "The modern cases show that when that state of mind was unknown to the other contracting party, and no advantage was taken of the lunatic, the defence cannot prevail, especially where the contract is not merely executory but executed in the whole or in part and the parties cannot be restored altogether to their original positions."³⁹ This rule had, at the time, the support of decisions in equity,⁴⁰ but went beyond what had been decided previously by courts of law. The rule is, however, in line with the view now generally prevailing in regard to mutual assent as a requirement for the formation of contracts. According to the modern view actual mental assent is not material in the formation of contracts, the important thing being what each party is justified in believing from the actions and words of the man he is dealing with.⁴¹ Accordingly if one dealing with a lunatic may reasonably suppose he is sane and makes a bargain with him on that assumption, there is no theoretical difficulty in the lack of mutual assent. Lunatics whose acts can deceive anybody are not so totally devoid of will that their words and acts can be compared to talking while asleep or signing a paper substituted by sleight of hand. It is necessary, however, for reasons of justice, that the lunatic should be privileged to avoid the contract if it is oppressive. As this is a personal privilege it may well be limited to cases where otherwise there would be hardship. It is so limited by the rule of *Molton v. Camroux*, for if a lunatic has received fair consideration, of which he has had the benefit, and which he cannot restore, there is no hardship in treating the transaction as valid. Accordingly the rule has not only been followed in England,⁴² but has been

³⁸ 2 Exch. 487, 4 Exch. 17. This was an action brought after a lunatic's death by his representatives to recover premiums paid by him for an annuity. Recovery was not allowed.

³⁹ 4 Exch. 17, 19.

⁴⁰ *Niell v. Morley*, 9 Ves. 478.

⁴¹ See *supra*, § 94.

⁴² *Matthews v. Baxter*, L. R. 8 Ex. 132; *Imperial Loan Co. v. Stone*, [1892] 1 Q. B. 599.

much extended. In *Molton v. Camroux* the court confined its remarks strictly to the case of executed contracts, but in a later English case⁴³ all of the judges state without limitation that unless the mental incapacity was known to the other party insanity is no defense to an action on a contract; and Lord Esher says expressly "whether it is executory or executed." But one of the three judges suggests that it is essential that the contract shall be fair, and none of the three suggest that if the consideration was restored the lunatic might rescind the contract. Indeed in the actual case the lunatic was a surety, who may be presumed to have received no benefit from the consideration.⁴⁴ Whether all the implications of this decision can be taken as settled law in England may be questioned in view of late judicial expressions in other cases.⁴⁵ In the United States, the weight of authority supports the rule quoted above from *Molton v. Camroux*.⁴⁶

⁴³ *Imperial Loan Co. v. Stone*, [1892] 1 Q. B. 599.

⁴⁴ In Pennsylvania it is held that an insane indorser of a note, whether for accommodation or not, is liable to the extent of the benefit received. *First National Bank v. Fidelity Title & Trust Co.*, 251 Pa. 529, 97 Atl. 75.

⁴⁵ "There cannot be a contract by a lunatic," per Cotton, L. J. *Re Rhodes*, 44 Ch. D. 94, 105 (1890). "A man, while of unsound mind, entered into a contract to purchase an estate. The contract was accordingly voidable," per Byrne, J. *Baldwyn v. Smith*, [1900] 1 Ch. 588, 590.

⁴⁶ *Brodrig v. Brodrig*, 56 Cal. 563; *More v. Calkins*, 85 Cal. 177, 24 Pac. 729; *Coburn v. Raymond*, 76 Conn. 484, 57 Atl. 116, 100 Am. St. Rep. 1000; *Strodder v. Southern Granite Co.*, 99 Ga. 595, 27 S. E. 174; *Bollnow v. Roach*, 210 Ill. 364, 71 N. E. 454; *Merry v. Bergfeld*, 264 Ill. 84, 105 N. E. 758; *Fay v. Burditt*, 81 Ind. 433, 42 Am. Rep. 142; *Copenrath v. Kienby*, 83 Ind. 18; *Northwestern, etc., Ins. Co. v. Blankenship*, 94 Ind. 535, 544, 48 Am. Rep. 185; *Behrens v. Mc-*

Kenzie, 23 Iowa, 333, 92 Am. Dec. 428; *Abbott v. Creal*, 56 Iowa, 175, 9 N. W. 115; *Bokemper v. Hazen*, 96 Iowa, 221, 64 N. W. 773; *Swartwood v. Chance*, 131 Iowa, 714, 109 N. W. 297; *Gribben v. Maxwell*, 34 Kans. 8, 7 Pac. 584; *Smith's Committee v. Forsythe*, 28 Ky. L. Rep. 1034, 90 S. W. 1075; *Twomey v. Papalia*, 142 La. 621, 77 So. 479; *Flach v. Gottschalk Co.*, 88 Md. 368, 41 Atl. 908, 42 L. R. A. 745, 71 Am. St. Rep. 418; *Shoulters v. Allen*, 51 Mich. 529, 16 N. W. 888; *Schaps v. Lehner*, 54 Minn. 208, 55 N. W. 911; *Morris v. Great Northern Ry. Co.*, 67 Minn. 74, 69 N. W. 628; *Hill-Dodge Banking Co. v. Loomis*, 140 Mo. App. 62119, S. W. 967; *Young v. Stevens*, 48 N. H. 133, 2 Am. Rep. 202, 97 Am. Dec. 592; *Matthiesen, etc., v. McMahon's Adm.*, 38 N. J. L. 536; *Miller v. Barber*, 73 N. J. L. 38, 62 Atl. 276; *Goldberg v. West End Homestead Co.*, 78 N. J. L. 70, 73 Atl. 128; *Groff v. Stitzer*, 77 N. J. Eq. 260, 77 Atl. 46; *Mutual Life Ins. Co. v. Hunt*, 79 N. Y. 541; *Ipock v. Atlantic, etc., R. Co.*, 158 N. C. 445, 74 S. E. 352; *Hosler v. Beard*, 54 Ohio

This principle applies to the case of a deed made by a lunatic.⁴⁷ So negotiable paper executed by a lunatic is binding in the hands of an innocent holder for value, if the lunatic received a proper consideration therefor;⁴⁸ but is not binding if he did not.⁴⁹ It seems generally assumed in these cases that if any consideration received by the lunatic can be and is restored, the bargain may be rescinded.⁵⁰ It follows, therefore, that contracts still wholly executory are not enforceable against such a person.⁵¹ And probably most courts in the United States would agree with the Supreme Court of Georgia in holding that the mere fact "that the other party to the contract was ignorant that the person with whom he was dealing was in fact insane, and that the existence of such insanity could

St. 398, 43 N. E. 1040, 35 L. R. A. 161, 56 Am. St. Rep. 720; *Loman v. Paulin* (Ok.), 152 Pac. 73; *Beals v. See*, 10 Pa. St. 56, 49 Am. Dec. 573; *Kneeder's Appeal*, 92 Pa. St. 428; *Cooney v. Lincoln*, 21 R. I. 246, 42 Atl. 867, 79 Am. St. Rep. 799; *Sims v. McLure*, 8 Rich. Eq. 286, 70 Am. Dec. 196; *National Metal Edge Box Co. v. Vanderveer*, 85 Vt. 488, 82 Atl. 837, 42 L. R. A. (N. S.) 343. But see cases cited in the preceding sections.

⁴⁷ *Ronan v. Bluhm*, 173 Ill. 277, 50 N. E. 694; *Eldredge v. Palmer*, 185 Ill. 618, 57 N. E. 770, 76 Am. St. Rep. 59; *Thrash v. Starbuck*, 145 Ins. 673, 44 N. E. 543; *Ashcraft v. De Armond*, 44 Iowa, 229; *Harrison v. Otley*, 101 Iowa, 652, 70 N. W. 724; *Myers v. Knabe*, 51 Kans. 720, 33 Pac. 602; *Rusk v. Fenton*, 14 Bush, 490, 29 Am. Rep. 413; *Smith's Committee v. Forsythe*, 28 Ky. L. Rep. 1034, 90 S. W. 1075; *McKenzie v. Donnell*, 151 Mo. 431, 52 S. W. 214; *Yauger v. Skinner*, 14 N. J. Eq. 389; *Riggan v. Green*, 80 N. C. 236, 30 Am. Rep. 77. But see *contra*, *McEvoy v. Tucker*, 115 Ark. 430, 171 S. W. 888; *Nichol v. Thomas*, 53 Ind. 42; *Hovey v. Hobson*, 53 Me. 451, 55 Me. 256, 275, 89 Am. Dec. 705; *Bates v. Hyman* (Miss.), 28 So. 567; *Dewey v.*

Allgire, 37 Neb. 6, 55 N. W. 276, 40 Am. St. Rep. 468; *Wager v. Wagoner*, 53 Neb. 511, 73 N. W. 937; *Smith v. Ryan*, 191 N. Y. 452, 84 N. E. 402, 19 L. R. A. (N. S.) 461, 123 Am. St. Rep. 609; *Gilgallon v. Bishop*, 46 N. Y. App. Div. 350; *Crawford v. Scovell*, 94 Pa. St. 48, 39 Am. Rep. 766; *Mitchell v. Inman* (Tex. Civ. App.), 156 S. W. 290. See also cases cited in the preceding sections.

⁴⁸ *Lancaster Bank v. Moore*, 78 Pa. St. 407, 21 Am. Rep. 24; *Snyder v. Laubach* (S. C. Pa.), 7 W. N. C. 464, 9 C. L. J. 496. *Contra*, *Hosler v. Beard*, 54 Ohio St. 398, 43 N. E. 1040, 35 L. R. A. 161, 56 Am. St. Rep. 720.

⁴⁹ *McClain v. Davis*, 77 Ind. 419; *Moore v. Hershey*, 90 Pa. St. 196; *Wirebach v. Bank*, 97 Pa. St. 543, 39 Am. Rep. 821; *Campbell v. Campbell*, 35 R. I. 211, 85 Atl. 930.

⁵⁰ It was so held in *Woolley v. Gaines*, 114 Ga. 122, 39 S. E. 892, 88 Am. St. Rep. 22; *Goldberg v. West End Homestead Co.*, 78 N. J. L. 70, 73 Atl. 128; *Ipock v. Atlantic, etc., R. Co.*, 158 N. C. 445, 74 S. E. 352.

⁵¹ *Baldwyn v. Smith*, [1900] 1 Ch. 588; *Corbit v. Smith*, 7 Iowa, 60, 71 Am. Dec. 431; *Young v. Stevens*, 48 N. H. 133, 2 Am. Rep. 202, 97 Am. Dec. 592.

not have been discovered by an ordinarily reasonable and prudent person, does not make such a contract valid and binding." ⁵² The fact that the consideration has been spent and that the lunatic without fault is unable to restore it does not seem to help his case. If he cannot do so, for whatever cause, the contract is binding. ⁵³ The requirement of restoration of the consideration as a condition of rescission is not universal. Of course jurisdictions which hold the contract of a lunatic is void cannot admit the existence of such a condition, and accordingly some of the older decisions hold that restoration of the consideration is unnecessary. ⁵⁴ Even though the consideration given for a lunatic's promise does not inure to his benefit as has been seen, the transaction has none the less been held binding in England ⁵⁵ and the English decision finds support in the United States, ⁵⁶ but the contrary has been held in Indiana, even though the contract was a fair one. ⁵⁷ Where the insanity was known to the person dealing with the lunatic, an offer to restore the consideration is not re-

⁵² *Orr v. Equitable Mortgage Co.*, 107 Ga. 499, 33 S. E. 708. See also *Jacks v. Estee*, 139 Cal. 507, 73 Pac. 247; *Woolley v. Gaines*, 114 Ga. 122, 39 S. E. 892, 88 Am. St. Rep. 22; *Hull v. Louth*, 109 Ind. 315, 10 N. E. 270, 58 Am. Rep. 405; *Clark v. New York &c. R. Co.*, 35 R. I. 479, 87 Atl. 206; *Campbell v. Campbell*, 35 R. I. 211, 85 Atl. 930.

⁵³ *Scanlan v. Cobb*, 85 Ill. 296; *Burnham v. Kidwell*, 113 Ill. 425; *Young v. Stevens*, 48 N. H. 133, 2 Am. Rep. 202, 97 Am. Dec. 592; *Matthiessen v. McMahon's Adm.*, 38 N. J. L. 536; *Yauger v. Skinner*, 14 N. J. Eq. 389; *Mutual L. I. Co. v. Hunt*, 79 N. Y. 541; *Riggan v. Green*, 80 N. C. 236, 30 Am. Rep. 77; *Ipock v. Atlantic, etc., R. Co.*, 158 N. C. 445, 74 S. E. 352; *Lancaster Bank v. Moore*, 78 Pa. St. 407, 21 Am. Rep. 24; *Sims v. McLure*, 8 Rich. Eq. (S. C.) 286, 70 Am. Dec. 196. See, however, *Strodger v. Southern Granite Co.*, 99 Ga. 595,

27 S. E. 174; *Hale v. Kobbert*, 109 Iowa, 128, 130, 80 N. W. 308.

⁵⁴ *Breckenridge v. Ormsby*, 1 J. J. Marsh. 236, 245, 19 Am. Dec. 71; *Hovey v. Hobson*, 53 Me. 451, 89 Am. Dec. 705; *Gibson v. Soper*, 6 Gray, 279, 66 Am. Dec. 414; *Flanders v. Davis*, 19 N. H. 139.

⁵⁵ *Imperial Loan Co., v. Stone*, [1892] 1 Q. B. 599.

⁵⁶ *Abbott v. Creal*, 56 Iowa, 175, 9 N. W. 115; *Blount v. Spratt*, 113 Mo. 48, 20 S. W. 967; *Bank v. Sneed*, 97 Tenn. 120, 36 S. W. 716, 56 Am. St. Rep. 788. In *Groff v. Stitzer*, 77 N. J. Eq. 260, 77 Atl. 46, 31 L. R. A. (N. S.) 1159, a bank which had lent money in good faith on the security of stock, belonging to another, who was mentally incompetent, was held entitled to enforce its claim against the security.

⁵⁷ *Northwestern, etc., Ins. Co. v. Blankenship*, 94 Ind. 535, 48 Am. Rep. 185; *Physio-Medical College v. Wilkinson*, 108 Ind. 314, 9 N. E. 167.

quired as a condition precedent to rescission,⁵⁸ and the same result has been reached where the bargain was an unfair one.⁵⁹

Interest also is charged against one who has received money from a lunatic, knowing him to be such.⁶⁰

§ 255. Necessaries.

For the same reason as in the case of infants, lunatics are liable for necessities furnished them.⁶¹ As pointed out⁶² under the heading of infancy, this liability should be regarded as quasi-contractual rather than contractual.⁶³ Hence it is not necessary for the existence of the liability that any

⁵⁸ *Imperial Loan Co. v. Stone*, [1892] 1 Q. B. 599; *Allore v. Jewell*, 94 U. S. 506, 24 L. Ed. 260; *Harding v. Wheaton*, 2 Mason (U. S.), 378; *Henry v. Fine*, 23 Ark. 417; *Ronan v. Bluhn*, 173 Ill. 277, 50 N. E. 694; *Hardy v. Dyas*, 203 Ill. 211, 67 N. E. 852; *Thrash v. Starbuck*, 145 Ind. 673, 44 N. E. 543; *Sheehan v. Allen*, 67 Kans. 712, 74 Pac. 245; *Waller v. Julius*, 68 Kans. 314, 74 Pac. 157, 35 L. R. A. 161; *Rhoades v. Fuller*, 139 Mo. 179, 40 S. W. 760; *Creekmore v. Baxter*, 121 N. C. 31, 27 S. E. 994; *Hosler v. Beard*, 54 Ohio St. 398, 43 N. E. 1040, 56 Am. St. Rep. 720; *Crawford v. Scovell*, 94 Pa. St. 48, 39 Am. Rep. 766; *Lincoln v. Buckmaster*, 32 Vt. 652.

⁵⁹ *Hale v. Kobbert*, 109 Iowa, 128, 80 N. W. 308; *Clark v. Lopez*, 75 Miss. 932, 23 So. 648, 957; *Halley v. Troester*, 72 Mo. 73; *Sims v. McLure*, 8 Rich. Eq. (S. C.) 286, 70 Am. Dec. 196.

⁶⁰ *Goldberg v. West End Homestead Co.*, 78 N. J. L. 70, 73 Atl. 128.

⁶¹ *Baxter v. Portsmouth*, 5 B. & C. 170; *Ex parte Northington*, 37 Ala. 496, 79 Am. Dec. 67; *Borum v. Bell*, 132 Ala. 85, 31 So. 454; *Henry v. Fine*, 23 Ark. 417; *Ratliff v. Baltzer's Adm.* 13 Ida. 152, 89 Pac. 71; *Sawyer v. Lufkin*, 56 Me. 308; *Kendall v. May*, 10

Allen, 59; *Gross v. Jones*, 89 Miss. 44, 42 So. 802; *Reando v. Misplay*, 90 Mo. 251, 2 S. W. 405, 59 Am. Rep. 13; *Hartley v. Hartley's Est.*, 173 Mo. App. 18, 155 S. W. 1099; *Seeva v. True*, 53 N. H. 627; *Van Horn v. Hann*, 39 N. J. L. 207; *Waldron v. Davis*, 70 N. J. L. 788, 58 Atl. 293, 66 L. R. A. 591; *Richardson v. Strong*, 13 Ired. L. 106, 55 Am. Dec. 430; *Surles v. Pipkin*, 69 N. C. 513; *Kneedler's Appeal*, 92 Pa. St. 428; *In re Arnold's Est.*, 253 Pa. 517, 98 Atl. 701; *Blaisdell v. Holmes*, 48 Vt. 492.

⁶² See *supra*, § 240.

⁶³ *Re Rhodes*, 44 Ch. D. 94; *Henry v. Fine*, 23 Ark. 417, 418; *Hartley v. Hartley's Estate*, 173 Mo. App. 18, 155 S. W. 1099; *Seeva v. True*, 53 N. H. 627; *Sheltman v. Taylor's Committee*, 116 Va. 762, 82 S. E. 698. *In Re Rhodes*, at p. 107, *Lindley, L. J.*, deprecated "The unfortunate terminology of our law, owing to which the expression 'implied contract' has been used to denote not only a genuine contract established by inference, but also an obligation which does not arise from any real contract, but which can be enforced as if it had a contractual origin. Obligations of this class are called by civilians *obligationes quasi ex contractu*."

express contract be made, as is shown by the fact, that even though a lunatic is under guardianship and, consequently, totally incapable of contracting, he can, nevertheless, bind himself for necessities if not furnished with them by his guardian.⁶⁴ As in the case of infants also a lunatic's liability is measured not by the promises he may have made but by the value of the necessities furnished him.⁶⁵ As to what constitutes necessities, the same principles that have been discussed previously in case of infants are applicable. In the case of a lunatic medical services, including nursing and other protection usual for insane persons, may be necessary.⁶⁶ Legal services of an attorney to obtain release from an asylum have also been held necessary if faithfully and prudently rendered, regardless of whether they proved beneficial.⁶⁷ Necessaries furnished to the wife of the lunatic are also a necessary expense to him for which he may be held liable.⁶⁸ The lender of money to a lunatic who uses it in the purchase of necessities is dealt with in the same way as a similar lender of money to an infant;⁶⁹ and, therefore, he is subrogated in equity to the rights of one from whom the necessities were purchased.⁷⁰

§ 256. What constitutes insanity.

In the early decisions little distinction is made between

⁶⁴ *Creagh v. Tunstall*, 98 Ala. 249, 12 So. 713; *Merwin's App.*, 72 Conn. 167, 172, 43 Atl. 1055, 1057; *Sawyer v. Lufkin*, 56 Me. 308; *Darby v. Cabanné*, 1 Mo. App. 126; *Stannard v. Burns*, 63 Vt. 244, 22 Atl. 460; *Maughan v. Burns*, 64 Vt. 316, 23 Atl. 583. But not if the guardian is making adequate provision. *Hamilton v. Pickett* (Conn.), 104 Atl. 162.

⁶⁵ *Surles v. Pipkin*, 69 N. C. 513.

⁶⁶ *Richardson v. Strong*, 13 Ired. L. 106, 55 Am. Dec. 430. See *Edson v. Hammond*, 142 N. Y. App. Div. 693, 127 N. Y. S. 359.

⁶⁷ *Lyon v. Minor*, 174 Mich. 114, 140 N. W. 517, 45 L. R. A. (N. S.) 67.

⁶⁸ *Drew v. Nunn*, 4 Q. B. D. 661;

Pearl v. McDowell, 3 J. J. Marsh. 659, 20 Am. Dec. 199; *Dalton v. Dalton*, 172 Ky. 585, 189 S. W. 902; *Shaw v. Thompson*, 16 Pick. 198, 26 Am. Dec. 655; *Stuckey v. Mathes*, 24 Hun, 461.

⁶⁹ See *supra*, § 243; and *Bank of Rector v. Parrish*, 131 Ark. 216, 198 S. W. 689.

⁷⁰ *In re Beavan*, [1912] 1 Ch. 196. See criticism of this case in 25 Harv. L. Rev. 725. In *Henry v. Knight* (Ind. App.), 122 N. E. 675, one who furnished support to a lunatic, which another was bound by contract to furnish was held entitled to be subrogated to the lunatic beneficiary's right to enforce the contract.

different kinds of lunatics or different kinds of insanity. It was indeed recognized from early times that a lunatic might enjoy lucid intervals and that contracts made during such intervals were valid.⁷¹ This rule, of course, still prevails.⁷² In modern times it has, however, been recognized that a person may be insane for some purposes and yet be perfectly able to reason upon other matters. The question, therefore, should depend and, according to the great weight of modern authority, does depend upon whether the alleged lunatic had sufficient reason to enable him to understand the nature and effect of the act in dispute.⁷³ It is not necessary, however, that a person should have average mental capacity in order to make a valid bargain. Mere weakness of mind or a condition approaching imbecility is not sufficient to constitute what the law regards as insanity.⁷⁴ Such condition, however, is highly important, for frequently advantage is taken by designing persons of those in this way partially disqualified to protect themselves, and evidence of weakness of mind, together with other circumstances, may be important in

⁷¹ *Beverley's Case*, 4 Co. Rep. 123b; *Hall v. Warren*, 9 Ves. 605.

⁷² *Critchfield v. Easterday*, 26 App. D. C. 89; *Lilly v. Waggoner*, 27 Ill. 395; *Jones' Admr. v. Perkins*, 5 B. Mon. (Ky.) 222; *Richardson v. Smart*, 152 Mo. 623, 54 S. W. 542, 75 Am. St. Rep. 488; *Gingrich v. Rogers*, 69 Neb. 527, 96 N. W. 156; *Wright v. Market Bank* (Tenn. Ch. App.), 60 S. W. 623; *McPeck v. Graham*, 56 W. Va. 200, 49 S. E. 125.

⁷³ *Baldwyn v. Smith*, [1900] 1 Ch. 588; *Parker v. Marco*, 76 Fed. Rep. 510; *Pike v. Pike*, 104 Ala. 642, 16 So. 689; *More v. Calkins*, 85 Cal. 177, 24 Pac. 729; *Ratliff v. Baltzer's Adm.*, 13 Idaho, 152, 89 Pac. 71; *Searle v. Galbraith*, 73 Ill. 269; *Weller v. Cope-land*, 285 Ill. 150, 120 N. E. 578; *Raymond v. Wathen*, 142 Ind. 367, 41 N. E. 815; *Elwood v. O'Brien*, 105 Iowa, 239, 74 N. W. 740; *Swartwood v. Chance*, 131 Iowa, 714, 109 N. W. 297; *Mathews v. Nash*, 151 Ia. 125, 130 N. W. 796;

Meigs v. Dexter, 172 Mass. 217, 52 N. E. 75; *Sutcliffe v. Heatley* (Mass.), 122 N. E. 317; *Chadwell v. Reed*, 198 Mo. 359, 95 S. W. 227; *Dewey v. All-gire*, 37 Neb. 610, 40 Am. St. Rep. 468; *Dennett v. Dennett*, 44 N. H. 531, 84 Am. Dec. 97; *Sbarbero v. Miller*, 72 N. J. Eq. 248, 65 Atl. 472; *Aldrich v. Bailey*, 132 N. Y. 85, 30 N. E. 264; *Aikens v. Roberts*, 164 N. Y. S. 502; *Sprinkle v. Wellborn*, 140 N. C. 163, 111 Am. St. Rep. 827; *Cathcart v. Matthews*, 105 S. Car. 329, 89 S. E. 1021; *Buckey v. Buckey*, 38 W. Va. 168, 18 S. E. 383.

⁷⁴ *Soberanes v. Soberanes*, 106 Cal. 1, 39 Pac. 39, 527; *Harrison v. Otley*, 101 Iowa, 652, 70 N. W. 724; *Entwistle v. Meikle*, 180 Ill. 9, 21, 54 N. E. 217; *Richardson v. Travelers' Ins. Co.*, 109 Me. 117, 82 Atl. 1005; *Wherry v. Latimer*, 103 Miss. 524, 60 So. 563; *Mulloy v. Ingalls*, 4 Neb. 115; *Ducker v. Whitson*, 112 N. C. 44, 16 S. E. 854.

establishing that a bargain is voidable for fraud or undue influence, although it fails to establish insanity. If insanity is established the burden is upon one who claims that a transaction took place during a lucid interval to show sufficient capacity at the time in question,⁷⁵ but this rule has been denied if the insanity is only occasional and intermittent.⁷⁶

§ 257. During guardianship lunatics' bargains are void.

In the discussion thus far it has been assumed that the lunatic was not under guardianship. When a guardian is appointed he thereupon becomes vested with the control of the property of his ward, and he alone is capable of transferring it.⁷⁷ It may also be assumed that all contracts of a lunatic made during guardianship are held void.⁷⁸ The guardian represents the lunatic for the purpose of all business transactions. So far is this doctrine carried that even though the lunatic has a lucid interval or regains his reason while the guardianship still exists a transaction with him is void.⁷⁹

⁷⁵ *Rogers v. Rogers*, 6 Pen. 267 (Del.), 66 Atl. 374; *Richardson v. Smart*, 152 Mo. 623, 54 S. W. 542, 75 Am. St. Rep. 488; *Gingrich v. Rogers*, 69 Neb. 527, 96 N. W. 156; *Fishburne v. Ferguson*, 84 Va. 87, 4 S. E. 575.

⁷⁶ *McPeck v. Graham*, 56 W. Va. 200, 49 S. E. 125.

⁷⁷ *Re Walker*, [1905] 1 Ch. 160; *Cockrill v. Cockrill*, 92 Fed. 811, 34 C. C. A. 254; *McKenzie v. Donnell*, 151 Mo. 431, 52 S. W. 214; *Hughes v. Jones*, 116 N. Y. 67, 22 N. E. 446, 5 L. R. A. 632, 15 Am. St. Rep. 386; *Sander v. Savage*, 75 N. Y. App. Div. 333, 78 N. Y. S. 189.

⁷⁸ *Griswold v. Butler*, 3 Conn. 227; *Church v. Rosenstein*, 85 Conn. 279, 82 Atl. 568; *Weeks v. Reliance Fertilizer Co.*, 20 Ga. App. 498, 93 S. E. 152; *Bradbury v. Place (Me.)*, 10 Atl. 461; *Wait v. Maxwell*, 5 Pick. 217, 16 Am. Dec. 391; *Leonard v. Leonard*, 14 Pick. 280; *Lynch v. Dodge*, 130 Mass. 458; *Knox v. Haug*, 48 Minn. 58, 50 N. W. 934; *Rannells v. Gerner*, 80

Mo. 474; *McKenzie v. Donnell*, 156 Mo. 431, 451, 456, 52 S. W. 214; *Burgedorff v. Hamer*, 95 Neb. 113, 145 N. W. 250. But see *Taylor v. Superior Court*, 30 R. I. 560, 76 Atl. 644, where the court held the guardian might ratify legal proceedings begun by the ward.

⁷⁹ *In re Walker*, [1905] 1 Ch. 160; *Gingrich v. Rogers*, 69 Neb. 527, 96 N. W. 156; *Carter v. Beckwith*, 128 N. Y. 312, 28 N. E. 582; *Sander v. Savage*, 75 N. Y. App. Div. 333, 78 N. Y. S. 189. In *Leonard v. Leonard*, 14 Pick. 280, 284, the court said: "We are of opinion, that as to most subjects, the decree of the probate court, so long as the guardianship continues, is conclusive evidence of the disability of the ward; but that it is not conclusive in regard to all. For example, the ward, if in fact of sufficient capacity, may make a will, for this is an act which the guardian cannot do for him." But when the guardianship has terminated for whatever cause, as by re-

The contrary has, however, been held where the lunatic has regained his reason and the guardianship had been allowed to fall into disuse although not legally terminated.⁸⁰ Stress is laid in many of the cases upon whether the lunatic has been so found by inquisition. If so found it is held in some States that his transactions are void.⁸¹ The better view seems to be, however, that the finding merely establishes the fact of insanity as existing at that time, unless a statute expressly provides that the finding makes subsequent agreements void.⁸² It is the appointment of a guardian which works the change in the legal power of a lunatic to act for himself.⁸³ After adjudication that he is insane, however, a man's insanity is presumed to continue in the absence of evidence to the contrary.⁸⁴

§ 258. Drunkenness—when it incapacitates.

It is not every degree of intoxication that renders a person incapable in a legal sense. In order to make out incapacity it is necessary to prove that a man was so far intoxicated

removal of the guardian, there is no longer a conclusive presumption of disability. *Willwerth v. Leonard*, 156 Mass. 277, 31 N. E. 299. See also *Mohr v. Tulip*, 40 Wis. 66; and while that guardianship lasts it is conclusive only upon domestic courts. *Talbot v. Chamberlain*, 149 Mass. 57, 59, 20 N. E. 305, 3 L. R. A. 254.

⁸⁰ *Thorpe v. Hanscom*, 64 Minn. 201, 66 N. W. 1; *Blaisdell v. Holmes*, 48 Vt. 492.

⁸¹ *Gillet v. Shaw*, 117 Md. 508, 83 Atl. 394, 42 L. R. A. (N. S.) 47; *Rutledge v. Rutledge*, 118 Md. 552, 85 Atl. 661; *West v. Seaboard Air Line Ry. Co.*, 151 N. C. 231, 65 S. E. 979.

⁸² See *Snook v. Watts*, 11 Beav. 105; *McCormack v. Littler*, 85 Ill. 62; *Stitzel v. Farley*, 148 Ill. App. 635; *Mott v. Mott*, 49 N. J. Eq. 192, 22 Atl. 997; *In re Gangwere's Est.*, 14 Pa. 417, 53 Am. Dec. 554.

⁸³ *Weeks v. Reliance Fertilizer Co.*,

20 Ga. App. 498, 93 S. E. 152; *Wolcott v. Conn. Life Ins. Co.*, 137 Mich. 309. In *Hughes v. Jones*, 116 N. Y. 67, 22 N. E. 446, 5 L. R. A. 632, 15 Am. St. Rep. 386, the rule is stated that before office found though within the period during which the lunatic is declared by the finding to have been insane, the evidence of incapacity is only presumptive and may be overthrown by satisfactory evidence of sanity, but "the presumption whether conclusive or *prima facie* extends to all the world, and includes all persons whether they have notice of the inquisition or not." *Cf. Hill v. Day*, 34 N. J. Eq. 150. By statute in New York after inquisition and confirmation a lunatic's contracts are void. *O'Reilly v. Sweeney*, 54 N. Y. Misc. Rep. 408, 105 N. Y. S. 1033.

⁸⁴ *Redden v. Baker*, 86 Ind. 191; *Mutual Life Ins. Co. v. Wiswell*, 56 Kan. 765, 44 Pac. 996, 35 L. R. A. 258.

as to be incapable in fact of understanding the nature of the transaction in which he engaged.⁸⁵

§ 259. Drunkards' bargains voidable.

If intoxication is so extreme as to produce legal incapacity, the effect is generally held to be the same as that of insanity; consequently, a contract or sale made under such circumstances is voidable.⁸⁶ In some jurisdictions where insanity is said to make a lunatic's transactions void, extreme intoxication is also said to make bargains void and for the same reason, namely—lack of mutual assent.⁸⁷ But in Alabama the court

⁸⁵ *Hawkins v. Bone*, 4 F. & F. 311; *Conley v. Nailor*, 118 U. S. 127, 6 S. Ct. 1001, 30 L. Ed. 112; *Taylor v. Purcell*, 60 Ark. 606, 31 S. W. 567; *Cook v. Bagnell Timber Co.*, 78 Ark. 47, 94 S. W. 696; *Caulkins v. Fry*, 35 Conn. 170; *Bates v. Ball*, 72 Ill. 108; *Shackleton v. Sebree*, 86 Ill. 616; *Watson v. Doyle*, 130 Ill. 415, 22 N. E. 613; *Ryan v. Schutt*, 135 Ill. App. 554; *Kuhlman v. Wieben*, 129 Iowa, 188, 105 N. W. 445; *Glenn v. Martin*, 179 Ky. 295, 200 S. W. 456; *Wright v. Fisher*, 65 Mich. 275, 32 N. W. 605, 8 Am. St. Rep. 886; *Johns v. Fritchey*, 39 Md. 258; *Rogers v. Warren*, 75 Mo. App. 271; *McKeon v. Van Slyck*, 223 N. Y. 392, 119 N. E. 851; *Spoonheim v. Spoonheim*, 14 N. Dak. 380, 104 N. W. 845; *French v. French*, 8 Ohio, 214, 31 Am. Dec. 441; *Bush v. Breinig*, 113 Pa. St. 310, 6 Atl. 86, 57 Am. Rep. 469; *Reynolds v. Dechaums*, 24 Tex. 174, 76 Am. Dec. 101; *Houston, etc., R. R. Co. v. Tierney*, 72 Tex. 312, 12 S. W. 586; *Loftus v. Maloney*, 89 Va. 576, 16 S. E. 749; *Bursinger v. Bank*, 67 Wis. 75, 30 N. W. 290, 58 Am. Rep. 848. The rule was applied with considerable strictness in *Caulkins v. Fry*, 35 Conn. 170, and *Johns v. Fritchey*, 39 Md. 258. In the former case the court held that if the drunkard could remember the following morning what he had done,

he was not so far intoxicated as to be legally incapacitated. As expressed in a recent Illinois decision the drunkenness must have been such as to drown reason, memory, and judgment, and to impair the mental faculties to such an extent as to render the party *non compos mentis* for the time being. *Martin v. Harsh*, 231 Ill. 384, 83 N. E. 164, 13 L. R. A. (N. S.) 1000.

⁸⁶ *Gore v. Gibson*, 13 M. & W. 623; *Matthews v. Baxter*, L. R. 8 Ex. 132; *Snead v. Scott*, 182 Ala. 97, 62 So. 36; *Sellers v. Knight*, 185 Ala. 96, 64 So. 329; *Phelan v. Gardner*, 43 Cal. 306; *Caulkins v. Fry*, 35 Conn. 170; *Cummings v. Henry*, 10 Ind. 109; *Mansfield v. Watson*, 2 Iowa, 111; *Glenn v. Martin*, 179 Ky. 295, 200 S. W. 456; *Johns v. Fritchey*, 39 Md. 258; *Foss v. Hildreth*, 10 Allen, 76; *Carpenter v. Rodgers*, 61 Mich. 384, 28 N. W. 156, 1 Am. St. Rep. 595; *Newell v. Fisher*, 11 Sm. & M. 431, 49 Am. Dec. 66; *Broadwater v. Darne*, 10 Mo. 277; *Van Wyck v. Brasher*, 81 N. Y. 260; *Baird v. Howard*, 51 Ohio St. 57, 36 N. E. 732, 22 L. R. A. 846, 46 Am. St. Rep. 550; *Straughan v. Cooper*, 41 Okl. 515, 139 Pac. 265; *Bush v. Breinig*, 113 Pa. St. 310, 6 Atl. 86.

⁸⁷ *Taylor v. Purcell*, 60 Ark. 606, 31 S. W. 567; *Shackleton v. Sebree*, 86 Ill. 616; *Berkley v. Cannon*, 4 Rich.

makes a distinction between intoxication and insanity, holding that the former cannot render a bargain void.⁸⁸ Although going beyond the statements of most courts, the doctrine enunciated in New Jersey is sustained, it is submitted, by sound reason: "Drunkenness may be insanity, but it is voluntary. It is no excuse from the consequences of crime; why should it be against those of acts affecting property? Sound policy requires that it should not, unless brought about by the other party, or unless it was so total as to be palpable evidence of fraud in the person entering into a contract with one so intoxicated."⁸⁹ If an intoxicated person is able to appear to give intelligent assent he should not be allowed to set up his own misconduct to defeat one who has been deceived in dealing with him. Doubtless the reason why such a rule is not more generally expressed in the books is because cases in fact can rarely arise where one dealing with an intoxicated person is unaware of the fact. Insane persons frequently appear to be sane, but persons so far intoxicated as to have lost their intelligence must almost invariably give indication of their condition to any one dealing with them. If, however, we suppose the case of an offer signed in extreme intoxication and sent to some one at a distance, it is submitted that if accepted and certainly if acted on, the intoxicated person should be bound.⁹⁰

§ 260. Effects of drunkards' bargains.

If a bargain is voidable on the ground of intoxication, the same consequences follow as in the case of a bargain voidable

L. 136; *Hunter v. Tolbard*, 47 W. Va. 258, 34 S. E. 737. A note signed under these circumstances was said to be "void as between the parties" in *Green v. Gunsten*, 154 Wis. 69, 142 N. W. 261, 46 L. R. A. (N. S.) 212.

⁸⁸ *Oakley v. Shelley*, 129 Ala. 467, 29 So. 385. The court said at p. 470: "Unlike general and permanent insanity and idiocy, drunkenness does not create such legal incapacity as will alone render a contract wholly void. Though it may furnish the party suffering from it ground for

rescission, yet being voidable only, the contract may be affirmed and made binding by him after he becomes sober." See also *Snead v. Scott*, 182 Ala. 97, 62 So. 36; *Sellers v. Knight*, 185 Ala. 96, 64 So. 329.

⁸⁹ *Burroughs v. Richman*, 1 Green (N. J. L.), 233, 238, 23 Am. Dec. 717. See also *Cook v. Bagnell Timber Co.*, 78 Ark. 47, 54, 94 S. W. 695, quoted *infra*, § 263, n. 3.

⁹⁰ See *Youn v. Lamont*, 56 Minn. 216, 57 N. W. 478.

for insanity. The transaction may, therefore, be ratified.⁹¹ What constitutes ratification gives rise to the same question as in the case of insanity, and, therefore, a failure to disaffirm the transaction within a reasonable time after becoming sober will, unless the drunkard remains ignorant of what he did when intoxicated, amount to a ratification.⁹² If goods are bought when drunk and kept when sober, the buyer must pay the price. The same reasons that require return of consideration as a condition precedent to the avoidance of a lunatic's bargain apply with even greater force to the case of an intoxicated person,⁹³ and if the consideration is not restored the drunkard may be sued for it.⁹⁴ Even though the drunkard should have spent or wasted the consideration while intoxicated, the rule should not be relaxed unless the person dealing with the drunkard knowingly took fraudulent advantage of his condition.⁹⁵

§ 261. Bona fide purchasers.

As the lack of intelligence of an intoxicated person is his own fault, his privilege of avoiding a bargain made while intoxicated should not enable him to regain property transferred by him and subsequently transferred to one who paid value for it in good faith without notice of the circumstances under which it had been acquired from the original owner, or

⁹¹ *Matthews v. Baxter*, L. R. 8 Ex. 132; *Johnson v. Harmon*, 94 U. S. 371, 24 L. Ed. 271; *Oakley v. Shelley*, 129 Ala. 467, 29 So. 385; *Sellers v. Knight*, 185 Ala. 96, 64 So. 329; *Strickland v. Parlin & Orendorf Co.*, 118 Ga. 213, 44 S. E. 997; *Hawley v. Howell*, 60 Iowa, 79, 14 N. W. 199; *Carpenter v. Rodgers*, 61 Mich. 384, 28 N. W. 156, 1 Am. St. Rep. 595; *Easton's Adm. v. Perry*, 29 Mo. 96; *Smith v. Williamson*, 8 Utah, 219, 30 Pac. 753. But see *Newell v. Fisher*, 11 Sm. & M. 431, 49 Am. Dec. 66; *Berkley v. Cannon*, 4 Rich. L. 136.

⁹² *Wright v. Waller*, 127 Ala. 557, 29 So. 57, 54 L. R. A. 440; *Mansfield v. Watson*, 2 Iowa, 111; *Youn v. Lamont*, 56 Minn. 216, 57 N. W. 478;

Spoonheim v. Spoonheim, 14 N. Dak. 380, 104 N. W. 845; *Bush v. Breinig*, 113 Pa. St. 310, 316, 6 Atl. 86, 57 Am. Rep. 469; *Fowler v. Meadow Brook Co.*, 208 Pa. St. 473, 57 Atl. 959; *Williams v. Inabnet*, 1 Bailey, 343; *Smith v. Williamson*, 8 Utah, 219, 30 Pac. 753. *Contra*, *Reinskopf v. Rogge*, 37 Ind. 207.

⁹³ *Joest v. Williams*, 42 Ind. 565, 13 Am. Rep. 377; *Fowler v. Meadow Brook Co.*, 208 Pa. St. 473. Compare *Thackrah v. Haas*, 119 U. S. 499, 7 S. Ct. 311, 30 L. Ed. 486.

⁹⁴ *Haneklau v. Felchlin*, 57 Mo. App. 602.

⁹⁵ Compare *Thackrah v. Haas*, 119 U. S. 499, 7 S. Ct. 311, 30 L. Ed. 486.

to escape liability to a holder in due course of negotiable paper made by him. The latter question has arisen several times and it has been said that the better opinion supports the right of the maker, if his drunkenness is so complete as to suspend all rational thought, to set up his condition as a defence even against such a holder.⁶⁶ Most modern decisions, however, with good reason, take the opposite view.⁶⁷ In the case of ordinary chattel property, as in the case of negotiable paper, if a title voidable for a cause personal to the original grantee is transferred to one who pays value without notice of the voidable character of the title, an indefeasible title is created. It has already been argued and reasons have been given for confining a drunkard's right of avoiding his contracts to such as were made with persons who knew of his condition.⁶⁸ The same reasons should protect a *bona fide* purchaser. Under the Uniform Sales Act it is clear that there can be no right to avoid a voidable title after the property has been acquired by a *bona fide* purchaser for value without notice.⁶⁹

§ 262. Necessaries.

For the same reason and to the same extent as in the case of lunatics, intoxicated persons are liable on principles of quasi-contract for necessities which have been furnished to them.¹

§ 263. Fraud upon intoxicated persons.

Bargains made with intoxicated persons are peculiarly likely to have been induced by fraud. No different legal principle covers such cases from that applicable to all cases

⁶⁶ Daniel on Negotiable Instruments, 214, quoting from *Gore v. Gibson*, 13 M. & W. 623. "It is just the same as if the defendant had written his name on the bill in his sleep in the state of somnambulism." To the same effect see *Green v. Gunsten*, 154 Wis. 69, 142 N. W. 261, 46 L. R. A. (N. S.) 212.

⁶⁷ *Page v. Krekey*, 137 N. Y. 307, 33 N. E. 311, 21 L. R. A. 409, 33 Am. St. Rep. 731; *State Bank v.*

McCoy, 69 Pa. St. 204, 8 Am. Rep. 246; *McSparran v. Neeley*, 91 Pa. St. 17; *Smith v. Williamson*, 8 Utah, 219, 30 Pac. 753. See also *Miller v. Finley*, 26 Mich. 249, 12 Am. Rep. 306.

⁶⁸ *Supra*, § 259.

⁶⁹ Sec. 24. See *supra*, 233.

¹ *Gore v. Gibson*, 13 M. & W. 623; *McCrillis v. Bartlett*, 8 N. H. 569; *Van Horn v. Hann*, 39 N. J. L. 207; *Brockway v. Jewell*, 52 Ohio St. 187, 39 N. E. 470.

of fraud, but in view of the obvious impropriety of entering into a bargain with an intoxicated person, such a transaction should be closely scrutinized. It is, of course, not essential in order to make out a case of fraudulent advantage to show that the intoxication was sufficient altogether to overthrow the reasoning powers if it was sufficient to diminish the intelligence, and the party dealing with the intoxicated person knowingly made use of the situation in order to induce the bargain. If such a case has been made out the transaction may be set aside in any proceeding against the fraudulent party.² Especially if the intoxication was brought about by the other party is there ground for suspecting the good faith of the transaction and reason for setting it aside.³

² *Say v. Barwick*, 1 Ves. & B. 195. *Cooke v. Clayworth*, 18 Ves. 12; *Holland's Adm. v. Barnes*, 53 Ala. 83, 25 Am. Rep. 595; *Murray v. Carlin*, 67 Ill. 286; *Henry v. Ritenour*, 31 Ind. 136; *Warnock v. Campbell*, 25 N. J. Eq. 485; *Baird v. Howard*, 51 Ohio St. 57, 36 N. E. 732, 22 L. R. A. 846, 46 Am. St. Rep. 550; *Birdsong v. Birdsong*, 2 Head, 289; *Jones v. McGruder*, 87 Va. 360, 12 S. E. 792.

³ *Johnson v. Medlicott*, 3 P. Wms. 130, note; *Wilcox v. Jackson*, 51 Iowa, 208, 1 N. W. 513; *Newell v. Fisher*, 11 Sm. & M. 431, 49 Am. Dec. 66; *O'Conner v. Rempt*, 29 N. J. Eq. 156; *Dunn v. Amos*, 14 Wis. 106. In *Cook v. Bagnell Timber Co.*, 78 Ark. 47, 54, 94 S. W. 695, the court said: "In general, courts of equity, as a matter of public policy, do not incline on the one hand to lend their assistance to a person who has obtained an agreement or deed from another in a state of intoxication; and, on the other hand, they are equally unwilling to assist the intoxicated party to get rid of his agreement or deed merely on the ground of his intoxication at the time. They will leave the parties to their ordinary remedies at law, unless there is some fraudulent contrivance or some

imposition practised." 1 Story, Eq. Jur., § 231.

"The rule deducible from this statement, and from all the authorities, is that the contract of a person partially intoxicated at the time will not be set aside because of his intoxication. That condition results from his own act, and entitles him to no consideration whatever in either a court of law or of equity. It is not because of his intoxication that courts will annul the contract, but because of some fraud or imposition perpetrated by the person who takes advantage of his condition to make a contract with him. The courts merely grant relief from the fraud or imposition perpetrated. Therefore, while the inadequacy or excessiveness of the consideration for the contract may be a circumstance tending to establish the perpetration of a fraud, it does not, of itself, when good faith is affirmatively shown, constitute such a fraud or imposition as will afford grounds for setting aside a contract. *Birdsong v. Birdsong*, 2 Head (Tenn.) 290.

"This view, it is argued, puts a partially intoxicated person upon precisely the same plane as a perfectly sober man, with reference to his right to

avoid a contract. Not so. One who deals with a sober man upon equal footing owes him only the duty not to mislead him to his prejudice by a material false representation concerning the subject-matter, or by a failure to disclose a material fact within his knowledge which the circumstances may make it his duty to disclose, whereas one who deals with a person whom he knows to be partially intoxicated owes him the duty not to take advantage of his condition by know-

ingly imposing a harsh contract upon him.

"In either case equity will give relief from a contract induced by material false representations which were relied upon, or by failure to disclose material facts when peculiar circumstances existed which called for such disclosure; but only in the case of the drunken man will knowledge of the drunkenness, coupled with knowledge of the harshness or improvidence of the contract, be deemed such a fraud or imposition as affords ground for relief."

CHAPTER X

CAPACITY OF PARTIES. MARRIED WOMEN, CORPORATIONS

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§ 264. Married women.

The incapacity of married women at common law may be considered in connection with their rights and liabilities under contracts, and as affecting attempted transfers of property to or by a married woman.

§ 265. Rights and liabilities under contracts.

A married woman, during the life of her husband could not bind herself by a contract,¹ nor by representing herself as unmarried or a widow, render herself by estoppel liable on an agreement.² If she were liable upon a contract at the time of her marriage the liability upon this contract passed to her husband. Upon such ante-nuptial liabilities, however, the husband could not be sued alone,³ and if the wife died before judgment had been recovered against both, the husband's liability was discharged,⁴ except so far as he might have assets in his hands as her administrator. If the

¹ Com. Dig. Baron & Feme (Q); *James v. Fowks*, 12 Mod. 101. ard, 91 N. J. L. 379, 103 Atl. 1001. And see *supra*, § 245.

² *Cannan v. Farmer*, 3 Exch. 698; ³ *Garrard v. Guibilei*, 13 C. B. (N. S.) 832.

Liverpool &c. Assoc. v. Fairhurst, 9 Exch. 422; *Wright v. Leonard*, 11 C. B. (N. S.) 258; *First Nat. Bank v. Shum-*

⁴ Com. Dig. Baron & Feme (C. 2).
⁵ *Woodman v. Chapman*, 1 Campb. 189.

husband died before judgment had been recovered, the widow was again liable as if she had never been married.⁵ The capacity of a married woman to acquire rights under a contract, though limited, was not absolutely excluded. Promises for which she rendered personal services were recognized as giving her a contractual right.⁶ It is true that the husband might reduce this right to possession and thereby acquire the fruits of it himself, but unless he did so the right survived to the wife or, if she died during her husband's life, passed to her representatives.⁷ A contractual right which a woman had before marriage was dealt with in the same way. It might be reduced to possession by the husband, but in the meantime was regarded as the wife's chose in action and upon her husband's death, or her own, was dealt with accordingly.⁸

§ 266. Effects of attempted transfers.

As the chattels a woman had upon her marriage immediately passed to her husband, she was obviously incapacitated from transferring such property even aside from her inability to make a valid bargain, because she had no title.⁹ If chattel property was transferred to her while she was married, it vested immediately in the husband in the same way as property owned by her at the time of her marriage, and it was immaterial whether the property was acquired by the wife's personal services, by gift, or otherwise.¹⁰ She might, however, take land by grant or devise if her husband did not dissent;¹¹ and even her husband's dissent would not preclude her from taking as heir.¹² The husband, however, was entitled to the rents and profits of land owned by the wife, whenever or however she may have acquired it.¹³

⁵ See cases in the following note.

⁷ *Brashford v. Buckingham*, Cro. Jac. 77; *Dalton v. Midland, etc., Ry. Co.*, 13 C. B. 474, 478.

⁸ Com. Dig., Baron & Feme (E. 3), (Z).

⁹ "If the wife sell or dispose of the money or goods of the husband without his assent the sale is void, and the

husband may have trover." Com. Dig., Baron & Feme (Q.); *Manby v. Scott*, 1 Sid. 109, 122.

¹⁰ Com. Dig., Baron & Feme (E. 3); *Buckley v. Collier*, 1 Salk. 114.

¹¹ Com. Dig. Baron & Feme (P. 2); *Perkins, Profitable Book*, § 43.

¹² *Dane's Abr.* 368.

¹³ 1 Bl. Com. 442.

§ 267. Modifications in equity.

The almost total denial of property rights to a married woman under the common-law system was modified in equity by the doctrine of separate estate. Originally this was given effect by conveying to trustees property of which a married woman was made the beneficiary.¹⁴ Though it remained customary to convey the property to trustees, it became also permissible to make the conveyance directly to the married woman for her separate use. A court of equity would then compel her husband to hold the legal estate, which he took by virtue of the common-law rules, in trust for his wife for her separate use. As to property held to the separate use of a married woman, courts of equity gave her a limited power of contracting and charging it. In order that a contract should bind the separate estate, it was necessary that it should have been made with reference to the separate estate or that either from express language or otherwise the courts should find a purpose to charge the separate estate.¹⁵ In order to protect married woman from improvident dispositions of their separate property, it became usual in settlements of property on married women to add a clause restraining them from "anticipation." The effect of this clause was to deprive the woman of power to alienate or charge the property.¹⁶ The restraint might be confined to the principal or it might extend also to the income.¹⁷

§ 268. Modern statutes.

In England the Married Woman's Property Act of 1882 greatly extended the rights of married woman. In the United States there are statutes in nearly if not quite all the States extending or changing the rules of the common law. Except in so far as those rules are changed by statute, they still exist,¹⁸ but the statutes in most States are so far reaching that little

¹⁴ Hayne, *Outlines of Equity*, Lecture VII; *Fettiplace v. Gorges*, 1 Ves. Jr. 46.

¹⁵ *Murray v. Barlee*, 3 Myl. & K. 209.

¹⁶ *Re Currey*, 32 Ch. D. 361.

¹⁷ *Cooper v. Macdonald*, 7 Ch. D. 288.

¹⁸ *Bank v. Partee*, 99 U. S. 325, 25 L. Ed. 390; *Parker v. Lambert*, 31 Ala. 89; *Flesh v. Lindsay*, 115 Mo. 1, 37 Am. St. Rep. 374.

is left of the old rules. The legislation in the different States, however, varies widely. Some States broadly provide that married women have the same rights and powers as if sole, other States do not allow a married woman to make certain kinds of contracts, such as contracts of suretyship or contracts with her husband. It may be assumed in most jurisdictions that a married woman now has the power to enter into ordinary contracts and dealings with personal property. A more detailed statement of American Statutes is contained in the following section.

§ 269. American statutory modifications of the common law relating to the contractual capacity of married women.

ALABAMA. A married woman has generally full contractual capacity, and a husband and wife may contract with one another, but a wife cannot either directly or indirectly contract as surety for her husband.¹⁹

ALASKA. A married woman has full contractual capacity.²⁰

ARIZONA. A married woman has full contractual capacity but she cannot bind the community property by her contracts.²¹

ARKANSAS. The Constitution secures to married women enjoyment of their property as if they were unmarried, but no statutory change was made in the contractual capacity of a married woman until 1915, when she was given power to contract as if sole.²²

CALIFORNIA. A married woman may contract as if sole, but community property is not bound by such contracts unless the husband joins. Husband and wife may contract with one another.²³

COLORADO. A married woman may contract as if sole.²⁴

CONNECTICUT. A married woman may contract with third persons.²⁵

¹⁹ Code (1907), Secs. 4492, 4497.

²⁰ Code (1907), Part V, Sec. 68.

²¹ Rev. Stat. (1913), Sec. 3852.

²² Kirby & Castle's Dig. of Stat.

(1916), Sec. 6120; *Walker v. Arkansas*
Nat. Bank, 256 Fed. 1 (C. C. A.).

²³ Civ. Code, § 158.

²⁴ Mills Annot. Stat. (1912), § 4759.

²⁵ Gen. Stat. (1918), § 5274.

DELAWARE. A married woman may make a bond or mortgage, and may make any necessary contracts with respect to her property. Aside from this enlargement of the common law, its rules are still in force.²⁶

DISTRICT OF COLUMBIA. A married woman may contract fully as if sole except that she cannot contract as surety.^{26a}

FLORIDA. The capacity of a married woman is in general governed by the rules of the common law, but in an agreement in writing she may charge her separate property for the performance of any agreement beneficial to her separate estate, and the court may on petition remove the disabilities of a married woman if she is found to be competent.²⁷

GEORGIA. A married woman may contract as if she were sole with reference to her separate estate, but she cannot bind her estate by a contract of suretyship or by a contract to pay her husband's debts.²⁸

HAWAII. A married woman may contract as if she were sole except that she can neither contract with her husband nor contract for her personal services without her husband's consent in writing.²⁹

IDAHO. A married woman has full power to contract with reference to her separate estate.³⁰

ILLINOIS. A married woman has full contractual capacity except she cannot enter into a partnership unless abandoned or unless her husband is insane or in prison.³¹

INDIANA. A married woman may contract as if sole except that she cannot become surety.³²

IOWA. A married woman has full contractual capacity.³³

KANSAS. A married woman may make any contract with reference to her property; may engage in any occupation as if sole.³⁴

KENTUCKY. A married woman has full contractual capacity except that she cannot make an executory contract to sell

²⁶ Rev. Code (1915), Secs. 3049, 3052.

^{26a} Code (1911), Sec. 1155.

²⁷ Comp. Laws (1914), Secs. 1955-1959.

²⁸ Park's Annot. Code (1914), Sec. 3007.

²⁹ Rev. Laws (1915), Sec. 2951.

³⁰ Rev. Codes (1908), Sec. 2677.

³¹ Rev. Stat. (1917), c. 68, § 6.

³² Burns' Annot. Stat. (1914), §§ 7853, 7855.

³³ Code (1987), Sec. 3164.

³⁴ Gen. Stat. (1915), §§ 6161, 6163.

or mortgage her real estate unless her husband join in the contract.³⁵

LOUISIANA. A married woman cannot bind herself by contract unless authorized by her husband, or by the court, except when she carries on a trade or business separate from her husband. She cannot contract with him or become surety for her husband's debts, even though authorized by him to do so.³⁶

MAINE. A married woman has power to contract as if sole.³⁷

MARYLAND. A married woman since 1898 has power to contract as if sole.³⁸

MASSACHUSETTS. A married woman may contract as if sole but husband and wife cannot contract with one another.³⁹ If a married woman carries on business, either she or her husband must record the nature and place of business, or the property engaged therein is bound for the husband's debts, and the husband as well as the wife is bound for the debts incurred in the business.⁴⁰

MICHIGAN. A married woman may by contract bind her separate estate except that her contract of suretyship is not binding.⁴¹

MINNESOTA. A married woman may contract as if sole, except that a contract for the disposition of her homestead or any part of it is not binding unless her husband joins with her. Husband and wife may contract with one another except in regard to the real estate of either.⁴²

MISSISSIPPI. A married woman may contract as if sole except that gifts or transfers between husband and wife are invalid as are contracts with one another for payment for services.⁴³

³⁵ Ky. Stat. (1915), § 2128.

³⁶ Merrick's Rev. Code (2d ed.), Arts. 122, 125, 131, 1790, 2398.

³⁷ Rev. Stat. (1916), c. 66, Sec. 4.

³⁸ Code (1911), Art. XLV, Sec. 5.

³⁹ Rev. Laws (1902), c. 153, Sec. 2.

But if a debt existed from one to the other prior to the marriage, the debt is not extinguished thereby. A difficulty of procedure arises since neither can sue the other, but as the difficulty

is merely procedural, an assignee of the creditor can successfully sue the debtor. *Delval v. Gagnon*, 213 Mass. 203, 99 N. E. 1095.

⁴⁰ Rev. Laws (1902), c. 153, sec. 10.

⁴¹ See *Bolthouse v. DeSpelder*, 181 Mich. 153, 147 N. Y. 589.

⁴² Gen. Stat. (1913), §§ 1444, 7147.

⁴³ Hemingway's Annot. Code (1917), 2051, 2055.

MISSOURI. A married woman may contract as if sole.⁴⁴

MONTANA. A married woman may contract as if sole.⁴⁵

NEBRASKA. A married woman may contract for her services or may carry on business as if sole. She can bind herself by covenant of warranty when selling her separate estate, but not on covenants in deeds of her husband's land in which she joins.⁴⁶

NEVADA. A married woman may contract in her own name and on obtaining an order of the court may become a sole trader.⁴⁷

NEW HAMPSHIRE. A married woman may contract as if sole except that she cannot bind herself by either contract or conveyance as a surety for her husband, or as assuming his obligations.⁴⁸

NEW JERSEY. A married woman may contract as if sole except that she cannot become an accommodation surety.⁴⁹

NEW MEXICO. A married woman has full power to contract.⁵⁰

NEW YORK. A married woman may contract as if sole and may carry on trade in her own name. Husband and wife may contract with one another except in regard to relieving the husband from liability to support her on contracts affecting the marriage relation.⁵¹

NORTH CAROLINA. Until 1911 a married woman could contract as if sole only if she was a free trader, and this she could not become without the consent of her husband. If she was not a free trader her power to contract in such a way as to bind her property was limited to contracts for her necessary personal expenses, the payment of antenuptial debts or to support her family, unless her husband consented in writing.⁵² By a statute of 1911, she can now contract "so as to affect her real and personal property" as if unmarried.⁵³

⁴⁴ Rev. Stat. (1909), Sec. 8304.

⁴⁵ Civ. Code (1907), §§ 3694, 3734.

⁴⁶ Rev. Stat., §§ 1561, 1562, 1566; *Real v. Hollister*, 17 Neb. 661, 24 N. W. 333.

⁴⁷ Rev. Laws (1912), §§ 2173, 2190.

⁴⁸ Pub. Stat. (1901), §§ 593, 594.

⁴⁹ Comp. St. 1911, p. 3226. See

First Nat. Bank v. Rutter (N. J. L.), 106 Atl. 371.

⁵⁰ Stat. (1915), § 2750.

⁵¹ Domestic Relations Law, § 51.

⁵² Pell's Revisal (1908), §§ 2094, 2112, and notes pp. 1153 *et seq.*

⁵³ Gregory's Supplement (1913), § 2094.

NORTH DAKOTA. A married woman may contract as if sole, and husband and wife may contract with one another.⁵⁴

OHIO. A married woman may contract as if sole, and husband and wife may contract with one another.⁵⁵

OKLAHOMA. A married woman may contract as if sole and husband and wife may contract with one another.⁵⁶

OREGON. A married woman may contract as if sole.⁵⁷

PENNSYLVANIA. A married woman may contract as if sole except that she cannot become an accommodation surety.⁵⁸

RHODE ISLAND. A married woman may contract as if sole.⁵⁹

SOUTH CAROLINA. A married woman may contract as if sole.⁶⁰

SOUTH DAKOTA. A married woman may contract as if sole, and husband and wife may contract with one another.⁶¹

TENNESSEE. The rules of the common law as to married women still prevail with slight exceptions. A married woman's separate estate is bound for the necessities purchased by her for herself or her minor children. If her husband is adjudged insane or deserts her she then acquires the same capacity as if sole.⁶²

TEXAS. A married woman has capacity to contract for necessities or in regard to her separate estate. Beyond this her capacity is limited as at common law.⁶³ Her contracts will not bind community property unless they were incurred for necessities during marriage. A married woman cannot become a partner but may become surety for her husband by pledge or mortgage.⁶⁴

UTAH. A married woman may contract as if sole.⁶⁵

VERMONT. A married woman may contract as if sole with any one but her husband, so far as concerns her separate property except that she can only become surety for her husband by way of mortgage of her property.⁶⁶

⁵⁴ Civ. Code, § 4411.

⁵⁵ Shannon's Annot. Code (1917),

⁵⁶ Page v. Adams Gen. Code (1912), §§ 7999, 8000.

§ 4241 and notes, § 4244.

⁵⁷ Rev. Laws (1910), § 3353.

⁵⁸ Lemons v. Biddy (Tex. Civ. App.), 149 S. W. 1065.

⁵⁹ Lord's Laws (1901), § 7049.

⁶⁰ McEachin's Civ. Stat. (1913), Arts. 4624, 4627 and notes.

⁶¹ 3 Purd. Dig. (13th ed.), p. 2451.

⁶² Comp. Laws (1907), § 1199.

⁶³ Gen. Laws (1909), c. 246, sec. 3.

⁶⁴ Code (1912), § 3761.

⁶⁵ Pub. Stat. (1906), Secs. 3037, 3039; Seaver v. Lang (Vt.), 104 Atl. 877.

⁶⁶ Civ. Code, §§ 98, 105.

VIRGINIA. A married woman may contract as if sole.⁶⁷

WASHINGTON. A married woman may contract as if sole.⁶⁸

WEST VIRGINIA. The rules of the common law still generally prevail. A married woman may deposit money in her own name and give a good receipt on withdrawing it. The husband is liable for antenuptial contracts of his wife to the extent of property acquired from his wife. Her earnings are her own, and if living apart from her husband she may carry on business in her own name.⁶⁹

WISCONSIN. A married woman is not given general power to contract, but she may carry on business in her own name if deserted by her husband, or if he fails to support her.⁷⁰

WYOMING. A married woman may contract as if sole.⁷¹

§ 270. Agency of wife for husband.

Even at common law in early times it was recognized that the wife might be the agent of the husband and, as such, bind him by contracts and purchases. She herself incurred no liability even as a warrantor of her authority,⁷² but under modern statutes, giving a married woman power to contract, this would doubtless be otherwise. Whether a married woman is in any case agent for her husband, except in regard to contracts for necessities, is a question of fact to be determined by the same rules which govern the law of agency in general. So far as express authority is concerned, there is no occasion for discussion. As to implied authority, however, the relation of husband and wife necessarily differentiates the situation from that of ordinary cases of implied authority in the law of agency; though the differences are of fact rather than of legal principle. Where a husband and wife are living together and the wife is in the habit of buying goods and pledging her husband's credit for them and he has been in the habit of paying the price of such goods, it may fairly be inferred that he authorizes the continued purchase of goods of that

⁶⁷ Code, § 2286a.

⁶⁸ Remington's Codes (1915), § 5927.
See *Northern Bank & Trust Co. v. Graves*, 79 Wash. 411, 140 Pac. 328.

⁶⁹ Code (1913), Secs. 3676, 3678, 3682.

⁷⁰ Wis. Stat. (1915), Sec. 2343.

⁷¹ Comp. Stat. (1910), § 3909.

⁷² *Smout v. Ilbery*, 10 M. & W. 1.

character." This implication may, however, be avoided if it appears that the husband warned the seller not to give credit, or if the husband and wife separate.⁷⁴ As to necessities for the wife or family, an obligation is imposed by law upon the husband similar to that which the law imposes upon infants and insane persons in regard to necessities furnished to them.⁷⁵ There is some confusion in the early cases between this obligation of the husband to pay for necessities purchased on his credit by his wife, and his obligation to pay for goods which he had either impliedly or apparently authorized her to buy. The distinction is important because while an implied or apparent authority may be revoked by express prohibition, an obligation imposed by law, sometimes called an "agency by necessity," cannot be. This agency by necessity is limited to cases where the husband is not fulfilling the obligation imposed upon him by law to furnish support to his wife according to his station in life, owing to his fault and not that of his wife; but within this limit the husband is bound even though the necessities are furnished against his will.⁷⁶ Similarly he is liable for her funeral expenses to one who in the husband's absence or because of his refusal to act reason-

⁷² *Wallis v. Biddick*, 22 W. R. 76; *Ryan v. Sams*, 12 Q. B. 460; *Debenham v. Mellon*, 6 A. C. 24; *Dolan v. Brooks*, 168 Mass. 350, 353, 47 N. E. 408; *Bergh v. Warner*, 47 Minn. 250, 50 N. W. 77, 28 Am. St. Rep. 362; *Feiner v. Boynton*, 73 N. J. L. 136, 62 Atl. 420; *Gilman v. Andrus*, 28 Vt. 241, 67 Am. Dec. 713.

⁷⁴ *Etherington v. Parrot*, 1 Salk. 118. See also *Jolly v. Rees*, 15 C. B. (N. S.) 628; *Debenham v. Mellon*, 6 A. C. 24; *McKee v. Cunningham*, 2 Cal. App. 684, 84 Pac. 260; *Hibler v. Thomas*, 99 Ill. App. 355; *Olson Co. v. Youngquist*, 76 Minn. 26, 78 N. W. 870; *Hass v. Brady*, 49 N. Y. Misc. Rep. 235, 96 N. Y. Suppl. 449; *Segelbaum v. Ensminger*, 117 Pa. St. 248, 10 Atl. 759, 2 Am. St. Rep. 662. And as to goods of a character not needed for herself or for ordinary fam-

ily use no inference of authority can be made, as where goods were bought by the wife to establish her sons in business. *Richburg v. Sherwood* (Tex. Civ. App.), 105 S. W. 524.

⁷⁵ Therefore, where support is furnished to a husband and wife jointly under circumstances entitling the person furnishing the support to payment, the liability is solely that of the husband, though by statute the wife is competent to contract. *Lavoie v. Dube*, 229 Mass. 87, 118 N. E. 179.

⁷⁶ *Nissen v. Bendixsen*, 69 Cal. 521, 11 Pac. 29; *Rea v. Durkee*, 25 Ill. 503; *Raynes v. Bennett*, 114 Mass. 424; *Dorrance v. Dorrance*, 257 Mo. 317, 165 S. W. 783; *Tebbetts v. Hapgood*, 34 N. H. 420; *Ott v. Hentall*, 70 N. H. 231, 47 Atl. 80, 51 L. R. A. 226; *Clothier v. Sigle*, 73 N. J. L. 419, 63 Atl. 865.

ably incurs the expense.⁷⁷ If the parties are living apart the plaintiff in order to recover, on the theory of agency by necessity, must show that the separation is due to the husband's fault.⁷⁸ If the wife is sufficiently provided for by her husband she has no agency by necessity to bind him even for articles of a sort which would ordinarily be classified as necessities.⁷⁹ Whether a wife has power to pledge her husband's credit in this way, if she has property of her own from which she could derive an adequate support, is a point which has been somewhat questioned. Two early English cases⁸⁰ denied her that right. In the later of these cases Lord Ellenborough instructing the jury said: "The only credit given to the husband is an implied one, which arises from his situation and the inadequacy of the funds of the wife. . . . If [she was adequately provided for] the circumstance repels all idea of implied credit." This seems still to represent the law of England,⁸¹ and has some support in the United States.⁸² But in a recent New Hampshire case,⁸³ the court in a careful opinion held that the wife's right was not limited by her possession of means sufficient to supply her reasonable wants. On principle, this decision seems sound. Certainly, if the husband is bound to support his wife when she is living with him in spite of the fact that she has means of her own, she ought to be allowed to pledge his credit if he fails to perform that obligation. The early English decisions went on the mistaken idea of an agency implied in fact instead of a right

⁷⁷ See Woodward, Quasi-Cont., § 205. *Hatton v. Cunningham*, 162 N. Y. S. 1008.

⁷⁸ *Brinckerhoff v. Briggs*, 92 Ill. App. 537; *Sturbridge v. Franklin*, 160 Mass. 149, 35 N. E. 669; *Clothier v. Sigle*, 73 N. J. L. 419, 63 Atl. 865; *Sturvetant v. Starin*, 19 Wis. 268. Compare *Baker v. Oughton*, 130 Iowa, 35, 106 N. W. 272.

⁷⁹ *Reid v. Teakle*, 13 C. B. 627; *Hoey v. Hechtman*, 2 Cal. App. 120, 83 Pac. 85 (statutory); *Bergh v. Warner*, 47 Minn. 250, 252, 50 N. W. 77, 28 Am. St. Rep. 362; *Oatman v. Watrous*, 105 N. Y. S. 174. Compare

Wenz v. McCann, 107 N. Y. App. Div. 557, 95 N. Y. S. 462.

⁸⁰ *War v. Huntly*, 1 Salk. 118; *Liddlow v. Wilmot*, 2 Stark. 86.

⁸¹ *Dixon v. Hurrell*, 8 C. & P. 717.

⁸² *Litson v. Brown*, 26 Ind. 489; *Hunt v. Hayes*, 64 Vt. 89, 23 Atl. 920, 15 L. R. A. 661, 33 Am. St. Rep. 917. In both these cases it should be noticed that the wife's means were derived from her husband. In the Vermont case as an allowance expressly for her support, and apparently sufficient for that purpose.

⁸³ *Ott v. Hentall*, 70 N. H. 231, 47 Atl. 80. See also *Eiler v. Crull*, 99

given by law. In any event, the fact that the wife has separate property, if it is inadequate for her support, will not prevent her from pledging her husband's credit.⁸⁴ The wife herself at common law could not be made liable even for necessities.⁸⁵ Now by statute in a few States, not only is she enabled to contract but her separate estate is bound though she herself did not buy the necessities.⁸⁶ Apart from such statutes, if credit is in fact given to the wife, no one else will be liable even though the circumstances were such that she might have pledged her husband's credit.⁸⁷

The word "necessaries," when used in connection with married women, seems to have a wider meaning than when used in regard to infants. In a Massachusetts case,⁸⁸ the court said: "As a general rule the term 'necessaries,' applied to a wife, is not confined to articles of food or clothing required to sustain life, or to preserve decency, but includes such articles of utility as are suitable to maintain her according to the estate and degree of her husband." Accordingly the court refused to say, as matter of law, that a gold chain and locket and a gold watch and chain were not necessities, and evidence that the husband wore diamonds and kept a fast horse was held to be admissible.⁸⁹ The question whether money lent

Ind. 375; *Arnold v. Brandt*, 16 Ind. App. 169, 44 N. E. 936; *Scott v. Carothers*, 17 Ind. App. 673, 47 N. E. 389; *Thorpe v. Shapleigh*, 67 Me. 235; *Dolan v. Brooks*, 168 Mass. 350, 353, 47 N. E. 408; *Prescott v. Webster*, 175 Mass. 316, 56 N. E. 577.

⁸⁴ *Arnold v. Brandt*, 16 Ind. App. 169, 44 N. E. 936; *Prescott v. Webster*, 175 Mass. 316, 56 N. E. 577.

⁸⁵ *Marshall v. Rutton*, 8 T. R. 545.

⁸⁶ *Hurd's Rev. Stat.* Ill (1917), c. 68, § 15; *Iowa Code* (1897), § 3165; *Mo. Rev. St.* (1909), § 8308; *Lord's Oreg. Laws* (1910), § 7039.

⁸⁷ *Bentley v. Griffin*, 5 Taunt. 356; *Metcalf v. Shaw*, 3 Campb. 22; *Shelton v. Pendleton*, 18 Conn. 417; *Taylor v. Shelton*, 30 Conn. 122; *Halle v. Einstein*, 34 Fla. 589, 16 So. 554; *Connerat v. Goldsmith*, 6 Ga. 14; *Dolan v.*

Brooks, 168 Mass. 350, 47 N. E. 408; *Bolthouse v. DeSpelder*, 181 Mich. 153, 147 N. W. 589; *Swett v. Penrice*, 24 Miss. 416; *Tuttle v. Hoag*, 46 Mo. 38, 2 Am. Rep. 481; *Hill v. Goodrich*, 46 N. H. 41; *Stammers v. Maccomb*, 2 Wend. 454; *Simmons v. McElwain*, 26 Barb. 420; *Catron v. Warren*, 1 Coldw. 358; *Carter v. Howard*, 39 Vt. 106; *Zent v. Sullivan*, 47 Wash. 315, 91 Pac. 1088.

⁸⁸ *Raynes v. Bennett*, 114 Mass. 424, 429.

⁸⁹ See further, *Phillipson v. Hayter*, L. R. 6 C. P. 38; *Shelton v. Hoadley*, 15 Conn. 535; *Clark v. Cox*, 32 Mich. 204; *Sauter v. Scrutchfield*, 28 Mo. App. 150. Under an Illinois statute a waist of Honiton lace, costing \$200, was held a "family expense" for which a wife could pledge her hus-

to the wife on the credit of her husband for the purchase of necessities and which is, in fact, expended by her for necessities can be recovered from the husband by the lender should be governed by the same principles previously discussed under the heading of infancy and insanity,⁹⁰ but there is an additional circumstance in the case of husband and wife to which attention is not always directed. If the money is loaned on the credit of the wife there seems no possible ground for holding the husband liable. The English authorities have held broadly that the husband is not liable,⁹¹ and these cases have been followed to some extent in this country.⁹² In equity the husband, on the other hand, has been held liable.⁹³ In the decisions both at law and in equity it does not seem generally to have been regarded as material whether the credit was in fact given by the lender to the husband. This seems, however, a vital point and the importance of it is brought out in a Massachusetts decision.⁹⁴

§ 271. Corporations.

Corporations derive their power from the government which creates them, and if they act beyond the limits of power given them by that government, their acts are at least unwarranted by law and, according to many authorities, absolutely

band's credit. *Ross v. Johnson*, 125 Ill. App. 65. A set of "Stoddard's Lectures" was held not necessities in *Shuman v. Steinel*, 129 Wis. 422, 109 N. W. 74, 7 L. R. A. (N. S.) 1048, 116 Am. St. Rep. 961.

⁹⁰ *Supra*, §§ 243, 255.

⁹¹ *Knox v. Bushell*, 3 C. B. (N. S.) 334; *Paule v. Goding*, 2 F. & F. 585.

⁹² *Zeigler v. David*, 23 Ala. 127; *Gilbert's Ex. v. Plant*, 18 Ind. 308; *Anderson v. Cullen*, 16 Daly, 15; *Schwartz v. Bisland*, 4 N. Y. Misc. 534; *Marshall v. Perkins*, 20 R. I. 34, 37 Atl. 301, 78 Am. St. Rep. 841; *Gill v. Read*, 5 R. I. 343, 73 Am. Dec. 73.

⁹³ *Harris v. Lee*, 1 P. Wms. 482; *Matter of Wood's Est.*, 1 De G. J. & S. 465; *Jenner v. Morris*, 3 De G.

F. & J. 45; *Deare v. Soutten*, L. R. 9 Eq. 151; *Kenyon v. Farris*, 47 Conn. 510, 36 Am. Rep. 86; *Reed v. Crissey*, 63 Mo. App. 184; *Walker v. Simpson*, 7 Watts & S. (Pa.) 83, 42 Am. Dec. 216. See, however, *Leuppie v. Osborn's Ex.*, 52 N. J. Eq. 637, 29 Atl. 433, where the court refused to apply the rule to a case where the husband's default was the result of misfortune.

⁹⁴ *Skinner v. Tirrell*, 159 Mass. 474, 34 N. E. 692, 21 L. R. A. 673, 38 Am. St. Rep. 447. It is perhaps a fair implication from the decision that the court would not have allowed recovery even though the money had been borrowed on the credit of the husband, but the decision was primarily rested on the ground that the wife borrowed the money on her own credit.

void. It is beyond the scope of this work to enter upon a full discussion of the law of *ultra vires*, but the effect upon contracts made by a corporation without charter power to enter into such a transaction may be briefly stated. If the contract in question is wholly executory on both sides it will not be enforced.⁹⁵ It is unnecessary to decide in such cases whether the invalidity is due to lack of power or simply to violation of authority. In the case of contracts which have been executed wholly or partly on either side the distinction becomes important. All jurisdictions agree in allowing some relief to the party which has parted with consideration, but the grounds and the measure of recovery differ. The view which has the support of perhaps a majority of the most authoritative courts is that the contract is absolutely void because the corporation was wholly lacking in capacity to make such a bargain and, consequently, that recovery must be had, on principles of quasi-contract, for the benefit that has been rendered to or by the corporation rather than for what was actually promised.⁹⁶ A number of American courts, however, refuse to adopt this view and probably with greater justice hold that the contract is not void, that the corporation in fact made it and that it is merely a question of public policy, using the words in a broad sense, whether the contract should be enforced. These courts hold that if the contract has been partly executed on either side, the other party will not be allowed to set up the defence of *ultra vires* in order to defeat liability on a promise made in return.⁹⁷

⁹⁵ *Ashbury Ry. Carriage Co. v. Riche*, L. R. 7 H. L. 653; *Atty.-Gen. v. Gt. Eastern Ry. Co.*, 5 A. C. 473; *Camden, etc., R. R. Co. v. May's Landing, etc., R. R. Co.*, 48 N. J. L. 530, 7 Atl. 523; *Jemison v. Citizens' Sav. Bank*, 122 N. Y. 135, 25 N. E. 264, 19 Am. St. Rep. 482. See many decisions collected and discussed in an article by Prof. E. H. Warren, 24 Harv. L. Rev. 534.

⁹⁶ *Central Transportation Co. v. Pullman's Co.*, 139 U. S. 24, 11 Sup. Ct. 478, 35 L. Ed. 55; *Pullman's Co. v. Central Transportation Co.*, 171

U. S. 138, 18 Sup. Ct. 808, 43 L. Ed. 108; *Davis v. Old Colony R. R. Co.*, 131 Mass. 258, 41 Am. St. Rep. 221; *Tennessee Ice Co. v. Raine*, 107 Tenn. 151, 64 S. W. 29. See many decisions collected and discussed in an article by Prof. E. H. Warren in 23 Harv. L. Rev. 495. See also in regard to a municipal corporation, *Shoemaker v. Buffalo Steam Roller Co.*, 83 N. Y. Misc. 162, 144 N. Y. S. 721.

⁹⁷ *Heims Brewing Co. v. Flannery*, 137 Ill. 309, 27 N. E. 286; *Rehberg v. Tontine Surety Co.*, 131 Mich. 135, 91 N. W. 132; *Vought v. Eastern Bldg.*

In the early law it was held that a corporation could not contract except under its corporate seal,⁹⁸ and this rule has persisted in England with some relaxation into the nineteenth century.⁹⁹ But in the United States "a corporation may bind itself, in a matter within its charter powers, by a writing not under seal to the same extent as an individual may."¹

§ 272. Convicts; spendthrifts; aged persons.

Under the early common law one convicted of a felony was incapable of suing though liable to be sued on a contract;² but no such rule prevails generally in America.³ By statute in some States spendthrifts and aged persons may be under guardianship and, if under guardianship, become thereby unable to contract as do insane persons under similar circumstances.⁴

Assoc., 172 N. Y. 508, 65 N. E. 496, 92 Am. St. Rep. 761. See many decisions collected in 29 Am. & Eng. Encyc. 57.

⁹⁸ See for the early authorities, 2 2 Harv. L. Rev. 117.

⁹⁹ East London Water Works v. Bailey, 12 Moo. 532, s. c. 4 Bing. 283; Homersham v. Wolverhampton Water Works Co., 6 Ex. 137; Copper Miners v. Fox, 16 Q. B. 229. Cf. Crampton v. Varna Railway Co., L. R. 7 Ch. 562.

¹ Green Co. v. Blodgett, 159 Ill. 169, 42 N. E. 176; Griffing Bros. Co. v. Winfield, 53 Fla. 589, 43 So. 687; Muscatine Water Co. v. Muscatine Lumber Co., 85 Ia. 112, 52 N. W. 108, 39 Am. St. Rep. 284; Speirs v. Union, etc., Co., 174 Mass. 175, 54 N. E. 497; Leinkauf v. Calman, 110 N. Y. 50, 17 N. E. 389; Mershon, etc., Co. v.

Morris, 148 N. C. 48, 61 S. E. 647. As to the capacity of a corporation to appoint an agent without a seal see *infra*, § 275.

² Banyster v. Trussel, Cro. Eliz. 516; Harvey v. Jacob, 1 B. & Ald. 159.

³ See Estate of Nerac, 35 Cal. 392, 95 Am. Dec. 111; Coffee v. Haynes, 124 Cal. 561, 57 Pac. 482, 71 Am. St. Rep. 99; Estate of Donnelly, 125 Cal. 417, 58 Pac. 61, 73 Am. St. Rep. 62, in which reference is made to a California statute copied from a New York statute, depriving one who has been imprisoned for life of the capacity to sue, and of all civil rights. See further Platner v. Sherwood, 6 Johns. Ch. 118; Davis v. Duffie, 8 Bosworth, 617.

⁴ Lynch v. Dodge, 130 Mass. 458 (spendthrift).

CHAPTER XI

CONTRACTS OF AGENTS AND FIDUCIARIES

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§ 273. Scope of chapter.

It is not within the limits of this work to consider broadly the law of agents or fiduciaries, but it is within its scope to determine who are regarded in law as the parties bound by a contract which has been entered into by an agent or other fiduciary.

§ 274. Appointment of agents may generally be informal.

In general no formality is necessary for the appointment of an agent to contract on behalf of his principal. Authority may be given by expression of assent thereto in any way. Frequently the principal and agent make a contract providing that the agent shall act as such. For the formation of such a contract the same rules are applicable, as to any other contract; but a contract is not necessary in order to give an agent authority. The principal's authorization may neither expressly nor impliedly request any expression of assent by the agent as a condition of the authority, and in such a case any exercise of the authority by the agent during the term for which it was given or within a reasonable time, if no fixed term was mentioned, will bind the principal.¹

§ 275. Authority to enter into a sealed contract must be under seal.

The only exception made by the common law to the possibility of creating an agency informally, relates to sealed contracts. Authority to enter into written contracts for the sale of land may be oral;² but authority to execute sealed

¹ That a contract is unnecessary in order to create an agency is shown by the circumstance that one who has no capacity to make a contract with the principal may nevertheless be authorized to act as his agent. It was so held in regard to married women in

Emerson v. Blondon, 1 Esp. 142; *Clifford v. Burton*, 1 Bing. 199; *Butler v. Price*, 110 Mass. 97; *Pickering v. Pickering*, 6 N. H. 120; *Fenner v. Lewis*, 10 Johns. 38; *Stall v. Meek*, 70 Pa. 181; *Gray v. Otis*, 11 Vt. 628.

² See *infra*, § 489.

under seal.³ Ratification of the unauthorized execution of a sealed instrument may be made, but the ratification must be under seal.⁴ Wherever seals still retain anything of their common-law efficacy, this rule still prevails, but in States where the effect of seals has been totally abolished,⁵ it may be assumed that this requirement of the common law no longer exists.⁶ Nor does the requirement of sealed authorization exist, at least in the United States, where a corporation is the principal.⁷

³ *Combes's Case*, 9 Co. 75 a; *Steiglitz v. Egginton*, 1 Holt, 141; *Hibblewhite v. M'Morine*, 6 M. & W. 200; *Elliott v. Stocks*, 67 Ala. 336; *Daniel v. Garner*, 71 Ark. 484, 76 S. W. 1063; *Rowe v. Ware*, 30 Ga. 278; *Henderson v. Howard*, 147 Ga. 371, 94 S. E. 251; *Watson v. Sherman*, 84 Ill. 263; *Short v. Kieffer*, 142 Ill. 258, 31 N. E. 427; *Heath v. Miller*, 50 Me. 378; *Banorsee v. Hovey*, 5 Mass. 11, 4 Am. Dec. 17; *Hatch v. Smith*, 5 Mass. 42; *Maurda v. Fuller*, 225 Mass. 341, 114 N. E. 366; *Lobdell v. Mason*, 71 Miss. 937, 15 So. 44; *Gage v. Gage*, 30 N. H. 420; *Rafferty v. Lougee*, 63 N. H. 54; *Wagoner v. Watts*, 44 N. J. L. 126, 45 N. J. L. 184; *Williams v. Gillies*, 75 N. Y. 197, 202; *Peterson v. New York*, 194 N. Y. 437, 440, 87 N. E. 772, 773; *Royal Indemnity Co. v. Danziger*, 101 N. Y. Misc. 505, 167 N. Y. S. 379; *Humphreys v. Finch*, 97 N. C. 303, 1 S. E. 870, 2 Am. St. Rep. 293; *Gordon v. Bulkeley*, 14 S. & R. 331; *Preston v. Hull*, 23 Gratt. 600, 14 Am. Rep. 153; *Gordon v. Funkhouser*, 100 Va. 675, 42 S. E. 677. In *Elliott v. Stocks*, 67 Ala. 336, the court, perhaps inadvertently, states as the rule that the agent's authority must be in writing.

⁴ *Sans v. People*, 8 Ill. 327; *Ingraham v. Edwards*, 64 Ill. 526 (*cf. Donason v. Barbero*, 230 Ill. 138, 82 N. E. 620); *Heath v. Nutter*, 50 Me. 378; *Gor-*

don v. Funkhouser, 100 Va. 675, 42 S. E. 677.

⁵ See *supra*, § 218.

⁶ See *Daniel v. Garner*, 71 Ark. 484, 76 S. W. 1063; *Streeter Co. v. Janu*, 90 Minn. 393, 96 N. W. 1128; *cf. Jones v. Morris*, 61 Ala. 518, 524; *Sanger v. Warren*, 91 Tex. 472, 44 S. W. 477, 66 Am. St. Rep. 913.

⁷ *Alabama, etc., R. Co. v. South & North Ala. R. Co.*, 84 Ala. 570, 577, 3 So. 286, 5 Am. St. Rep. 401; *Fitch v. Lewiston Steam Mill Co.*, 80 Me. 34, 12 Atl. 732; *Donovan v. P. Schoenhofen Brewing Co.*, 92 Mo. App. 341; *Cook v. Kuhn*, 1 Neb. 472; *Despatch Line Co. v. Bellamy Mfg. Co.*, 12 N. H. 205, 37 Am. Dec. 203. In *Dodge v. American, etc., Co.*, 109 Ga. 394, 396, 34 S. E. 672, the court in speaking of a power of attorney to execute a deed, said: "If the seal of the company had been attached to the power of attorney, the law would have presumed that when the directors and the secretary signed it they were authorized so to do by the company. *Carr v. Ga. Loan & Trust Co.*, 108 Ga. 757, 33 S. E. 190; The seal not being attached, it was necessary for the plaintiff to show when he offered it in evidence that these persons were either authorized by a vote of the company to sign the power, or that they were authorized by the company's charter. No such proof being offered, the court erred in admitting the power of attorney in evidence."

In the early English law though it was recognized that a corporation might appoint without deed, "butlers and cooks, and things of that kind,"⁸ agents generally could be appointed and contracts could be made only under the seal of the corporation, and the early doctrine, though somewhat relaxed, still seems preserved in the English law.⁹ There is another apparent exception to the general principle that sealed authority is necessary for the execution by an agent of sealed contracts, in the rule that any agent in the presence of his principal, though authorized merely orally, may seal and deliver an obligation so as to bind the principal.¹⁰ In such a case the agent is regarded as exercising no volition of his own but as being merely the mechanical instrument by which the principal carries out his own intention. It is a corollary of the requirement of sealed authority that even though the agent has a power of attorney under seal, the execution by him of a sealed instrument is ineffectual unless the terms of the power are exactly followed.¹¹ And for the same reason that an entire sealed instrument cannot be executed under parol authority, so authority to fill in blanks in such an instrument cannot be given by parol.¹²

In many jurisdictions, however, on account of the hard-

⁸ See 2 Harv. L. Rev. 119.

⁹ See *supra*, § 271.

¹⁰ *Ball v. Dunsterville*, 4 T. R. 313; *Hibblewhite v. M'Morine*, 6 M. & W. 200; *Lewis v. Watson*, 98 Ala. 479, 13 So. 570, 22 L. R. A. 297, 39 Am. St. Rep. 82; *Videau v. Griffin*, 21 Cal. 389; *People v. Organ*, 27 Ill. 27, 79 Am. Dec. 391; *Frost v. Deering*, 21 Me. 156; *Gardner v. Gardner*, 5 Cush. 483, 52 Am. Dec. 740; *Burns v. Lynde*, 6 Allen, 305; *Kidder v. Prescott*, 24 N. H. 263; *Lord v. Lord*, 58 N. H. 7, 42 Am. Rep. 565; *Mackay v. Bloodgood*, 9 Johns. 285; *Fitzpatrick v. Engard*, 175 Pa. 393, 34 Atl. 803.

¹¹ *Spofford v. Hobbs*, 29 Me. 148, 48 Am. Dec. 521; *Minnesota Stone Ware Co. v. McCrossen*, 110 Wis. 316, 85 N. W. 1019.

¹² *Perkins' Profitable Book*, § 118;

Hibblewhite v. M'Morine, 6 M. & W. 200; *Upton v. Archer*, 41 Cal. 85, 10 Am. Rep. 266; *Ingram v. Little*, 14 Ga. 173, 58 Am. Dec. 549; *People v. Organ*, 27 Ill. 27, 79 Am. Dec. 391; *Mickey v. Barton*, 194 Ill. 446, 62 N. E. 802; *Osby v. Reynolds*, 260 Ill. 576, 100 N. E. 556 (*cf.* *Chicago v. Gage*, 95 Ill. 593, 35 Am. Rep. 182); *Basford v. Pearson*, 9 Allen, 387, 85 Am. Dec. 764; *Macurda v. Fuller*, 225 Mass. 341, 114 N. E. 366; *Clark v. Butts*, 73 Minn. 361, 76 N. W. 199; *Williams v. Crutcher*, 5 How. (Miss.) 71, 35 Am. Dec. 422; *Blacknall v. Parish*, 6 Jones Eq. 70, 78 Am. Dec. 239; *Famulener v. Anderson*, 15 Oh. St. 473; *Shirley v. Burch*, 16 Or. 83, 18 Pac. 351, 8 Am. St. Rep. 273; *Preston v. Hull*, 23 Gratt. 600, 14 Am. Rep. 153.

ship involved, and the violation of the intention of the parties resulting from the enforcement of this technical rule, it has been held, following an early decision by Lord Mansfield,¹³ that though complete execution of a sealed instrument by an agent may require sealed authority, the necessity does not extend to filling in blanks especially if the blanks are slight or unimportant.¹⁴ The difficulty regarding parol authorization for the execution of an instrument under seal or for any addition or change in one, extends also to parol ratification of an addition or alteration of such an instrument originally made without authority.¹⁵

If a sealed instrument executed by an agent required no seal for its validity, parol authority is generally held sufficient to validate the instrument,¹⁶ and the result seems technically defensible, if the instrument on its face purports to be the obligation of the principal, not of the agent. In such a case there is no sealed instrument since the seal cannot be regarded as that of the principal, yet the document shows

¹³ *Texira v. Evans*, cited in 1 Anstr. 228, overruled in *Hibblewhite v. M'Morine*, 6 M. & W. 200.

¹⁴ *Drury v. Foster*, 2 Wall. 24, 17 L. Ed. 780; *Allen v. Withrow*, 110 U. S. 119, 28 L. Ed. 90, 3 Sup. Ct. 517; *Boardman v. Gore*, 1 Stew. (Ala.) 517, 18 Am. Dec. 73; *Bridgeport Bank v. New York, etc., R. R. Co.*, 30 Conn. 231; *Brown v. Colquitt*, 73 Ga. 59, 54 Am. Rep. 867; *Chicago v. Gage*, 95 Ill. 593, 35 Am. Rep. 182; *Robinson v. Yetter*, 238 Ill. 320, 87 N. E. 363 (Missouri law); *Richmond Mfg. Co. v. Davis*, 7 Blackf. 412; *McCleery v. Wakefield*, 76 Ia. 529, 41 N. W. 210, 2 L. R. A. 529; *South Berwick v. Huntress*, 53 Me. 89, 87 Am. Dec. 535; *Farmers' Bank v. Worthington*, 145 Mo. 91, 46 S. W. 745; *Camden Bank v. Hall*, 14 N. J. L. 583; *Campbell v. Smith*, 71 N. Y. 26, 27 Am. Rep. 5; *Cribben v. Deal*, 21 Ore. 211, 27 Pac. 1046, 28 Am. St. Rep. 746; *Bell v. Kennedy*, 100 Pa. 215; *Lafferty v.*

Lafferty, 42 W. Va. 783, 26 S. E. 262.

¹⁵ See *infra*, § 278.

¹⁶ *Morrow v. Higgins*, 29 Ala. 448; *Ledbetter v. Walker*, 31 Ala. 176; *Love v. Sierra Nevada Co.*, 32 Cal. 639, 91 Am. Dec. 602; *Walsh v. Lennon*, 98 Ill. 27, 38 Am. Rep. 75; *Tapley v. Butterfield*, 1 Metc. 515, 35 Am. Dec. 374; *Milton v. Mosher*, 7 Metc. 244; *McIntosh v. Hodges*, 110 Mich. 319, 68 N. W. 158, 70 N. W. 550; *Dickerman v. Ashton*, 21 Minn. 538; *Adams v. Power*, 52 Miss. 828; *Wagoner v. Watts*, 44 N. J. L. 126, 45 N. J. L. 184; *Worrall v. Munn*, 5 N. Y. 229, 55 Am. Dec. 330; *Woods v. Auburn, etc., Railroad Co.*, 8 N. Y. 160; *Wood v. Wise*, 153 N. Y. App. D. 223, 137 N. Y. S. 1017; *Royal Indemnity Co. v. Danziger*, 101 N. Y. Misc. 505, 167 N. Y. S. 379; *Baum v. Dubois*, 43 Pa. 260; *Marshall v. Rugg*, 6 Wyo. 270, 44 Pac. 700. But see *Rowe v. Ware*, 30 Ga. 278, 281; *Van Dyke v. Van Dyke*, 123 Ga. 686, 51 S. E. 582; *Wheeler v. Nevins*, 34 Me. 54.

an intent to contract on the part of the principal through an agent authorized to express such intent, though not authorized to covenant under seal. If, however, the covenant purports to be that of the agent, there is greater difficulty in finding a simple contract, for the sealed instrument binds the agent and it seems hard to establish that by the same act and with the apparent intent to enter into a single obligation the agent made a covenant himself and a simple contract on behalf of his principal. The authority, however, is divided.¹⁷

§ 276. In some states authority for certain acts is required to be in writing.

In a number of States, by statute or otherwise, authority to execute contracts for the sale of land must be in writing, though such contracts need not be sealed.¹⁸ And where the authority is required to be in writing, ratification of an unauthorized writing must also be written.¹⁹ In such States if local statutes forbid an oral lease for a period exceeding one year, a longer written lease cannot be made by an agent without written authority.²⁰ Apart from statute the great

¹⁷ See *infra*, § 296.

¹⁸ *Thompson v. New South Coal Co.*, 135 Ala. 630, 34 So. 31; *Toomy v. Dunphy*, 86 Cal. 639, 25 Pac. 130; *Lambert v. Gerner*, 142 Cal. 399, 76 Pac. 53; *Castner v. Richardson*, 18 Colo. 496, 33 Pac. 163; *Johnson v. Lennox*, 55 Colo. 125, 133 Pac. 744; *Kozel v. Dearlove*, 144 Ill. 23, 32 N. E. 542, 36 Am. St. Rep. 416; *Cowan v. Curran*, 216 Ill. 598, 75 N. E. 322; *Smith v. Schriver*, 91 Kans. 582, 138 Pac. 584; *Detroit, etc., R. Co. v. Hartz*, 147 Mich. 354, 110 N. W. 1089; *Newlin v. Hoyt*, 91 Minn. 409, 98 N. W. 323 [but an undisclosed principal may enforce a written contract made by an orally authorized agent in his own name. *Davidson v. Hurty*, 116 Minn. 280, 133 N. W. 862, 39 L. R. A. (N. S.) 324; *Unruh v. Roemer*, 135 Minn. 127, 160 N. W. 251]; *Kirkpatrick v. Pease*, 202 Mo.

471, 101 S. W. 651; *Marshall v. Trerise*, 33 Mont. 28, 81 Pac. 400; *Frahm v. Metcalf*, 75 Neb. 241, 106 N. W. 227; *Walk v. Hibberd*, 65 Or. 497, 133 Pac. 95; *Llewellyn v. Sunnyside Coal Co.*, 242 Pa. 517, 89 Atl. 575; *Dal v. Fischer*, 20 S. Dak. 426, 107 N. W. 534.

¹⁹ *Harper, etc., Co. v. Jackson*, 240 Pa. 312, 314, 87 Atl. 430; *Llewellyn v. Sunnyside Coal Co.*, 242 Pa. 517, 89 Atl. 575.

²⁰ *Rogan v. Arnold*, 233 Ill. 19, 84 N. E. 58; *McIntosh v. Hodges*, 110 Mich. 319, 68 N. W. 158, 70 N. W. 550; *Hoover v. Pacific Oil Co.*, 41 Mo. App. 317; *Landt v. Schneider*, 31 Mont. 15, 77 Pac. 307. In New Jersey the requirement applies only to leases exceeding three years. *Clement v. Young-McShea Amusement Co.*, 70 N. J. Eq. 677, 67 Atl. 82.

weight of authority sustains the power to give an agent oral authority to make a contract for the purchase or sale of land.²¹ In Georgia any contract of which a written memorandum is required when entered into by the principal himself, cannot be made by an agent on his behalf unless the agent has written authority.²² In Kentucky, contracts of suretyship cannot be executed by an agent unless his authority is written.²³ If the general principle assumed by many of the cases cited in this section is sound—that the authority of the agent must be executed with the same formality that is required in the execution of the contract which the agent is to execute, it follows that if attestation or acknowledgment is required for the validity of a contract, it is also required for the validity of a power of attorney.²⁴

§ 277. Apparent authority and estoppel.

An agent may be able to make contracts which will bind his principal not only when actually authorized by express words or implication of fact to do so but also in cases where the principal did not intend to confer such authority on the agent but, nevertheless, held out to the public or to the person with whom the agent dealt an appearance of authority. If one with whom the agent dealt justifiably believed the agent was authorized, and if the facts justifying that belief were due to the conduct of the supposed principal, the latter will be bound. The misconduct on the part of the supposed principal need not have been fraudulent or wilful.²⁵ Illustrations of apparent authority binding the principal, though no actual authority was given, arise where a person is knowingly permitted by another to act in business matters in the latter's name, or apparently on his behalf.²⁶

²¹ See *infra*, § 489.

²² *Overman v. Atkinson*, 102 Ga. 750, 29 S. E. 758.

²³ *First Nat. Bank v. Gaines*, 87 Ky. 597, 9 S. W. 396; *Simpson v. Commonwealth*, 89 Ky. 412, 12 S. W. 630; *Inter-Southern Life Ins. Co. v. First Nat. Bank*, 178 Ky. 95, 198 S. W. 563.

²⁴ *Lithograph Bldg. Co. v. Watt*,

96 Ohio St. 74, 117 N. E. 25.

²⁵ *Bronson's Exec. v. Chappell*, 12 Wall. 681, 20 L. Ed. 436; *Johnson v. Christian*, 128 U. S. 374, 32 L. Ed. 412, 9 S. Ct. 87; *Stark Electric R. Co. v. McGinty Contracting Co.*, 238 Fed. 657, 151 C. C. A. 507.

²⁶ *Thomas v. Moody*, 57 Cal. 215; *Florida, etc., R. Co. v. Varnedoe*, 81

So where one intrusts another with negotiable paper containing blanks, he is bound, as against a holder in due course, by the terms of the instrument as filled in by the person intrusted therein though the blanks were filled in violation of the authority actually given;²⁷ and in any case where a supposed principal by his conduct justifies another in assuming the existence of authority, he will be bound by simple contracts entered into on his behalf within the apparent authority of the supposed agent.

§ 278. Ratification.

Subsequent ratification by a principal of a contract made on his behalf by one who had at the time neither actual nor apparent authority, is as effectual as original authorization. Not only is a contract formed between the principal and the third person, but the agent is absolved from liability for loss which may happen because of his unauthorized action.²⁸ Ratification like original authority need not be express. Any conduct which indicates assent to the transaction is sufficient.²⁹ Even silence with full knowledge of the facts may operate as a ratification. The person with whom the agent dealt will so obviously be deceived by assuming the professed agent was authorized to act as such, that the principal is under a duty

140 Mass. 517, 5 N. E. 485; *Columbia Mill Co. v. National Bank of Commerce*, 52 Minn. 224, 53 N. W. 1061; *James v. Russell*, 92 N. C. 194; *Ferguson v. Majestic Amusement Co.*, 171 N. C. 663, 89 S. E. 45; *National Surety Co. v. Miozany*, 53 Okl. 322, 156 Pac. 651; *Hill v. Nation Trust Co.*, 108 Pa. 1.

²⁷ See *Negotiable Instruments Law*, Sec. 14, *infra*, § 1141. Authority to fill in blanks in a bond, however, cannot thus arise, but must be given under seal. *Hibblewhite v. M'Morine*, 6 M. & W. 200; *Preston v. Hull*, 23 Gratt. 600, 14 Am. Rep. 153. See also *supra*, § 275.

²⁸ *Lunn v. Guthrie*, 115 Ia. 501, 88 N. W. 1060; *Triggs v. Jones*, 46 Minn.

Ga. 175, 7 S. E. 129; *Thomas v. Wells*, 277, 283, 48 N. W. 1113; *Wann v. Scullin*, 235 Mo. 629, 139 S. W. 425; *Osborne v. Durham*, 157 N. C. 262, 72 S. E. 849; *Green v. Clark*, 5 Denio, 497; *Hazard v. Spears*, 4 Keyes, 469.

²⁹ *Bronson's Exec. v. Chappell*, 12 Wall. 681, 20 L. Ed. 436; *Arzuaga v. Gonsalez*, 239 Fed. 60, 152 C. C. A. 110, L. R. A. 1917 D. 697; *Martin v. Powell (Ala.)*, 75 So. 358; *Burkhard v. Mitchell*, 16 Col. 376, 26 Pac. 657; *McDowell v. McKenzie*, 65 Ga. 630; *Davenport v. Burke*, 30 Idaho, 599, 167 Pac. 481; *White City Elec. Co. v. Fleckles*, 201 Ill. App. 459; *Brimmer v. M. H. Brimmer*, 174 N. C. 435, 93 S. E. 984; *Wile v. Ewing*, 67 Pa. Super. 472.

to undeceive him.³⁰ It is true that there are contrary judicial expressions. It is sometimes asserted that here as in the formation of contracts,³¹ silence is purely negative and justifies no inferences.³² But silence may justify reasonable inferences, as well as positive action, and a person is no more justified in keeping silent when he knows, or ought to know that a reasonable person will regard his silence as assent, than he is in making a gesture that he knows is ordinarily regarded as an expression of assent, and afterwards asserting that it was not so intended and that he made the gesture merely in the exercise of his privilege to move his hands about in the way that seemed most comfortable. An exception must be made, if the transaction to be ratified is an instrument under seal. In that case the ratification must also be under seal;³³ and so if a statute requires a written authority for a particular transaction,³⁴ oral ratification will not validate an unauthorized execution of the transaction. In order that ratification shall be effective, not only must the transaction originally have been entered into on behalf of the person who subsequently ratifies it, but the supposed agent must have professed at the time to be acting as such.³⁵ The anomalous doctrines of undisclosed principal are

³⁰ *Courcier v. Ritter*, 4 Wash. Cir. Ct. 549; *Mobile & Montgomery Ry. Co. v. Jay*, 65 Ala. 113; *Coffin v. Planters' Cotton Co.*, 124 Ark. 360, 187 S. W. 309; *Pacific Vinegar &c. Works v. Smith*, 152 Cal. 507, 93 Pac. 85; *Brooke v. Cunningham*, 19 Ga. App. 21, 90 S. E. 1037; *Pauly v. Madison County*, 199 Ill. App. 225; *Mad-dux v. Bevan*, 39 Md. 485; *Amory v. Hamilton*, 17 Mass. 103; *Foster v. Rockwell*, 104 Mass. 167, 171; *Heyn v. O'Hagen*, 60 Mich. 150, 157, 26 N. W. 861; *Triggs v. Jones*, 46 Minn. 277, 283, 48 N. W. 1113; *Kent v. Quicksilver Mining Co.*, 78 N. Y. 159; *Price v. Peeples (Okl.)*, 168 Pac. 191; *Philadelphia &c. R. Co. v. Cowell*, 28 Pa. 329, 70 Am. Dec. 128; *Baker v. Seattle &c. Packing Co.*, 95 Wash. 45, 163 Pac. 17; *Saveland v. Green*, 40 Wis. 431. In *Norris v. Cook*, 1 Curtis,

464, 469, Curtis, J., said: "In *Cairnes v. Bleecker*, 12 Johns. R. 300, 306, Mr. Justice Spencer says: 'It is a salutary rule, in relation to agencies, that when the principal has been informed of what has been done, he must dissent, and give notice in a reasonable time, otherwise his assent to what has been done shall be presumed.' And the same law may be found in *Bredin v. Dubarry*, 14 Serg. & Rawle, 27, 30, and in other cases."

³¹ See *supra*, § 91.

³² *Iron City Nat. Bank v. Fifth Nat. Bank (Tex. Civ. App.)*, 47 S. W. 533, *affd.* in *Fifth Nat. Bank v. Iron City Nat. Bank*, 92 Tex. 436, 49 S. W. 368.

³³ See *supra*, § 275, n. 4.

³⁴ See *supra*, § 276.

³⁵ *Keighley v. Durant*, [1901] A. C. 240 (reversing *Durant v. Roberts*,

thus not extended to the law of ratification. It is essential, too, that the principal should himself have been an ascertained person competent to enter into the transaction at the time when the so-called agent acted.³⁶ Furthermore, the ratification must be made with knowledge of the material facts, or with an obvious lack of any desire to know further facts, or it will not be binding.³⁷ If either strangers to the transaction or the person who dealt with the supposed agent have acquired rights with reference to the matter between the time of the agent's acts and the time of ratification, these rights cannot be disturbed by the ratification.³⁸ Thus a rescission, agreed upon by the supposed agent and the person contracting with him, precludes subsequent ratification.³⁹

As the ratification is a substitute for original authority, the fiction is necessary that the ratification relates back to the time when the agent acted.⁴⁰

Whether the person with whom the agent dealt, if ignorant of the agent's lack of authority, may withdraw from the transaction prior to ratification is a matter which has given rise to some difference of decision. As a matter of technical though somewhat fictitious reasoning, it may be said that since the rati-

[1900] 1 Q. B. 629); *Blackwell v. Kercheval*, 29 Idaho, 473, 160 Pac. 741; *Crowder v. Reed*, 80 Ind. 1, 10; *Ferris v. Snow*, 130 Mich. 254, 90 N. W. 850. See also *Mitchell v. Minnesota Fire Assoc.*, 48 Minn. 278, 51 N. W. 608; *Brown Realty Co. v. Myers*, 89 N. J. L. 247, 98 Atl. 310. But see *contra*, *Sartwell v. Frost*, 122 Mass. 184; *Hayward v. Langmaid*, 181 Mass. 426, 63 N. E. 912.

³⁶ *Watson v. Swann*, 11 C. B. (N. S.) 756; *Kelner v. Baxter*, L. R. 2 C. P. 174, 185; *Melhado v. Porto Alegre, etc., Ry. Co.*, L. R. 9 C. P. 503, 505. *In re Empress Engineering Co.*, 16 Ch. D. 125, 128; *Trueblood v. Trueblood*, 8 Ind. 195, 65 Am. Dec. 756; *Armitage v. Widoe*, 36 Mich. 124.

³⁷ *Lewis v. Reed*, 13 M. & W. 834; *Coffin v. Planters' Cotton Co.*, 124 Ark. 360, 187 S. W. 309; *Blackwell v. Kercheval*, 29 Idaho, 473, 160 Pac. 741;

Shields v. Hitchman, 251 Pa. 455, 96 Atl. 1039. If the principal ratifies a contract in writing without reading it when he has the opportunity, he will be bound; *Liska v. Lodge*, 112 Mich. 635, 71 N. W. 171; or if he otherwise indicates, that he is willing to trust the agent's judgment and ratify his act without further inquiry. *Hutchinson Co. v. Gould (Calif.)*, 181 Pac. 651.

³⁸ *Bird v. Brown*, 4 Ex. 786, 797; *Johnson v. Johnson*, 31 Fed. 700, 703; *McCracken v. San Francisco*, 16 Cal. 591, 624; *Goldschmidt v. Board of Education*, 217 N. Y. 470, 112 N. E. 167; *Kempner v. Rosenthal*, 81 Tex. 12, 16 S. W. 639.

³⁹ *Walter v. James*, L. R. 6 Ex. 124.

⁴⁰ *Miller v. People's Sav. Bank*, 193 Mo. App. 498, 186 S. W. 547; *United States Express Co. v. Rawson*, 106 Ind. 215, 217, 6 N. E. 337, and see cases in this section, *passim*.

fication relates back to the time of the agent's acts, it necessarily precedes in legal effect the withdrawal of the person with whom he dealt; and the English courts have reached this result.⁴¹ This permits the existence of a situation where a bilateral contract may be binding upon one party since he cannot withdraw, and yet may be, for a time at least optional with the other (the supposed principal), since he can at his pleasure ratify the contract or refrain from doing so. The English rule has not commended itself to the courts in America. It has been held in Pennsylvania⁴² that withdrawal at any time prior to the ratification is effectual. This rule treats the promise of the person who bargains with the agent as amounting in legal effect to an offer, which is accepted by the ratification. Strictly there is no offer and acceptance here because the so-called offeror understands that he is making a completed bargain when he enters into the transaction with the agent, and it cannot be assumed that he would have been willing to make a continuing offer. The result, however, seems desirable and may be defended on the analogy of the limitation imposed on the right of ratification where interests of third persons have intervened. The relation back of a ratification to the time of the original transaction is fictitious and the fiction should be limited so that it will not work injustice. It is injustice to hold the other party to the transaction bound prior to the ratification, while the supposed principal is free.

The Wisconsin court has gone still further and has held that even though the person who bargains with the agent does not withdraw prior to the ratification he is not bound until he gives a fresh assent to the transaction subsequent to the ratification.⁴³ This view treats ratification as if it were an offer

⁴¹ *Bolton v. Lambert*, 41 Ch. D. 295. See also *In re Portuguese Mines*, 45 Ch. D. 16; *In re Tiedemann*, 81 L. T. 191. The English Marine Insurance Act of 1906, Sec. 86, expressly provides "where a contract of marine insurance is in good faith effected by one person on behalf of another, the person upon whose behalf it is effected may ratify the contract even after he is aware of a loss." *Williams v. Insurance Co.*,

1 C. P. D. 757, 764; *Boston Fruit Co. v. British, etc., Co.*, [1906] A.C. 336. Cp. *Keighley v. Durant*, [1901], A. C. 240.

⁴² *McClintock v. South Penn Oil Co.*, 146 Pa. 144, 23 Atl. 211, 28 Am. St. Rep. 785.

⁴³ *Dodge v. Hopkins*, 14 Wis. 630; *Atlee v. Bartholmew*, 69 Wis. 43, 33 N. W. 110, 5 Am. St. Rep. 103. See also *Baldwin v. Schiappacasse*, 109 Mich. 170, 66 N. W. 1091.

which must be accepted in order to create a binding contract. Such a doctrine in effect abolishes the fiction of relation altogether, and indeed abolishes ratification as a distinct doctrine. It would be possible for the supposed principal if no doctrine of ratification were recognized, on learning of the transaction entered into by the alleged agent, to make an offer to the person with whom the agent dealt, to enter into the transaction which the agent assumed to complete. Like any other offer there would arise a binding contract when the offer was accepted. This, which seems to be the view of the Wisconsin court, may be thought not only out of harmony with the law of ratification as generally understood, but unnecessary to produce a just result.

§ 279. Termination of agent's authority.

An agent's authority may be terminated in various ways. The authority may itself fix its limits or may contain conditions which, when they come into effect, automatically end it. But an agency may be determined in other ways also, and especially by a renunciation on the part of the agent or by a revocation on the part of the principal, even though such renunciation or revocation is in violation of a contract between the two. Though, as between the principal and the agent receipt of a notice from one to the other would terminate the agency,⁴⁴ in order to free the principal from possible liability to third persons for further acts of the agent within the apparently continuing scope of his original authority, notice must be given to such third persons either of renunciation⁴⁵ or of revocation,⁴⁶

⁴⁴ *Jones v. Hodgkins*, 61 Me. 480.

⁴⁵ *Capen v. Pacific Mut. Ins. Co.*, 25 N. J. L. (1 Dutch.) 67, 64 Am. Dec. 412.

⁴⁶ *Southern L. Ins. Co. v. McCain*, 96 U. S. 84, 24 L. Ed. 653; *Johnson v. Christian*, 128 U. S. 374, 32 L. Ed. 412, 9 S. Ct. 87; *Gratz v. Land, etc., Improvement Co.*, 82 Fed. 381, 27 C. C. A. 305, 40 L. R. A. 393; *Quinn v. Dresbach*, 75 Cal. 159, 16 Pac. 762, 7 Am. St. Rep. 138; *Meyer v. Hehner*, 96 Ill. 400; *Harris v. Cuddy*, 21 La. Ann. 388; *Maxey*

Mfg. Co. v. Burnham, 89 Me. 538, 36 Atl. 1003, 56 Am. St. Rep. 436; *Packer v. Hinckley Locomotive Works*, 122 Mass. 484; *Rice v. Barnard*, 127 Mass. 241; *Blake v. Garwood*, 42 N. J. Eq. 276, 10 Atl. 874; *Beard v. Kirk*, 11 N. H. 397; *Farmers' L. & T. Co. v. Wilson*, 139 N. Y. 284, 289, 34 N. E. 784, 36 Am. St. Rep. 696; *Smith v. Watson*, 82 Va. 712, 1 S. E. 96. But where an agent was originally authorized to do but a single act his power is thereby exhausted without notice.

in order that the principal may not be bound by the continuing apparent authority of the agent. Notice must, therefore, be given to all who have dealt with the agent as such, and also to all who because of the previous existence of the agency are likely to be deceived even though they have had no previous dealings with him. As it is impossible to give actual notice to every one of the latter class, a general notice by publication is sufficient. But as those who have had previous dealings with the agent, direct notice is necessary.⁴⁷ An agency may also be terminated by death either of the principal or of the agent, and it seems that death of the principal even though unknown to the agent or to the person with whom he deals, revokes the agent's power.⁴⁸ But the hardship of this rule has led to decisions by several courts that unless the act in question had to be done in the principal's name, notice of the principal's death is necessary.⁴⁹ Insanity of the principal effects a revocation of the agent's powers but not until notice.⁵⁰ Bankruptcy of the principal also terminates the agency,⁵¹ and it seems irrespective of

Fellows v. Hartford &c. Steamboat Co., 38 Conn. 197; *Watts v. Kavanagh*, 35 Vt. 34.

⁴⁷ These rules are the same as those which govern the dissolution of a partnership. See *Wright v. Herrick*, 128 Mass. 240; *Claffin v. Lenheim*, 66 N. Y. 301.

⁴⁸ *Blades v. Free*, 9 B. & C. 167; *Smout v. Ilbery*, 10 M. & W. 1; *In re Oriental Bank Corp.*, 28 Ch. D. 634, 640; *Long v. Thayer*, 150 U. S. 520, 37 L. Ed. 1167; 14 S. Ct. 189; *McClaskey v. Barr*, 50 Fed. 712, 714; *Ferris v. Irving*, 28 Cal. 645; *Travers v. Crane*, 15 Cal. 12; *Lewis v. Kerr*, 17 Ia. 73; *Harper v. Little*, 2 Me. 14, 11 Am. Dec. 25; *Marlett v. Jackman*, 3 Allen, 287; *Clayton v. Merrett*, 52 Miss. 353; *Weber v. Bridgman*, 113 N. Y. 600, 21 N. E. 985; *Farmer's L. & T. Co. v. Wilson*, 139 N. Y. 284, 34 N. E. 784, 36 Am. St. Rep. 696; *Fischer v. Schram*, 173 N. Y. App. D. 147, 159 N. Y. S. 496; *Bunch v. Dunning*, 106 S. C. 300, 91 S. E. 331; *Rigs v. Cage*,

2 Humph. 350, 37 Am. Dec. 559; *Cleveland v. Williams*, 29 Tex. 204, 94 Am. Dec. 274; *Davis v. Windsor Bank*, 46 Vt. 728; *Larson v. Anderson*, 97 Wash. 484, 166 Pac. 774. *Cf. Moore v. Hall*, 48 Mich. 143, 11 N. W. 844.

⁴⁹ *Dick v. Page*, 17 Mo. 234, 57 Am. Dec. 267; *Deweese v. Muff*, 57 Neb. 17, 77 N. W. 361, 42 L. R. A. 789, 73 Am. St. Rep. 488; *Ish v. Crane*, 13 Oh. St. 574, s. c. 8 Oh. St. 520; *Cassidy v. McKenzie*, 4 W. & S. 282, 39 Am. Dec. 76. See also *Garrett v. Trabue*, 82 Ala. 227, 3 So. 149. Statutes to this effect either covering agencies generally, or certain specified agencies, have been passed in some jurisdictions. Powers of Atty Act of 1882, § 3 (England). Such is the rule in Porto Rico. *Santiago v. Roses*, 242 Fed. 209, 155 C. C. A. 49.

⁵⁰ *Matthiesen, etc., Co. v. McMahon's Adm'r*, 38 N. J. L. 536; *Hill v. Day*, 34 N. J. Eq. 150, 157; *Davis v. Lane*, 10 N. H. 156; *Merritt v. Merritt*, 43 N. Y. App. Div. 68, 59 N. Y. S. 357.

⁵¹ *Minett v. Forrester*, 4 Taunt. 541;

notice.⁵² Bankruptcy of the agent has a similar effect,⁵³ unless the agency was of a somewhat formal character not requiring business confidence.⁵⁴ The appointment of a receiver for the principal's property is distinguished from bankruptcy, and takes effect only on notice.⁵⁵ Marriage at common law, as it deprived a woman of contractual capacity,⁵⁶ revoked her power of attorney, and even though a third person who dealt with the general agent of a woman prior to her marriage, continued to do so subsequently, in ignorance thereof, she would not be bound.⁵⁷ How far the law in this respect has been changed depends on local statutes.⁵⁸ Even where married women are given full contractual capacity, marriage would revoke a power which related to property the rights in which became affected by the marriage relation.⁵⁹ Finally, war between the country of the principal and that of the agent ends the relation between them, except as to matters which do not require commercial intercourse or the sending of property to a belligerent.⁶⁰

§ 280. When an agent's authority is irrevocable.

When the power of an agent is coupled with an interest it is irrevocable. The meaning of the words "coupled with an interest" has not been very accurately defined. They certainly mean something more than a contract on the part of the principal that the agency shall not be revoked. In spite of such a contract, an agency may be revoked though a principal will thereupon become liable for damages.⁶¹ There must be an

Fuller v. Emerson, 7 Cush. 203; *Wilson v. Harris*, 21 Mont. 374, 54 Pac. 46; *Elwell v. Coon* (N. J. L.), 46 Atl. 580.

⁵² *Ex parte Snowball*, L. R. 7 Ch. 534, 548; *In re Oriental Bank Corp.*, 28 Ch. D. 634, 640.

⁵³ *Hudson v. Granger*, 5 B. & Ald. 27; *Audenried v. Betteley*, 8 Allen, 302; *Cushman v. Snow*, 186 Mass. 169, 71 N. E. 529.

⁵⁴ *Hudson v. Granger*, 5 B. & Ald. 27.

⁵⁵ *In re Oriental Bank Corp.*, 28 Ch. D. 634, 640.

⁵⁶ See *supra*, § 285.

⁵⁷ See *Charnley v. Winstanley*, 5 East, 266.

⁵⁸ See *supra*, § 269; also *Wambole v. Foote*, 2 Dak. 1, 2 N. W. 239.

⁵⁹ *Brown v. Miller*, 46 Mo. App. 1; *Henderson v. Ford*, 46 Tex. 627; compare *Joseph v. Fisher*, 122 Ind. 399, 23 N. E. 856.

⁶⁰ See *Insurance Co. v. Davis*, 95 U. S. 425, 24 L. Ed. 453; *Williams v. Paine*, 169 U. S. 55, 74, 42 L. Ed. 658, 18 S. Ct. 279.

⁶¹ *Davis v. Cotton States L. Ins. Co.*, 232 Fed. 343, 146 C. C. A. 391; *Coney v. Sanders*, 28 Ga. 511; *Feldman*

interest in property to which the agency is subservient, as when the agency is intended to enable the person to whom it is given to collect property or realize its value.⁶² The interest which the agent would derive from compensation for his services as agent, even though this compensation is to be paid out of property to which the agency relates, is not a sufficient interest within the meaning of the rule.⁶³

§ 281. Contracts made by an agent in his principal's name are contracts of the principal.

If an agent is acting within the scope of his actual or apparent authority, and purports to enter into a contract on behalf of the principal it is fundamental that the contract is that of the principal and all rights and obligations under it belong to him. The agent can neither enforce it, nor is he bound by it.⁶⁴ In informal contracts it is sometimes a difficult question of fact to determine whether the agent did contract on his own behalf or on behalf of his principal. In any case the question is one of fact. The inquiry must be made, to whom was the third person justified in giving credit?⁶⁵ If the name of the

v. Wear-U-Well Shoe Co., 191 Mich. 73, 157 N. W. 395; *cf. Terwilliger v. Ontario, etc., R. Co.*, 149 N. Y. 86, 94, 43 N. E. 432.

⁶² *Raleigh v. Atkinson*, 6 M. & W. 670; *Hunt v. Rousmaniere*, 8 Wheat. 174, 5 L. Ed. 589; *Taylor v. Burns*, 203 U. S. 120, 51 L. Ed. 116, 27 Sup. Ct. 40; *Chambers v. Seay*, 73 Ala. 372; *Barr v. Schroeder*, 32 Cal. 609; *Bonney v. Smith*, 17 Ill. 531; *Smith v. Dare*, 89 Md. 47, 42 Atl. 909; *Langdon v. Langdon*, 4 Gray, 186; *Oatman v. Watrous*, 120 N. Y. App. Div. 66, 105 N. Y. S. 174; *Wainwright v. Massenburg*, 129 N. C. 46, 39 S. E. 725; *Blackstone v. Buttermore*, 53 Pa. 266.

⁶³ *Missouri v. Walker*, 125 U. S. 339, 31 L. Ed. 769, 8 S. Ct. 929; *Chambers v. Seay*, 73 Ala. 372; *Flanagan v. Brown*, 70 Cal. 254, 11 Pac. 706; *Gilbert v. Holmes*, 64 Ill. 548, 550; *Andrews v. Travelers' Ins. Co.*, 24 Ky. L. Rep. 844, 70 S. W. 43; *Merry v. Lynch*,

68 Me. 94; *Kolb v. J. E. Bennett Land Co.*, 74 Miss. 567, 21 So. 233; *Elwell v. Coon* (N. J.), 46 Atl. 580; *Simpson v. Carson*, 11 Or. 361, 8 Pac. 325; *Hartley's Appeal*, 53 Pa. 212, 91 Am. Dec. 207.

⁶⁴ *Owen v. Gooch*, 2 Esp. 567; *Green v. Kopke*, 18 C. B. 549; *Sampson v. Fox*, 109 Ala. 662, 19 So. 896, 55 Am. St. Rep. 950; *Seeberger v. McCormick*, 178 Ill. 404, 53 N. E. 340; *Thilmany v. Iowa Paper Bag Co.*, 108 Iowa, 357, 79 N. W. 261, 75 Am. St. Rep. 259; *Maury v. Ranger*, 38 La. Ann. 485, 58 Am. Rep. 197; *Southard v. Sturtevant*, 109 Mass. 390; *Goodenough v. Thayer*, 132 Mass. 152; *Huffman v. Newman*, 55 Neb. 713, 76 N. W. 409; *Sleeper v. Weymouth*, 26 N. H. 34; *American Nat. Bank v. Wheelock*, 82 N. Y. 118.

⁶⁵ *Thomson v. Davenport*, 9 B. & C. 78; *Calder v. Dobell*, L. R. 6 C. P. 486; *Usher v. Waddingham*, 62 Conn. 412,

principal is disclosed, the presumption is strong of an intention to contract on behalf of the principal, and not of the agent.⁶⁶ An exception to the general rule is made in England in case of a foreign principal. Even though the name of the principal is disclosed in such a case, it is presumed that the credit of the agent was relied upon.⁶⁷ The English rule has been adopted to some extent in the United States.⁶⁸ The different States of the Union are not, however, foreign to each other within the meaning of the rule.⁶⁹

Other authorities treat the question as one of fact whether credit was given to the agent or to the principal, even though the principal is foreign.⁷⁰ All the rules stated in this section are but rules of presumption. It is possible for the agent to bind himself either as a joint obligor with his principal⁷¹ or by a separate several obligation.⁷² It is also possible that the agent's obligation shall by agreement be the sole obligation, though the name of the principal is disclosed.⁷³

26 Atl. 538; *Guest v. Burlington Opera House Co.*, 74 Iowa, 457, 38 N. W. 158; *Simonds v. Heard*, 23 Pick. 120, 34 Am. Dec. 41; *Kelly v. Thuey*, 102 Mo. 522, 15 S. W. 62.

⁶⁶ *Higgins v. Senior*, 8 M. & W. 834; *Whitney v. Wyman*, 101 U. S. 392, 25 L. Ed. 1050; *Great Lakes Coal & Co. v. Seither Transit Co.*, 220 Fed. 28, 136 C. C. A. 110; *Anderson v. Timberlake*, 114 Ala. 377, 22 So. 431, 62 Am. St. Rep. 105; *Hall v. Crandall*, 29 Cal. 567, 89 Am. Dec. 64; *Thilmany v. Iowa Paper Bag Co.*, 108 Ia. 357, 360, 79 N. W. 261, 75 Am. St. Rep. 259; *Steamship Bulgarian Co. v. Merchants' Desp. Transp. Co.*, 135 Mass. 421; *Dart v. Ensign*, 47 N. Y. 619; *Commercial Bank v. Waters*, 45 N. Y. App. Div. 441, 60 N. Y. S. 981; *Jones v. Gould*, 123 N. Y. App. Div. 236, 108 N. Y. S. 31; *Clarke v. Watt*, 83 N. Y. Misc. 404, 145 N. Y. S. 145; *Bailey v. Galbreath*, 100 Tenn. 599, 601, 47 S. W. 84; *Richmond Union Pass. Ry. Co. v. New York, etc., Ry. Co.*, 95 Va. 386, 28 S. E. 573. This principle is applicable to contracts made by an attorney-at-law, whose

client is disclosed. *Covell v. Hart*, 14 Hun, 252.

⁶⁷ *Armstrong v. Stokes*, L. R. 7 Q. B. 598; *Hutton v. Bulloch*, L. R. 9 Q. B. 572; *Wilson v. De Zulueta*, 14 Q. B. 405, 414. Cf. *Brandt v. Morris*, [1917] 2 K. B. 784.

⁶⁸ *Vawter v. Baker*, 23 Ind. 63; *McKensie v. Nevins*, 22 Me. 138, 38 Am. Dec. 291; *Rogers v. March*, 33 Me. 106; *Hochster v. Baruch*, 5 Daly, 440; *In re Merrick's Est.*, 5 W. & S. 9.

⁶⁹ *Vawter v. Baker*, 23 Ind. 63; *Rogers v. March*, 33 Me. 106; *Barham v. Bell*, 112 N. C. 131, 16 S. E. 903.

⁷⁰ *Maury v. Ranger*, 38 La. Ann. 489, 58 Am. Rep. 197; *Bray v. Kettell*, 1 Allen, 80; *Kaulback v. Churchill*, 59 N. H. 296; *Kirkpatrick v. Stainer*, 22 Wend. 244; *Taintor v. Prendergast*, 3 Hill, 72, 38 Am. Dec. 618; *Whalen v. Saunders*, 90 Vt. 393, 98 Atl. 901.

⁷¹ *Tew v. Wolfsohn*, 174 N. Y. 272, 278, 66 N. E. 934.

⁷² *Elbinger Actien-Gesellschaft v. Claye*, L. R. 8 Q. B. 313.

⁷³ *Paterson v. Gandasequi*, 15 East, 62; *Addison v. Gandasequi*, 4 Taunt.

§ 282. Agent's liability when the principal though disclosed is not bound.

In some cases even though both parties attempted to bind a disclosed principal, they fail to do so because the principal had no capacity to contract, or was non-existent at the time. On general principles of contract the fact that the principal is not bound, would not afford ground for holding the agent bound by the terms of the proposed contract if it were clear that no bargain with him was intended; but it must be supposed generally that the parties intended to make a binding contract, and if they knew that none was possible with the principal because, for instance, it was a corporation not yet formed or because of its non-existence or lack of capacity, it is often a fair inference that a contract with the agent was contemplated. This inference of fact is the basis of a presumption sometimes too strongly stated, that the agent is bound in such a case.⁷⁴ If, however, circumstances make it clear that the parties, understanding the facts, had no intention that the agent should be liable, he will not be.⁷⁵ The agent has similarly been held in some cases bound personally where he contracts on behalf of a disclosed principal without authority;⁷⁶ but if on a fair con-

574; *Worthington v. Cowles*, 112 Mass. 30. In *DeRemer v. Brown*, 165 N. Y. 410, 417, 59 N. E. 129, the court said: "It is competent for an agent, although fully authorized to bind his principal, to pledge his own personal responsibility instead. Such a personal undertaking is not necessarily inconsistent with his character as an agent, and when he has so bound himself he will be held liable."

⁷⁴ *Doubleday v. Muskett*, 7 Bing. 110; *Kelner v. Baxter*, L. R. 2 C. P. 174, 183; *Johnston v. Allis*, 71 Conn. 207, 215, 41 Atl. 816; *Ryerson v. Shaw*, 277 Ill. 524, 115 N. E. 650; *Lewis v. Tilton*, 64 Ia. 220, 19 N. W. 911, 52 Am. Rep. 436; *Hastings v. Lovering*, 2 Pick. 214, 13 Am. Dec. 420; *Heath v. Goslin*, 80 Mo. 310, 50 Am. Rep. 505; *Learn v. Upstill*, 52 Neb. 271, 72 N. W. 213; *Booth ads. Wonderly*, 36 N. J. L. 250,

255; *Timken v. Tallmadge*, 54 N. J. L. 117, 120, 22 Atl. 996; *Lagrone v. Timmerman*, 46 S. C. 372, 24 S. E. 290; *Winona Lumber Co. v. Church*, 6 S. Dak. 498, 62 N. W. 107.

⁷⁵ *Holt v. Winfield Bank*, 25 Fed. 812, 814; *Abeles v. Cochran*, 22 Kan. 405, 410, 31 Am. Rep. 194; *Merchants & Planters' Co. v. Streuby*, 91 Miss. 211, 44 So. 791, 124 Am. St. Rep. 651; *Grafton Nat. Bank v. Wing*, 172 Mass. 513, 52 N. E. 1067, 43 L. R. A. 831, 70 Am. St. Rep. 303; *Codding v. Munson*, 52 Neb. 580, 72 N. W. 846, 66 Am. St. Rep. 524; *Ellis v. Stone*, 21 N. Mex. 730, 158 Pac. 480; *Elwell v. Tatum*, 6 Tex. Civ. App. 397, 402, 24 S. W. 71.

⁷⁶ *Reeb v. Bronson*, 196 Ill. App. 518; *Richie v. Bass*, 15 La. Ann. 668; *Weare v. Gove*, 44 N. H. 196; *Collins v. Allen*, 12 Wend. 356, 27 Am. Dec.

struction of the contract it appears that the intent was to bind the principal only, according to the better view the agent is liable not on the contract,⁷⁷ but on an implied warranty of his authority based on his representation of authority.⁷⁸

Fraud on the part of the agent is not essential to such liability,⁷⁹ but if he fully discloses the facts on which his assumption of authority is based, he will not be a warrantor.⁸⁰ And in order to hold the agent, the contract must have been one upon which the principal would have been liable had the agent been authorized.⁸¹

§ 283. Different situations where the principal is undisclosed.

Frequently one who is in fact an agent enters into a contract without naming his principal. He may either fail entirely to disclose that he is an agent, or he may disclose that he is an agent, but fail to name his principal. These two situations are often referred to indiscriminately as presenting questions of undisclosed principal. But though the law governing the two situations is in the main similar, the difference between them is not unimportant and should be observed. Moreover, where the agent discloses at the time of the bargain that he is an agent, the facts to which appropriate rules of law are to be applied are less troublesome to determine than where no agency is disclosed. In the latter case the agent's state of mind

130; *Coffman v. Harrison*, 24 Mo. 524; *Clark v. Foster*, 8 Vt. 98, 102.

⁷⁷ *Hall v. Crandall*, 29 Cal. 567, 89 Am. Dec. 64; *Senter v. Monroe*, 77 Cal. 347, 19 Pac. 580; *Johnson v. Smith*, 21 Conn. 627; *Craft Refrig. Mach. Co. v. Quinipiac Brewing Co.*, 63 Conn. 551, 564, 29 Atl. 76, 25 L. R. A. 856; *Duncan v. Niles*, 32 Ill. 532, 83 Am. Dec. 293; *Hancock v. Yunker*, 83 Ill. 208; *Newman v. Sylvester*, 42 Ind. 106; *McCurdy v. Rogers*, 21 Wis. 197, 91 Am. Dec. 468.

⁷⁸ *Collen v. Wright*, 7 E. & B. 301, 8 E. & B. 647; *Starkey v. Bank of England*, [1903] A. C. 114; *O'Rear v. Walker (Ala.)*, 75 So. 353; *Seeberger v.*

McCormick, 178 Ill. 404, 53 N. E. 340; *Bartlett v. Tucker*, 104 Mass. 336, 6 Am. Rep. 240; *Newland Hotel Co. v. Lowe Furniture Co.*, 73 Mo. App. 135, 138; *Sorenson v. Kribs*, 82 Oreg. 130, 161 Pac. 405; *Kroeger v. Pitcairn*, 101 Pa. 311, 47 Am. Rep. 718; *McCurdy v. Rogers*, 21 Wis. 197, 91 Am. Dec. 468.

⁷⁹ See cases in the preceding note.

⁸⁰ *Ware v. Morgan*, 67 Ala. 461; *Newman v. Sylvester*, 42 Ind. 106; *Michael v. Jones*, 84 Mo. 578; *Newland Hotel Co. v. Lowe Furniture Co.*, 73 Mo. App. 135, 139; *Hall v. Lauderdale*, 46 N. Y. 70.

⁸¹ *Dunn v. Parker*, 52 N. Y. 494.

when he enters into the transaction alone determines whether he is acting on his own account or for a principal.⁸²

§ 284. Rights and liabilities of the agent where the agency is undisclosed.

If it is not disclosed that the agent is acting as such it is evident that the person dealing with him must necessarily have supposed he was a principal and as apparent not actual mutual assent is effective in the formation of contracts, can continue to hold him liable as principal after discovery of the agency.⁸³ The right of the agent to sue is equally clear, for the person with whom he dealt certainly promised the agent as a principal; and the cases universally admit the agent's right to sue.⁸⁴ "Indeed such an agent, having made himself personally liable, may enforce the contract though the principal has renounced it." ⁸⁵

§ 285. Rights and liabilities of an agent who discloses his agency but does not name his principal.

It is not infrequently laid down broadly that if an agent dis-

⁸² *Jefferds v. Alvord*, 151 Mass. 94, 23 N. E. 734; *Estes v. Aaron*, 227 Mass. 96, 116 N. E. 392.

⁸³ *Brent v. Miller*, 81 Ala. 309, 8 So. 219; *Murphy v. Helmrick*, 66 Cal. 69, 4 Pac. 958; *Pierce v. Johnson*, 34 Conn. 274; *Gerrard v. Moody*, 48 Ga. 96; *Bickford v. First Nat. Bank*, 42 Ill. 238, 89 Am. Dec. 436; *Nudelman v. Haffenberg*, 199 Ill. App. 463; *Nixon v. Downey*, 49 Ia. 166; *Bartlett v. Raymond*, 139 Mass. 275, 30 N. E. 91; *McClellan v. Parker*, 27 Mo. 162; *Baltzen v. Nicolay*, 53 N. Y. 467, 470; *Cobb v. Knapp*, 71 N. Y. 348, 27 Am. Rep. 51; *Wanamaker v. Toole*, 179 N. Y. App. D. 77, 166 N. Y. S. 112; *Deming Investment Co. v. McGrady* (Okla.), 157 Pac. 734; *Beymer v. Bonsall*, 79 Pa. 298; *Robinson v. Wallace*, 65 Pa. Super. 54; *Bulton v. Winslow*, 53 Vt. 430.

⁸⁴ *Joseph v. Knox*, 3 Camp. 320; *Gardiner v. Davis*, 2 C. & P. 49; *Sims*

v. Bond, 5 B. & Ad. 389, 393; *Dutton v. Marsh*, L. R. 6 Q. B. 361; *Albany, etc., Co. v. Lunberg*, 121 U. S. 451, 7 S. Ct. 958, 30 L. Ed. 982; *Rowe v. Rand*, 111 Ind. 206, 12 N. E. 377; *Blanchard v. Page*, 8 Gray, 281; *Colburn v. Phillips*, 13 Gray, 64; *Ludwig v. Gillespie*, 105 N. Y. 653, 11 N. E. 835. In *Holliston v. Ernston*, 124 Minn. 49, 144 N. W. 415, an agent who was the grantee under a bill of sale of a business, which bound the seller not to engage in the same business in a certain city, was allowed to enforce the promise by injunction, though he purchased the business for an undisclosed principal and his only interest was under a contract of his principal to employ him if he made the purchase.

⁸⁵ *Kelly Asphalt Block Co. v. Barber Paving Co.*, 211 N. Y. 68, 105 N. E. 88, L. R. A. 1915 C, 256, citing *Short v. Spackman*, 2 B. & Ad. 962.

closes the fact that he is an agent, but not the name of his principal, he is personally liable.⁸⁶ This, however, cannot be literally true. It must everywhere be possible by language clearly indicating that the agent intends to assume no liability, and that all rights and liabilities are to be those of an unnamed principal, to produce the desired result. There can be no policy of the law forbidding a person who deals with an agent assenting to such a bargain, foolish though it may be, if he wishes to do so. But in the absence of clear expression to the contrary, it is a fair presumption that he does not wish to do so, and the law is clear that the mere fact that the agency, but not the principal, is disclosed will not free an agent from personal liability as a contractor.⁸⁷ Thus in a written contract, if one describing himself as "A, agent" or "A, broker" enters into an agreement, the contract is binding on him personally;⁸⁸ these words being regarded as merely *descriptio personæ*.⁸⁹ In the United States even though the language of the contract indicates that the agent was acting on behalf of an unknown principal, and not for himself, the same result has generally been reached;⁹⁰ yet it may be supposed that if a disclaimer of liability on the part of the agent were assented to by the other

⁸⁶ See cases in the following two notes.

⁸⁷ *Neely v. State*, 60 Ark. 66, 28 S. W. 800, 27 L. R. A. 503, 46 Am. St. Rep. 148; *McDonald v. Bond*, 195 Ill. 122, 62 N. E. 881; *Pugh v. Moore*, 44 La. Ann. 209, 10 So. 710; *Welch v. Goodwin*, 123 Mass. 71, 25 Am. Rep. 24; *Ginn v. Almy*, 212 Mass. 486, 504, 99 N. E. 276; *Landyskowski v. Lark*, 108 Mich. 500, 66 N. W. 371; *Brown v. Ames*, 59 Minn. 476, 61 N. W. 448; *Knapp v. Simon*, 96 N. Y. 284; *Argersinger v. MacNaughton*, 114 N. Y. 535, 21 N. E. 1022, 11 Am. St. Rep. 687; *DeRemer v. Brown*, 165 N. Y. 410, 419, 59 N. E. 129; *Meyer v. Redmond*, 205 N. Y. 478, 98 N. E. 906, affirming s. c. 141 N. Y. App. Div. 123, 125 N. Y. S. 1052; *Powers v. McLean*, 14 N. Y. App. Div. 92, 43 N. Y. S. 477; *Good v. Rumsey*, 50 N. Y. App. Div. 280,

63 N. Y. S. 981; *Beebe v. Worth*, 146 N. Y. S. 146; *Sloan Corp. v. Linton*, 280 Pa. 569, 103 Atl. 1011; *Long v. McKissick*, 50 S. C. 218, 27 S. E. 636; *Morris v. Clifton Forge Grocery Co.*, 46 W. Va. 197, 32 S. E. 997 (statutory).

⁸⁸ *Hutchison v. Eaton*, 13 Q. B. D. 861.

⁸⁹ See *infra*, § 296.

⁹⁰ *Neely v. State*, 60 Ark. 66, 28 S. W. 800, 27 L. R. A. 503, 46 Am. St. Rep. 148 (oral contract); *Brown v. Ames*, 59 Minn. 476, 61 N. W. 448 (oral contract); *Beebe v. Worth*, 146 N. Y. S. 146 (written contract); *Long v. McKissick*, 50 S. C. 218, 27 S. E. 636 (oral contract); cf. *Rodliff v. Dallinger*, 141 Mass. 1, 4 N. E. 805, 55 Am. Rep. 439, stated at the end of this section, and see *infra*, § 577.

party, the expressed intention would be made effectual. The imposition of liability on the agent where he has stated plainly that he is contracting on behalf of an unnamed principal, can certainly not be defended on ordinary principles of contract, and if supported, must be based on requirements of policy. In England the rule is less artificial than in the United States. If an agent contracts merely as such he is not liable personally, even if he does not name his principal;⁹¹ though proof of a

⁹¹ In *Fleet v. Murton*, L. R. 7 Q. B. 126, Cockburn, C. J., after approving *Fairlie v. Fenton*, L. R. 5 Ex. 169, said: "I am of opinion that the same principle would apply where the principal is not named, so long as it appears on the face of the contract that the broker is contracting, as broker for a principal, and not for himself as principal; and in that case, also, the broker would not be liable on the contract, if the principal failed to fulfil his contract." The agent was, however, held liable by virtue of a custom. So in *Pike v. Ongley*, 18 Q. B. D. 708, where a broker sold goods "for and on account of owner" but did not name the owner, the agent was held liable because of a custom of trade that if the name of the owner was not given in the buyer had the right to treat the broker as principal, but Lord Esher said: "In this case the defendants [the brokers] are clearly not liable upon the contract itself; they were selling as agents for an owner, and, in the absence of trade usage no liability would attach to them." See also *Miller v. Smith & Tyrer, Ltd.*, [1917] 2 K. B. 141. In *Cooper v. Gardiner*, 2 N. S. Wales St. Rep. 67, 77, the court said: "There is abundant authority to show that signing his name with the word 'broker' added is not sufficient to indicate that he was contracting as agent for another person. The word 'broker' is simply a description, and in no way indicates that he is contracting as agent. It is obvious that brokers do

sometimes—as was said in *Garrett v. Bird* (11 S. C. R. 97)—have shares standing in their own name, and contract as principals for the sale of them. And even though they are contracting on behalf of principals, yet they may nevertheless render themselves responsible. In the case of *Hutchison v. Eaton* (13 Q. B. D. 861), the defendant was an agent and was known to have been acting as an agent, but nevertheless he made himself responsible by the form of the contract he had signed. Although it is known that a person is a broker and that he is acting for principals, yet nevertheless liability may be incurred by the contract if made in a form which renders the broker personally liable. In this particular case, once admitting that the word 'broker' is a word of description, what is there on the face of this contract to indicate that the broker acted in such a manner as to relieve himself from personal responsibility? The only other thing suggested is the statement in the contract 'commission 16s. 6d.' If we could see that that statement was absolutely inconsistent with the fact that Gardiner was contracting for himself, and indicated absolutely and beyond all question that he was not contracting as principal, but contracting for another and not for himself, then he would not be responsible; but I am clearly of opinion that it does not indicate that he was contracting as agent. It is quite clear that the knowledge that the defendant is acting

custom in a particular trade so to regard him is admissible and effectual to charge him,⁹² unless the terms of the contract clearly indicate an intent that the custom shall not be applicable.⁹³

It seems to have been assumed that if the agent was liable on a contract when his principal was not disclosed, it must necessarily follow that he could sue upon it. If the liability of the agent is imposed only when it is found as a fact that an intention was expressed that he should be a party, this result is sound; if, however, liability is imposed on the agent irrespective of apparent intention, because he has failed to disclose his principal, the conclusion is not a necessary one. Where the suit is by the agent, there is no ground either of actual contract or of imposed liability to urge against one who has expressed a willingness to contract only with a described though not named principal. The reasons of policy do not exist which are applicable when suit is against the agent. It is generally held, however, that under circumstances where the agent is liable he may also enforce the contract.⁹⁴ There is, however, authority to the contrary. In a Massachusetts decision⁹⁵ one who purported to be an agent had agreed with the plaintiff to buy goods on behalf of an alleged existing but unnamed principal and the goods were delivered to the supposed agent who

as broker is not sufficient to relieve him. The case of *Hutchison v. Eaton* (13 Q. B. D. 861) is conclusive on that point. Then does this item '½ commission 16s. 6d.' carry the case any further? If it be said that it shows that the broker was an agent, the question still remains, was he nevertheless responsible under this contract? A man may have absolute knowledge that the broker is a broker, and may know that he is acting for a principal, and nevertheless if a broker chooses to make himself responsible under the contract he is personally responsible. It is said that a decision to this effect will come as a shock to the members of the Stock Exchange; but if we were to decide to the contrary we should be running counter to a long course of plain deci-

sions. If a broker wishes to relieve himself of personal liability, he can do so by the simple addition of the words in a contract of this sort 'sold on account of my principals,' or by signing the contract 'as broker.' It may seem a very slight difference, but apparently that is the law."

⁹² See cases in the preceding note.

⁹³ *Miller v. Smith & Tyrer, Ltd.*, [1917] 2 K. B. 141.

⁹⁴ *Short v. Spackman*, 2 B & Ad. 962; *United States Telegraph Co. v. Gildersleve*, 29 Md. 232, 96 Am. Dec. 519; *Ludwig v. Gillespie*, 105 N. Y. 653, 11 N. E. 835. See also *Camp v. Barber*, 87 Vt. 235, 88 Atl. 812.

⁹⁵ *Rodliff v. Dallinger*, 141 Mass. 1, 4 N. E. 805, 55 Am. Rep. 439.

resold them to the defendant, a *bona fide* purchaser for value without notice. The court held that not even a voidable title passed to the alleged agent and that the plaintiff was entitled to maintain replevin. This decision necessarily involves the assumption that there was no contract with the alleged agent. The court refused to distinguish decisions in which a principal was disclosed,⁹⁶ saying: "It was suggested that this case differed from the one cited, because there the principal was disclosed, whereas here he was not, and that credit could not be supposed to have been given to an unknown person. We have nothing to say as to the weight which this argument ought to have with a jury, beyond observing that the plaintiffs had reason in [the agent's] representations for giving credit to the supposed [principal]. But there is no rule of law that makes it impossible to contract with or sell to an unknown but existing party. And if the jury find that such a sale was the only one that purported to be made, the fact that it failed does not turn it into a sale to the party conducting the transaction."⁹⁷

§ 286. Rights and liabilities of the principal where the agency is undisclosed.

Though it was not disclosed at the time of the bargain that the agent was acting for any principal, the principal is nevertheless liable,⁹⁸ if the contract was not under seal or in the form

⁹⁶ Cases of this sort in which it was held that no title passed to a *bona fide* purchaser from the supposed agent are, *Hardman v. Booth*, 1 H. & C. 803; *Kingsford v. Merry*, 1 H. & N. 503; *Smith Typewriter Co. v. Stidger*, 18 Col. App. 261, 71 Pac. 400; *Alexander v. Swackhamer*, 105 Ind. 81, 4 N. E. 433, 5 N. E. 908, 55 Am. Rep. 180; *Edmunds v. Merchants' Transportation Co.*, 135 Mass. 283; *Rogers v. Dutton*, 182 Mass. 187, 65 N. E. 56; *Hamet v. Letcher*, 37 Oh. St. 356, 41 Am. Rep. 519; *Hentz v. Miller*, 94 N. Y. 64. See also *Dean v. Yates*, 22 Oh. St. 388; *Moody v. Blake*, 117 Mass. 23, 19 Am. Rep. 394; *Barker v. Dinsmore*, 72 Pa. St. 427, 13 Am. Rep. 697. Cf.

Hawkins v. Davis, 8 Baxt. 506. But if A sells goods to B, erroneously supposing him to be purchasing as agent for C, but without any representation or pretence being made by B, that he was buying as agent for another, the contract is valid and the title to the goods passes to B. *Stoddard v. Ham*, 129 Mass. 383, 37 Am. Rep. 369. Cf. *Ex parte Barnett*, 3 Ch. D. 123. And see *Ellsworth v. Randall*, 78 Iowa, 141, 42 N. W. 629, 16 Am. St. Rep. 425; *Huffman v. Long*, 40 Minn. 473, 42 N. W. 355; *Kayton v. Barnett*, 116 N. Y. 625, 23 N. E. 24.

⁹⁷ See also *School Sisters v. Kusnitt*, 125 Md. 323, 93 Atl. 928.

⁹⁸ *Smethurst v. Mitchell*, 1 E. & E.

of a negotiable instrument,⁹⁹ and this is true even though the party dealing with the agent expressly said he would not enter into any bargain with the principal,¹ though the agent acted in violation of instructions from his principal (but within the general scope of his authority),² though the principal has received no benefit under the contract,³ and though a written memorandum of the contract is required by the Statute of Frauds, and the memorandum made is signed by the agent without disclosure of his agency.⁴ Likewise if the agent purports to be buying for a named principal but is in fact himself the principal he is liable as such.⁵ Conversely, the principal

622; *Browning v. Provincial Ins. Co.*, L. R. 5 P. C. App. 263; *Darrow v. Horne Co.*, 57 Fed. 463; *Moore v. Sun Printing Co.*, 101 Fed. 591, 41 C. C. A. 506, *affd.*, 183 U. S. 642, 46 L. Ed. 366, 22 S. Ct. 240; *Mississippi Valley Const. Co. v. Abeles*, 87 Ark. 374, 112 S. W. 894; *Dashaway Assoc. v. Rogers*, 79 Cal. 211, 21 Pac. 742; *Merrill v. Kenyon*, 48 Conn. 314, 40 Am. Rep. 174; *Baldwin v. Garrett*, 111 Ga. 876, 36 S. E. 966; *Steele-Smith Grocery Co. v. Potthast*, 109 Ia. 413, 80 N. W. 517; *Jones v. Adair*, 76 Kans. 343, 344, 91 Pac. 78; *Ware v. Long*, 24 Ky. L. Rep. 696, 69 S. W. 797; *Maxcy Mfg. Co. v. Burnham*, 89 Me. 538, 36 Atl. 1003; *Tobin v. Larkin*, 183 Mass. 389, 67 N. E. 340; *Greenberg v. Palmieri*, 71 N. J. L. 83, 58 Atl. 297; *City Trust Co. v. American Brewing Co.*, 174 N. Y. 486, 67 N. E. 62; *Hager v. Henneberger*, 83 N. Y. Misc. 417, 145 N. Y. S. 152; *Thayer v. Luce*, 22 Oh. St. 62, 78; *Harper v. Tiffin Natl. Bank*, 54 Ohio St. 425, 44 N. E. 97; *Towner v. Lucas' Ex'r*, 13 Gratt. 705, 716; *Waddill v. Sebree*, 88 Va. 1012, 14 S. E. 849; *Belt v. Washington Water Power Co.*, 24 Wash. 387, 64 Pac. 525. See also cases in the following notes.

⁹⁹ As to such formal contracts, see *infra*, §§ 296, 298.

¹ *Kayton v. Barnett*, 116 N. Y. 625,

23 N. E. 24. It should be noticed that in such a case the principal could not enforce the contract. See *infra*, n. 10.

² *Watteau v. Fenwick*, [1893] 1 Q. B. 346; *Hubbard v. Tenbrook*, 124 Pa. 291, 16 Atl. 817, 2 L. R. A. 823, 10 Am. St. Rep. 585. See the comment on this doctrine by Professor Mechem, 23 Harv. L. Rev. 600. But if a principal supplies money for his agent for the purchase of goods, and the agent retaining the funds buys goods on his own credit, the seller on discovering the principal cannot charge him. *Fradley v. Hyland*, 37 Fed. 49; *Laing v. Butler*, 37 Hun, 144. See also *Becherer v. Asher*, 23 Ont. App. 202.

³ *Tobin v. Larkin*, 183 Mass. 389, 67 N. E. 340; *Dykers v. Townsend*, 24 N. Y. 57; *Waddill v. Sebree*, 88 Va. 1012, 14 S. E. 849.

⁴ *Trueman v. Loder*, 11 A. & E. 589, 594; *Lerned v. Johns*, 9 Allen, 419; *Phillips v. Cornelius (Miss.)*, 28 So. 871; *Haubelt v. Rea & Page Co.*, 77 Mo. App. 672; *Dykers v. Townsend*, 24 N. Y. 57; *Thayer v. Luce*, 22 Oh. St. 62, 78; *Wiener v. Whipple*, 53 Wis. 298, 10 N. W. 433, 40 Am. Rep. 775. See also *Briggs v. Partridge*, 64 N. Y. 357, 21 Am. Rep. 617.

⁵ *Railton v. Hodgson*, 4 Taunt. 576, n. (a); *Isham v. Burgett*, 157 Mass. 546, 32 N. E. 907.

can sue on a contract made by his agent without disclosure that he was an agent.^{5a} If the agent was himself a principal with others, all may sue jointly.⁶ Indeed even though the agent professed to be only an agent, it has been held that he may nevertheless be allowed to prove that he was a principal and recover as such.^{6a} The doctrine that where one person when making a contract apparently is the principal another person may ever be treated (either as plaintiff or defendant) as the real party to the contract in place of the former, and the doctrine that a person who asserts when making a contract that he is acting only as an agent may ever be treated as a principal, are opposed to the fundamental doctrines of mutual assent. The only terms on which the other party to the contract agreed to enter upon it are changed in a fundamental

^{5a} *Ford v. Williams*, 21 How. 287, 16 L. Ed. 36; *Darrow v. Horne Co.*, 57 Fed. 463; *Buchanan v. Cleveland Oil Co.*, 91 Fed. 88; 62 U. S. App. 332, 33 C. C. A. 351; *Bell v. Reynolds*, 78 Ala. 511, 56 Am. Rep. 52; *Western Union Tel. Co. v. Hicks*, 197 Ala. 81, 72 So. 356; *Ruiz v. Norton*, 4 Cal. 355, 60 Am. Dec. 618; *Eldridge v. Mowry*, 24 Cal. App. 183, 140 Pac. 978; *Sullivan v. Shailor*, 70 Conn. 733, 40 Atl. 1054; *Woodruff v. McGehee*, 30 Ga. 158; *Dodd Grocery Co. v. Postal Telegraph-Cable Co.*, 112 Ga. 685, 37 S. E. 981; *Nutt v. Humphreys*, 32 Kan. 100, 3 Pac. 787; *Cushing v. Rice*, 46 Me. 303, 71 Am. Dec. 579; *Baltimore Coal Tar Co. v. Fletcher*, 61 Md. 288; *Foster v. Graham*, 166 Mass. 202, 44 N. E. 129; *Doucette v. Baldwin*, 194 Mass. 131, 80 N. E. 444; *Bryant v. Wells*, 56 N. H. 152; *Briggs v. Partridge*, 64 N. Y. 357, 362, 21 Am. Rep. 617; *Nicoll v. Burke*, 78 N. Y. 580; *Milliken v. Western Union Tel. Co.*, 110 N. Y. 403, 410, 18 N. E. 251, 1 L. R. A. 281; *Brady v. Nally*, 151 N. Y. 258, 45 N. E. 547; *Navarre Hotel Co. v. American Appraisal Co.*, 156 N. Y. App. Div. 795, 142 N. Y. S. 89; *Ballard v. Freideberg*, 177 N. Y.

App. D. 715, 164 N. Y. S. 912; *Thayer v. Luce*, 22 Ohio St. 62, 78; *Houghton v. J. W. Hundley Co. (Okl.)*, 157 Pac. 1142; *Levy v. Nevada-California-Oregon Ry.*, 81 Oreg. 673, 160 Pac. 808; *Hubbert v. Borden*, 6 Whart. 79; *Hubbard v. Tenbrook*, 124 Pa. 291, 16 Atl. 817, 2 L. R. A. 823, 10 Am. St. Rep. 585; *Batley v. Lunt Mfg. Co.*, 30 R. I. 1, 73 Atl. 353, 136 Am. St. Rep. 926; *Edwards v. Golding*, 20 Vt. 30; *Pacific Power & Light Co. v. White*, 96 Wash. 18, 164 Pac. 602. In *Dunlop Pneumatic Tyre Co. v. Selfridge*, [1915] A. C. 847, it was held that the principal must furnish the consideration either himself or by his agent, and that therefore a sale by the agent of his own goods would not support a promise to maintain the price on which the principal, the manufacturer of the goods, could sue. See *supra*, § 114.

⁶ *Cothay v. Fennell*, 10 B. & C. 671.

^{6a} *Schmaltz v. Avery*, 16 Q. B. 655; *Harper v. Vigers*, [1909] 2 K. B. 549. It would seem, however, that such a false representation by the agent would give the other contracting party a right of rescission on restoring the value of any benefit received.

particular. Nevertheless, in view of the decisions, these doctrines must be treated as established.

An exception to the right of recovery by the undisclosed principal has been made where the agent expressly asserts in the contract that he is the principal. In such a case, another who is actually the principal, has been denied the right to sue.⁷ This exception is inconsistent with the general rule,⁸ since it must be equally true in any case where the agent does not disclose that he is an agent, that the third party enters into the contract on the assumption that the agent is the principal.⁹ The only possible distinction where this assumption is based on an express statement of the agent, rather than on inferences naturally and reasonably drawn from the surrounding circumstances is that the parties have made the representation more material in the former case.¹⁰ But it can hardly be denied that the identity of a party to a contract is material in every case, unless perhaps where he is the promisee in a unilateral contract, himself undertaking nothing.

The undisclosed principal may sue and be sued though the contract was in writing,¹¹ if it was neither under seal, nor a

⁷ *Humble v. Hunter*, 12 Q. B. 310. The agent in this case falsely described himself in a charter party as "owner" of the vessel chartered. See also *Formby v. Formby*, 102 L. T. 116; *Werlin v. Equitable Surety Co.*, 227 Mass. 157, 116 N. E. 484; *Moore v. Cement Co.*, 121 N. Y. App. Div. 667, 106 N. Y. S. 393; *Crowder v. Yovovich*, 84 Oreg. 41, 164 Pac. 576.

⁸ Lord Russell expressed doubts of its validity in *Killick v. Price*, 12 T. L. R. 253, but it was subsequently approved by the Court of Appeals in *Formby v. Formby*, 102 L. T. 116.

⁹ In *Rederi Aktienbolaget Transatlantic v. Fred Drughorn, Ltd.*, [1918] 1 K. B. 394, [1919] A. C. 203, the court held that the description of a person in a contract as "the charterer" did not preclude suit by an undisclosed principal of that person, as the word "owner" was held to do in *Humble v. Hunter* (stated *supra*, note 7). The

distinction is tenuous. See *Rederiaktiebolaget Argonaut v. Hani*, [1918] 2 K. B. 247.

¹⁰ In *Winchester v. Howard*, 97 Mass. 303, 93 Am. Dec. 93, the agent expressly represented that he was not acting for a certain principal, with whom the other contracting party stated he was unwilling to deal. In fact the agent was representing that principal. It was held the principal could not sue. See also *Gordon v. Street*, [1899] 2 Q. B. 641 (C. A.). Cf. *Kelly Asphalt Block Co. v. Barber Paving Co.*, 211 N. Y. 68, 105 N. E. 88, where the principal was allowed to enforce a contract made by an agent who refrained from disclosing his agency because his principal was a competitor of the defendant and feared that the defendant would not contract with him.

¹¹ See cases in this section *passim*; also *infra*, § 295.

negotiable instrument.¹² It is frequently said that there is an exception to the general rule that an undisclosed principal may enforce a contract made on his behalf, where personal confidence was reposed by the other contracting party in the agent who contracts in his own name.¹³ The matter is, however, more accurately expressed by saying that the party who contracted with the agent cannot be compelled either to give or to receive anything different from that for which he contracted with the agent. If the agent contracted apparently as principal to render services or perform an act personal in its nature, nobody but the agent can perform that act, and the party with whom he has contracted will not be bound to perform until he has received the agent's personal service.¹⁴ And within this principle pushed somewhat far it has been held that a contract by an agent to sell personalty apparently belonging to him is not fulfilled by an offer on the part of the principal to transfer the personalty in question, which in fact belonged to him.¹⁵ It seems possible, however, that the doctrine of undisclosed principal may, nevertheless, be applicable to such a contract. If the agent performs, or tenders performance¹⁶ of the

¹² See *infra*, §§ 296, 298. The doctrines of undisclosed principal are applicable to non-negotiable promissory notes. *Garland v. Reynolds*, 20 Me. 45; *National Ins. Co. v. Allen*, 116 Mass. 398; *Everett v. Drew*, 129 Mass. 150.

¹³ See *Navarre Hotel Co. v. American Appraisal Co.*, 142 N. Y. S. 89, 156 App. Div. 795; *Mechem on Agency* (2d ed.), § 2067.

¹⁴ *Sydney v. Mugford Printing & Co.*, 214 Fed. 841; *Sullivan v. Shailer*, 70 Conn. 733, 40 Atl. 1054; *Cowan v. Curran*, 216 Ill. 598, 75 N. E. 322; *Shields v. Coyne*, 148 Ia. 313, 127 N. W. 63, 29 L. R. A. (N. S.) 472; *Moore v. Vulcanite Portland Cement Co.*, 121 N. Y. App. D. 667, 106 N. Y. S. 393; *King v. Batterson*, 13 R. I. 117.

¹⁵ *New York Brokerage Co. v. Wharton*, 143 Ia. 61, 119 N. W. 969; *Winchester v. Howard*, 97 Mass. 303, 93 Am. Dec. 93 (dictum). But see *contra*

Hawkins v. Windhorst, 87 Kan. 168, 123 Pac. 761.

¹⁶ It is said by *Mechem*, and his statement is repeated, *e. g.*, in *Birmingham Matinee Club v. McCarty*, 152 Ala. 571, 44 So. 642, 13 L. R. A. (N. S.) 156, and in *Pancoast v. Dinsmore*, 105 Me. 471, 75 Atl. 43, 134 Am. St. 582, that the undisclosed principal will only be able to sue on such a contract if it is executed on the part of the agent; but if the performance is what was contracted for it is obviously immaterial whether the contract is unilateral or bilateral when made, if in the latter case the agent subsequently performs, or even tenders the correct performance; and if on the other hand, the performance actually rendered is not what was contracted for, *e. g.*, if the fact that property transferred belonged to the principal instead of to the agent as supposed makes it a different performance, a transaction

personal services which he agreed to render, the principal should be able to recover from the other party if he then breaks the contract.¹⁷ Even if the obligation on the other side is also for personal services which can be rendered only to the agent, the principal should be able to sue if such services are not rendered to the agent. In determining whether the nature of the performance, which the other party to the contract undertakes, will be changed if performance is rendered to the principal, it is not material that the other party engaged to do something which he alone could do, but it is important if his engagement would be changed in character if rendered to any one other than the agent. A contract with the agent that his co-contractor should paint a landscape might be enforced by the principal though such a contract is personal on the part of the painter; but a contract to paint a portrait of the agent if enforced by the principal, can be enforced not as a contract to paint his own portrait but as a contract to paint the agent's portrait. It is sometimes said that the personal liability of the agent when relied upon by the other party makes the contract so personal as to make the doctrine of undisclosed principal inapplicable,¹⁸ but there seems some misapprehension here. If the apparent principal in the transaction is the agent, and the contract is executory on his part, he will be liable whatever the nature of the contract in other respects may be. Another person's liability upon an executory promise can never be substituted without the promisee's consent for that which was agreed upon.¹⁹ But it is a part of the doctrine of undisclosed principle that the agent always remains liable, and the other party to the contract secures as an addition or an alternative the responsibility of the principal. This addition, whether little or great, can certainly do no harm.²⁰ Therefore, no quali-

executed under a material mistake should be rescinded.

¹⁷ See cases in the preceding note, also *Prichard v. Budd*, 76 Fed. 710, 22 C. C. A. 504; *Kelly Asphalt Block Co. v. Barber Asphalt Pav. Co.*, 136 N. Y. App. D. 22, 120 N. Y. S. 163. But see *Walton v. Davis*, 22 Cal. App. 456, 134 Pac. 795.

¹⁸ *Mechem on Agency* (2d ed.), § 2068; *Cowan v. Curran*, 216 Ill. 598, 75 N. E. 322; cf. *Davidson v. Hurty*, 116 Minn. 280, 133 N. W. 862, 39 L. R. A. (N. S.) 324.

¹⁹ See *supra*, § 80, *infra*, § 411.

²⁰ *Hawkins v. Windhorst*, 87 Kans. 176, 178, 123 Pac. 761.

fication of the doctrine of undisclosed principal is necessary. All that need be borne in mind here as always, is that the party dealing with the agent cannot be compelled to give or receive anything different from that for which he bargained.²¹ And at least it is true, that if there is any qualification to the doctrine of undisclosed principal because of the personal nature of the contract, the qualification must be confined to cases where not simply the name of the principal, but the agency itself was undisclosed. If the party dealing with the agent knows that the latter is dealing on behalf of a principal, it must be assumed that the party so dealing, is willing that the principal should enforce the obligation.

§ 287. Rights and liabilities of the principal where the agency is disclosed but the principal not named.

Where, in making an informal contract, the fact of agency was disclosed but no principal was named, the principal is liable;²² even though the plaintiff when making the contract

²¹ In *Shields v. Coyne*, 148 Ia. 313, 127 N. W. 63, 29 L. R. A. 472, a contract was made to lend an agent money on his note and mortgage. It was held that the principal could not enforce an obligation to lend money on his own note and mortgage, though the mortgage covered the agreed property. Here it will be observed that the execution of a specific instrument was contemplated,—the agent's note—and the party dealing with the agent could not be required to accept any different note. So in *Birmingham Matinee Club v. McCarty*, 152 Ala. 571, 44 So. 642, and *Pancoast v. Dinsmore*, 105 Me. 471, 75 Atl. 43, a contract by an agent to give a warranty deed was held not fulfilled by the tender of the principal's warranty deed. On the other hand, a contract with an agent to pay for property sold by the agent may be enforced by the undisclosed principal, since the obligation of the agent for the correct performance of his contract would not be lost by paying the price

to the principal. *Rice, etc., Co. v. International Bank*, 86 Ill. App. 136; *Hawkins v. Windhorst*, 87 Kans. 176, 123 Pac. 761. Such cases must be distinguished from offers to contract made to an agent or assignor but accepted by a principal or assignee. Only the offeree can accept an offer, whatever its character, but after a contract has once been formed a different problem is presented. See *infra*, § 432. See further, illustrating the effect upon the doctrine of undisclosed principal caused by the personal nature of the contract, *Walton v. Davis*, 22 Cal. App. 456, 134 Pac. 795; *National Bank v. Diefendorf*, 90 Ill. 396; *Cowan v. Curran*, 216 Ill. 598, 75 N. E. 322; *Kelly v. Thuey*, 102 Mo. 522, 15 S. W. 62, 143 Mo. 422, 45 S. W. 300; *Barns v. Barrow*, 61 N. Y. 39; *Navarre Hotel Co. v. American Appraisal Co.*, 156 App. Div. 795, 142 N. Y. S. 89; *King v. Batterson*, 13 R. I. 117, 43 Am. Rep. 13.

²² *Higgins v. Senior*, 8 M. & W. 834; *Anderson v. Beard*, [1900] 2 Q. B. 260;

charged the matter on his books to the agent and made out an invoice in the agent's name,²³ the principal can also sue.²⁴ These rights and liabilities are not affected by the circumstance that the contract is written, if it is neither under seal nor a negotiable instrument.²⁵

§ 288. What is sufficient disclosure of the principal.

As different rules of law are applicable when the agent discloses his principal and when he does not, the question of what is a sufficient disclosure of the principal is an important one. It is said that the duty is on the agent to make the disclosure, not upon the person with whom he is dealing to discover it.²⁶ Therefore, it is not sufficient to relieve the agent from personal liability that the person with whom he dealt had means of knowing that the agent was acting as such.²⁷ But, on the other hand, the general principles governing the formation of contracts require the conclusion that if the agent gave such information that a reasonable person in the light of the sur-

Edwards v. Gildemeister, 61 Kans. 141, 59 Pac. 259; *York County Bank v. Stein*, 24 Md. 447; *Byington v. Simpson*, 134 Mass. 169, 45 Am. Rep. 314; *Chandler v. Coe*, 54 N. H. 561; *Smith v. Felter*, 63 N. J. L. 30, 42 Atl. 1053; *Dykens v. Townsend*, 24 N. Y. 57; *Ludwig v. Gillespie*, 105 N. Y. 653, 11 N. E. 835.

²³ *Thomson v. Davenport*, 9 B. & C. 78. Compare *Rodliff v. Dallinger*, 141 Mass. 1, 4 N. E. 805, 55 Am. Rep. 439, stated *supra*, § 285.

²⁴ *Beckham v. Drake*, 9 M. & W. 79, 91; *McFadden v. Henderson*, 128 Ala. 221, 29 So. 640; *Smith v. Felter*, 63 N. J. L. 30, 42 Atl. 1053; *Nicoll v. Burke*, 78 N. Y. 580; *Thayer v. Luce*, 22 Oh. St. 62, 78; *National Bank v. Nolting*, 94 Va. 263, 28 S. E. 826; *Deitz v. Insurance Co.*, 31 W. Va. 851, 8 S. E. 616.

²⁵ See *infra*, § 295.

²⁶ *Holt v. Ross*, 54 N. Y. 472, 475, 13 Am. Rep. 615; *De Remer v. Brown*, 165 N. Y. 410, 419, 59 N. E. 129; *Baldwin*

v. Leonard, 39 Vt. 260, 94 Am. Dec. 324.

²⁷ *Brent v. Miller*, 81 Ala. 309, 8 So. 219 (knowledge that the agent had dealt for a certain principal in other transactions, held not to excuse the agent from liability); *Amans v. Campbell*, 70 Minn. 493, 73 N. W. 506, 68 Am. St. Rep. 547 (the fact that the defendant Campbell contracted in the name of "Campbell & Company" held not sufficient disclosure that he was acting as agent for his wife who did business under the name of Campbell & Company, but not to the general knowledge of the community); *Harmon v. Parker*, 193 Mich. 542, 160 N. W. 380; *Cobb v. Knapp*, 71 N. Y. 348, 27 Am. Rep. 51; *Curtis v. Miller*, 73 W. Va. 48, 80 S. E. 774. See also *Borries v. Imperial Ottoman Bank*, L. R. 9 C. P. 38; *Neely v. State*, 60 Ark. 66, 28 S. W. 800, 46 Am. St. Rep. 148; *Raymond v. Crown & Eagle Mills*, 2 Metc. 319.

rounding circumstances would have understood that the agent was acting for a principal indicated, though not named, the contract is with the principal and not with the agent.²⁸ And if the person with whom the agent dealt knew in fact that he was acting as agent for a specific principal though the agent did not himself disclose the fact, the case is not dealt with as one of undisclosed principal and the agent is not personally bound by the contract.²⁹

§ 289. Election of remedies where principal is undisclosed.

One who deals with the agent of an undisclosed principal would presumably desire, on discovering the existence of the principal, to assert that an obligation existed in his favor against both the principal and agent either jointly or severally, if the law allowed him to do so. If this were permitted, no assertion of right against either principal or agent would limit the right to make a claim upon the other, except to the extent that satisfaction was actually received. There seems no doubt, however, that the law does not give so large a right since with slight contrary authority it is held that after discovery of the principal judgment cannot be recovered against both agent and principal.³⁰ Though it is not easy to reconcile

²⁸ In *Mercer v. Leihy*, 139 Mich. 447, 102 N. W. 972, an auctioneer selling a horse, in the course of bidding requested the owner to show himself, and a man in the crowd stated that he was the owner of the horse. This was held a sufficient disclosure of the auctioneer's principal, though the name of the man who professed ownership of the horse was not given and was not known to the plaintiff.

In *Johnson v. Armstrong*, 83 Tex. 325, 18 S. W. 594, 29 Am. St. Rep. 648, the defendant was President of Fort Worth University. He requested the plaintiffs to draw plans for a building, which they did. The plaintiffs knew that the plans were for a school, or college building, but did not know for what institution. The court held that these circumstances showed that the

defendant was not contracting personally, and said of the plaintiffs: "The inquiry that it was their duty to make, under the circumstances of this case, would have developed a responsible principal, and it is difficult to conclude that plaintiffs did not have actual knowledge that they were dealing with a corporation, notwithstanding the fact that they did not at the time of making the contract inquire for or get that information from Johnson, the agent."

²⁹ *Chase v. Debolt*, 7 Ill. 371; *Warren v. Dickson*, 27 Ill. 115; *Boston & Maine R. v. Whiteher*, 1 Allen, 497.

³⁰ See *infra*, note 38. It has, however, been held in several cases that an action might be brought against both principal and agent, and that election, if necessary, need not be made until

all the decisions, the best view seems to be that the legal right is against the agent with whom the contract was in terms made, but that the law permits in substitution for the right against the agent a corresponding right against the principal. Under this view affirmative action is necessary to effect the substitution of the new right for the old. The plaintiff, therefore, must manifest within a reasonable time an election to hold the principal or the right to charge him will be lost.³¹ But no delay or conduct will discharge the principal until the plaintiff has both learned that the agent was such, and also has discovered the principal for whom the agent was acting.³² After such knowledge, any conduct on the part of the plaintiff which indicates an intention to hold the agent only, will be a discharge of the principal. But the manifestation of an intent to hold the agent, as by bringing action against him,³³ does not necessarily indicate an election to let the principal go free though it is doubtless evidence of such an election. And where an action against an agent and an attachment of his property were prosecuted after full knowledge of the principal's liability, it was held in the absence of fraud or mistake, an irrevocable election.³⁴ Even partial payment will not necessarily be conclusive.³⁵ Taking negotiable paper of one party or the other

the close of the evidence. *Williams v. O'Dwyer & Ahern Co.*, 127 Ark. 530, 192 S. W. 899; *Gay v. Kelley*, 109 Minn. 101, 123 N. W. 295; *Tew v. Wolfsohn*, 77 N. Y. App. Div. 454, 79 N. Y. S. 286, *affd.*, 174 N. Y. 272, 66 N. E. 934.

³¹ *Smethurst v. Mitchell*, 1 E. & E. 622.

³² *Thomson v. Davenport*, 9 B. & C. 78; *Curtis v. Williamson*, L. R. 10 Q. B. 57; *Merrill v. Kenyon*, 48 Conn. 314, 40 Am. Rep. 174; *Raymond v. Crown, etc.*, *Mills*, 2 Metc. 319; *Estes v. Aaron*, 227 Mass. 96, 99, 116 N. E. 392. See also *Steele-Smith Grocery Co. v. Potthast*, 109 Ia. 413, 80 N. W. 517; *Gay v. Kelley*, 109 Minn. 101, 123 N. W. 295, 26 L. R. A. (N. S.) 742; *Rommel v. Townsend*, 83 Hun. 353, 31 N. Y. S. 985; *Georgi v. Texas Co.*, 225 N. Y. 410, 122 N. E. 238.

³³ *Curtis v. Williamson*, L. R. 10 Q. B. 57; *Ferry v. Moore*, 18 Ill. App. 135; *Steele-Smith Co. v. Potthast*, 109 Ia. 413, 80 N. W. 517; *Jones v. Johnson*, 86 Ky. 530, 6 S. W. 582; *Hoffman v. Anderson*, 112 Ky. 893, 67 S. W. 49; *Raymond v. Crown, etc.*, *Mills*, 2 Metc. 319; *Estes v. Aaron*, 227 Mass. 96, 100, 116 N. E. 392; *Cobb v. Knapp*, 71 N. Y. 348, 27 Am. Rep. 51; *Tew v. Wolfsohn*, 77 N. Y. App. Div. 454, 79 N. Y. S. 286, *affd.* 174 N. Y. 272, 66 N. E. 934; *Daggett v. Champlain Mfg. Co.*, 71 Vt. 370, 45 Atl. 755.

³⁴ *Barrell v. Newby*, 127 Fed. 656, 62 C. C. A. 382. See also *Booth v. Barron*, 29 N. Y. App. Div. 66, 51 N. Y. S. 391; *Love v. St. Joseph Stock Yards Co. (Utah)*, 169 Pac. 951.

³⁵ *Jones v. Johnson*, 86 Ky. 530, 6 S. W. 582. After discovery of the prin-

for the claim is not, as matter of law, a decisive election.³⁶ Nor is merely charging the goods to the agent or demanding payment from him after discovery of the principal.³⁷ The question resolves itself into one of fact. Did the plaintiff with full knowledge elect to rely solely upon the credit of either the agent or the principal? If, however, judgment is taken against either with knowledge of the facts no claim can thereafter be asserted against the other although the judgment is unsatisfied.³⁸ And a settlement of the claim with the agent and release of him has the same effect.³⁹ But a judgment against the agent taken before disclosure of the facts of the agency will not bar a subsequent action against the principal.⁴⁰

principal a claim was made on the insolvent estate of the agent and a small dividend paid. The court nevertheless allowed a subsequent action against the principal. In *Hoffman v. Anderson*, 112 Ky. 893, 67 S. W. 49, the facts were the same except that the claim was presented against the principal's estate and a subsequent action was allowed against the agent.

³⁶ See *Atlas Steamship Co. v. Colombian Land Co.*, 102 Fed. 358, 42 C. C. A. 398. But in *Ames Packing Co. v. Tucker*, 8 Mo. App. 95, the court held that though taking negotiable paper in Missouri is presumably conditional only, it was, nevertheless, a conclusive election to take the individual note of the agent without taking at the time of the transaction any steps showing an intent to hold the principal.

³⁷ *Dyer v. Swift*, 154 Mass. 159, 28 N. E. 8.

³⁸ *Priestly v. Fernie*, 3 H. & C. 977; *Morel v. Westmorland*, [1904] A. C. 11; *Cross v. Matthews*, 91 L. T. (N. S.) 500; *Barrell v. Newby*, 127 Fed. 656, 62 C. C. A. 382; *Eufaula Grocery Co. v. Missouri Nat. Bank*, 118 Ala. 408, 24 So. 389; *Jones v. Aetna Insurance Co.*, 14 Conn. 501; *Mussenden v. Raiffe*, 131 Ill. App. 456; *Jones v. Johnson*, 86 Ky. 530, 6 S. E. 582; *E. J. Codd Co. v. Parker*, 97 Md. 319,

55 Atl. 623; *Kingsley v. Davis*, 104 Mass. 178; *Weil v. Raymond*, 142 Mass. 206, 7 N. E. 860; *Murphy v. Hutchinson*, 93 Miss. 643, 48 So. 178, 21 L. R. A. (N. S.) 785; *Sessions v. Block*, 40 Mo. App. 569; *Lears v. Cella* (Mo. App.), 186 S. W. 1150; *Tuthill v. Wilson*, 90 N. Y. 423; *Georgi v. Texas Co.*, 225 N. Y. 410, 122 N. E. 238; *Lage v. Weinstein*, 35 N. Y. Misc. 298, 71 N. Y. S. 744; *Rounsaville v. North Carolina Home Ins. Co.*, 138 N. C. 191, 50 S. E. 619; *Pittsburg Plate Glass Co. v. Roquemore* (Tex. Civ. App.), 88 S. W. 449. See, however, the contrary decision of *Beymer v. Bonsall*, 79 Pa. 298; also *McLean v. Sexton*, 44 N. Y. App. Div. 520, 60 N. Y. S. 871.

³⁹ *Orvis v. Wells*, 73 Fed. 110, 19 C. C. A. 382; *Booth v. Baron*, 29 N. Y. App. D. 66, 51 N. Y. S. 391; *Love v. St. Joseph's Stock Yards Co.* (Utah), 169 Pac. 951.

⁴⁰ *Auto Parts Co. v. Roberts*, 194 Ill. App. 417; *Lindquist v. Dickson*, 98 Minn. 369, 107 N. W. 958, 6 L. R. A. (N. S.) 729; *Greenburg v. Palmieri*, 71 N. J. L. 83, 58 Atl. 297; *Georgi v. Texas Co.*, 225 N. Y. 410, 122 N. E. 238; *Brown v. Reiman*, 48 N. Y. App. D. 295, 62 N. Y. S. 663. It is somewhat difficult to see why the claim is not merged in the judgment. In

§ 290. Undisclosed principal, rather than his agent is entitled to enforce the contract.

In enforcing the contract against a third person, the principal's right is superior to the agent's and the assertion of a right by the principal to enforce the contract abates the agent's right.⁴¹

§ 291. Defences to actions by an undisclosed principal.

As the doctrine by which an undisclosed principal is given rights and subjected to liabilities under a contract made professedly with another is somewhat artificial, and is adopted for the promotion of justice, courts will so limit the doctrine as to advance the ends of justice; and, therefore, will allow defences to actions by and against the principal when the situation is such as to make it equitable. Thus in an action by the principal against the person with whom the agent contracted, the defendant is entitled to take advantage of any settlement made with the agent while still believing him to be a principal;⁴² or to set off against the undisclosed principal a debt due from the agent on another account,⁴³ unless the debt was created after the agency was disclosed.⁴⁴ But if the defendant knew that the agent was acting as such, though his principal was not named, a set-off of claims against the agent cannot be made against the principal.⁴⁵

"The buyer must be cautious, and not act regardless of the

all other cases where the plaintiff is allowed to charge the principal, he thereby loses his right against the agent. But though a defence may arise to a judgment actually recovered against the agent, the judgment itself cannot be cancelled by a suit against the principal or a judgment in that suit. The court is in reality allowing at law what might more logically be achieved by a rescission in equity of the first recovery. Cf. other cases of election, *infra*, §§ 683, 684, 736, 1304, 1374, 1407, 1464, 1524, 1594.

⁴¹ *Sadler v. Leigh*, 4 Campb. 195; *Warder v. White*, 14 Ill. App. 50; *Pitts v. Mower*, 18 Me. 361, 38 Am.

Dec. 727; *Huntington v. Knox*, 7 Cush. 371; *Norcross v. Pease*, 5 Allen, 331.

⁴² *Doucette v. Baldwin*, 194 Mass. 131, 135, 80 N. E. 444.

⁴³ *Rabone v. Williams*, 7 T. R. 360 (note a); *George v. Clagett*, 7 T. R. 359; *Borries v. Imperial Ottoman Bank*, L. R. 9 C. P. 38; *Montagu v. Forwood*, [1893] 2 Q. B. 350; *Beatty v. Heath* (Mo. App.), 183 S. W. 1102; *Hudgins Produce Co. v. Beggs* (Tex. Civ. App.), 185 S. W. 339. See *Lime Rock Bank v. Plimpton*, 17 Pick. 159.

⁴⁴ *Norcross v. Pease*, 5 Allen, 331.

⁴⁵ *Hornby v. Lacy*, 6 M. & S. 166.

able grounds to believe that the party with whom he deals is but an agent. Hence, if the character of the seller is equivocal, if he is known to be in the habit of selling sometimes as principal and sometimes as agent, a purchaser who buys with a view of covering his own debts and availing himself of a set-off is bound to inquire in what character he acts in the particular transaction; and if the buyer chooses to make no inquiry, and it should turn out that he has bought of an undisclosed principal, he will be denied the benefit of his set-off."⁴⁶ Even though the claims against the agent which the defendant seeks to set off against the principal were acquired after the transaction with the agent, and indeed after the agent ceased to represent the principal, the claims may, nevertheless, be set off against the principal if, when they were acquired, the existence of the principal was still undisclosed.⁴⁷ Further, if agents make a single sale of goods belonging in part to themselves and in part to a principal whose existence is not disclosed, since the contract is indivisible, the principal cannot sue for the proportion of the price payable on the goods which belong to him.⁴⁸ The same principles are applicable to any other defences. If good against the agent, they are good against the principal.⁴⁹ But defences acquired through dealing with the agent after notice from the principal of his rights cannot be used by the other party.⁵⁰ Nor can he use against the principal any defence against the agent where he has such knowledge in regard to the agency as to make it a fraud for him to assert the defence.⁵¹

⁴⁶ *Miller v. Lea*, 35 Md. 396, 406, 6 Am. Rep. 417. See also *Cooke v. Eshelby*, 12 A. C. 271; *Baxter v. Sherman*, 73 Minn. 434, 76 N. W. 211, 72 Am. St. Rep. 631.

⁴⁷ *Stebbins v. Walker*, 46 Mich. 5, 8 N. W. 521.

⁴⁸ *Roosevelt v. Doherty*, 129 Mass. 301, 37 Am. Rep. 356.

⁴⁹ *Semenza v. Brinsley*, 18 C. B. (N. S.) 467; *Mildred v. Maspons*, 8 A. C. 874; *Lane v. Leiter*, 237 Fed. 149, 150 C. C. A. 295; *Amann v. Lowell*, 66 Cal. 306, 5 Pac. 363; *Peel v.*

Shepherd, 58 Ga. 365; *Baltimore Tar Co. v. Fletcher*, 61 Md. 288; *Illsley v. Merriam*, 7 Cush. 242, 54 Am. Dec. 721; *Houghton v. J. W. Hundley Co. (Okl.)*, 157 Pac. 1142.

⁵⁰ *Norcross v. Pease*, 5 Allen, 331.

⁵¹ *Mildred v. Maspons*, 8 A. C. 874; *Childers v. Bowen*, 68 Ala. 221; *Miller v. Lea*, 35 Md. 396, 6 Am. Rep. 417; *McLachlin v. Brett*, 105 N. Y. 391, 12 N. E. 17; *Frame v. William Penn Coal Co.*, 97 Pa. 309.

§ 292. Defences to actions against an undisclosed principal.

There is considerable confusion of authority in regard to the question whether settlement by the principal with his agent before the person with whom the agent dealt makes a claim upon the principal is a defence to the latter. The decision of the controversy depends upon whether the liability of an undisclosed principal is to be regarded as an absolute right of one who deals with the agent although confessedly the credit of the agent has been exclusively relied upon, or whether, on the other hand, a person who thus deals with an agent is to be given only such limited right against the undisclosed principal as is consistent with equity. If the first of these theories is sound, the person dealing with the agent cannot be deprived of his right against the principal unless in some way he has subjected himself to an estoppel by misleading the principal. If, however, the second theory is sound, the mere fact that the principal has innocently put himself in a situation where hardship will be caused by holding him liable on the agent's contract should be a defence. The English court has wavered somewhat uncertainly between these two views. The earliest decision on the subject⁵² adopted the second theory and held that recovery from the principal was "subject, however, to this qualification, that the state of the account between the principal and the agent is not altered to the prejudice of the principal." This rule is supported perhaps by the weight of authority in the United States,⁵³ but has now been much modified in England, the first of the two theories suggested above having been adopted by a later decision in the middle of the last century, and the principal held liable unless the plaintiff in some way had misled the principal.⁵⁴

⁵² *Thomson v. Davenport*, 9 B. & C. 78.

⁵³ *Fradley v. Hyland*, 37 Fed. 49, 2 L. R. A. 749; *Clealand v. Walker*, 11 Ala. 1058, 46 Am. Dec. 238; *Ketchum v. Verdell*, 42 Ga. 534; *Price-Evans Foundry Co. v. Southern Bell T. & T. Co.*, 19 Ga. App. 264, 91 S. E. 283; *Thomas v. Atkinson*, 38 Ind. 248; *Emerson v. Patch*, 123 Mass. 541;

Cheever v. Smith, 15 Johns. 276; *Fish v. Wood*, 4 E. D. Smith, 327; *Laing v. Butler*, 37 Hun, 144; *Knapp v. Simon*, 96 N. Y. 284; *Rowan v. Buttman*, 1 Daly, 412; *Muldon v. Whitlock*, 1 Cow. 290, 13 Am. Dec. 533; *Rathbone v. Tucker*, 15 Wend. 498; *English v. Rauchfuss*, 21 N. Y. Misc. 494, 47 N. Y. S. 639.

⁵⁴ *Heald v. Kenworthy*, 10 Exch.

It is still the law of England that if the plaintiff was aware when the contract was made that the agent was acting for some principal, though unnamed, a settlement by the principal with his agent will not preclude a suit against the principal by the third party;⁵⁵ but if the settlement by the undisclosed principal was made when the third party was still unaware that the agent was not himself the principal, it has been held that the plaintiff cannot hold the principal.⁵⁶ The later English cases find support in a few decisions in the United States.⁵⁷ There seems little ground for the fine distinctions taken by the later English cases. It would be better to adopt squarely either the rule that the undisclosed principal is liable in every case unless the plaintiff has discharged him by electing so to do, or by misleading him to his injury; or, on the other hand, to hold that the principal is not liable whenever his action honestly taken makes it undue hardship to hold him. The latter view seems more conformable to justice.

§ 293. Defences to actions by the agent of an undisclosed principal.

If the agent sues the person with whom he dealt it is a defence that settlement has been made with the principal though he was wholly undisclosed at the time of the contract.⁵⁸ Whether a claim that could be used as set-off against the principal may also be used as set-off against the agent, depends upon the character of the local statute governing set-off, and upon whether equitable principles are applied. Under the early English Statute such a set-off could not be used;⁵⁹ but at the

739. See also *Macfarlane v. Giannacopulo*, 3 H. & N. 860; *Smethurst v. Mitchell*, 1 E. & E. 622.

⁵⁵ *Irvine v. Watson*, 5 Q. B. D. 414. See also *Davison v. Donaldson*, 9 Q. B. D. 623.

⁵⁶ *Armstrong v. Stokes*, L. R. 7 Q. B. 598.

⁵⁷ *Bush v. Devine*, 5 Harr. 375; *Balister v. Hamilton*, 3 La. Ann. 401; *Hyde v. Wolf*, 4 La. 234, 23 Am. Dec. 484; *York County Bank v. Stein*, 24 Md. 447; *Brown v. Bankers'*, etc., Tel.

Co., 30 Md. 39; *Schepflin v. Dessar*, 20 Mo. App. 569; *Laing v. Butler*, 37 Hun, 144. See also dicta to this effect in *Guest v. Burlington Opera House Co.*, 74 Ia. 457, 38 N. W. 158; *Simmons Hardware Co. v. Todd*, 79 Miss. 163, 29 So. 851.

⁵⁸ *Atkinson v. Cotesworth*, 3 B. & C. 647.

⁵⁹ *Isberg v. Bowden*, 8 Exch. 852. See also *Alsop v. Caines*, 10 Johns. 396.

present day a contrary result would probably be reached in most jurisdictions.⁶⁰

§ 294. Defences to actions against the agent of an undisclosed principal.

If instead of suing the principal the person with whom the agent dealt sues the agent the latter cannot claim a set-off which would have been good in a suit against the principal, even though the principal's existence is discovered before the time when performance of the contract was due.⁶¹

§ 295. Informal written contracts.

The principles which have heretofore been referred to, are applicable not only to oral contracts but also in the main to unsealed written contracts. Some important consequences, however, flow from the contract being written rather than oral. There is less necessity for resorting to presumption, and extrinsic circumstances are less likely to be important where the contract is in writing than where it is oral. Moreover, the promises in writing cannot be contradicted, and the construction of them is for the court.⁶² Therefore an agent who signs personally an unsealed written contract, may sue or be sued upon it as a party to the contract though his principal is orally disclosed,⁶³ but if the contract is neither under seal nor a negotiable instrument, the principal also may sue or be sued upon it whether he is orally disclosed,⁶⁴ or undisclosed.⁶⁵

⁶⁰ *Bliss v. Sneath*, 103 Cal. 43, 36 Pac. 1029.

⁶¹ *Forney v. Shipp*, 4 Jones L. 527.

⁶² *Evans v. Evans*, 3 A. & E. 132; *De Ramer v. Brown*, 165 N. Y. 410, 417, 59 N. E. 129.

⁶³ *Jones v. Littleale*, 6 A. & E. 486; *Higgins v. Senior*, 8 M. & W. 834; *Calder v. Dobell*, L. R. 6 C. P. 486; *Brandt v. Morris*, [1917] 2 K. B. 784; *Hall v. Crandall*, 29 Cal. 567, 89 Am. Dec. 64; *Johnson v. Smith*, 21 Conn. 627; *Chandler v. Coe*, 54 N. H. 561; *Rapid Safety Filter Co. v. Lautkin*, 167 N. Y. S. 376; *Cream City Glass Co. v. Friedlander*, 84 Wis. 53, 54 N. W. 28, 21 L. R. A. 135, 36 Am. St.

Rep. 895. In *Camp v. Barber*, 87 Vt. 235, 88 Atl. 812, the agent was allowed to sue on such a contract, but the court relied on the fact that the agent was beneficially interested.

⁶⁴ *Bateman v. Phillips*, 15 East, 272; *Drake v. Beckham*, 11 M. & W. 315; *Calder v. Dobell*, L. R. 6 C. P. 486; *Boren v. Schweitzer*, (Ind. App.) 117 N. E. 526; *Byington v. Simpson*, 134 Mass. 169, 45 Am. Rep. 314; *Nicoll v. Burke*, 78 N. Y. 580; *Choate v. Stander* (Okl.), 160 Pac. 737; *Alvord v. Banfield*, 85 Oreg. 49, 166 Pac. 549; *Smith v. Campbell*, 85 Oreg. 420, 166 Pac. 546. But see *Chandler v. Coe*, 54 N. H. 561.

⁶⁵ *Boren v. Schweitzer* (Ind. App.),

It is said that this does not violate the parol evidence rule, since the party apparently liable on the face of the writing is never excused, but it is merely shown that his signature by virtue of the law of agency also binds another.⁶⁶ Even though the contract is within the Statute of Frauds, a signature of the agent without indication either in the body of the instrument or in the signature for whom he is acting is sufficient to bind the principal,⁶⁷ or to entitle him to sue.⁶⁸ But the agent also is liable though the other party knew he was acting merely as agent and knew his principal.⁶⁹ Evidence of the surrounding circumstances is always admissible to aid in the construction of a writing, and in case of ambiguity it may be necessary to resort to the inferences and presumptions which are appropriate to oral contracts. Wherever it becomes essential to determine whether the agent or the principal is the party named as the contracting party in an informal written contract, there seems no reason for invoking any different principles of construction from those which are hereafter stated as applicable to covenants and to negotiable instruments.⁷⁰

117 N. E. 526; *Huntington v. Knox*, 7 Cush. 371; *Borcherling v. Katz*, 37 N. J. Eq. 150; *Shenners v. Adams* (Okla.), 148 Pac. 1023; *Hubbert v. Borden*, 6 Whart. 79; *Edwards v. Golding*, 20 Vt. 30.

⁶⁶ *Higgins v. Senior*, 8 M. & W. 834; *Thayer v. Luce*, 22 Oh. St. 62, 78.

⁶⁷ *Trueman v. Loder*, 11 Ad. & El. 589, 594 (sale of goods); *Lerned v. Johns*, 9 Allen, 419 (sale of goods); *Haubelt v. Rea & Page Co.*, 77 Mo. App. 672 (sale of goods); *Conway v. Sweeney*, 24 W. Va. 643 (sale of land). And if the body of the instrument names the principal, *a fortiori* he is liable, though the signature of the agent does not indicate his agency. *Wiener v. Whipple*, 53 Wis. 298, 10 N. W. 433, 40 Am. Rep. 775 (sale of goods).

⁶⁸ *Huntington v. Knox*, 7 Cush. 371 (sale of goods); *Stowell v. Eldred*, 39 Wis. 614 (sale of judgment); *Hunter v. Giddings*, 97 Mass. 41, 93 Am. Dec.

54 (sale of goods); likewise where the body of the instrument names the principal but the signature is the agent's name without addition. *Phillips v. Cornelius* (Miss.), 28 So. 871 (land).

⁶⁹ *Higgins v. Senior*, 8 M. & W. 834 (goods); *Sanborn v. Flagler*, 9 Allen, 474. See also *Meyer v. Redmond*, 205 N. Y. 478, 98 N. E. 906, 41 L. R. A. (N. S.) 675; affirming s. c. 141 N. Y. App. Div. 123, 125 N. Y. S. 1052. And see *supra*, § 29.

⁷⁰ See *Lutz v. Van Heynigen Brokerage Co.* (Ala.), 75 So. 284; *Taylor v. Danielsonville Cotton Co.*, 82 Conn. 220, 72 Atl. 1080; *Grady v. Pruitt*, 111 Ky. 100, 63 S. W. 283; *Maine Red Granite Co. v. York*, 89 Me. 54, 35 Atl. 1014; *Copeland v. Hewett*, 96 Me. 525, 53 Atl. 36; *Rogers, etc., Co. v. Union, etc., Co.*, 134 Mass. 31; *Deering v. Thom*, 29 Minn. 120, 12 N. W. 350; *Towers v. Stevens Cattle Co.*, 83 Minn. 343, 86 N. W. 88; *New-*

§ 296. Sealed contracts.

In view of the right of action by or against the principal which exists even though the agent is named as the contracting party in the writing, it is only where the agent seeks to maintain a personal suit, or where it is sought to hold him personally liable that it is likely to be important to determine which is the actual party to a simple contract. If the contract is under seal the importance is greater.

By the rule of the Common Law none but parties to sealed instruments could have rights or be subject to liabilities thereunder. This rule obviously involves the consequences that a principal who is not, on a proper construction of a sealed instrument, named it in as a party, is not liable upon it, nor can he maintain an action on it.⁷¹

Not only must the principal be named in the document, but to become liable, it is essential both that he should be expressed as the covenantor and also that the instrument should be sealed with his seal.⁷² In many instances the execution of an instrument indicates that the signer is also the covenantor, as

land Hotel Co. v. Lowe Furniture Co., 73 Mo. App. 135; *Basnigh v. Southern, etc., Co.*, 148 N. C. 350, 62 S. E. 420; *Riter v. Sun Foundry Co.*, 10 Utah, 140, 37 Pac. 257; *Gavassa v. Plummer*, 53 Wash. 14, 101 Pac. 370.

⁷¹ *Pickering's Claim*, L. R. 6 Ch. 525; *Whitney v. Wyman*, 101 U. S. 392, 395, 25 L. Ed. 1050; *Badger Silver Mining Co. v. Drake*, 88 Fed. 48, 58 U. S. App. 129, 31 C. C. A. 378; *Gibson v. Victor Talking Mach. Co.*, 232 Fed. 225; *Hall v. Cockrell*, 28 Ala. 507; *Walsh v. Murphy*, 167 Ill. 228, 47 N. E. 354; *Huntington v. Knox*, 7 Cush. 371, 374; *New England Co. v. Rockport Co.*, 149 Mass. 381, 21 N. E. 947; *Congress Construction Co. v. Worcester Brewing Co.*, 182 Mass. 355, 65 N. E. 792; *Ferris v. Snow*, 124 Mich. 559, 83 N. W. 374, 130 Mich. 254, 90 N. W. 850; *Esper v. Miller*, 131 Mich. 334, 91 N. W. 613; *Mahoney v. McLean*, 26 Minn. 415, 4 N. W. 784; *Borcherling v. Katz*, 37 N. J. Eq. 150;

Taft v. Brewster, 9 Johns. 334, 6 Am. Dec. 280; *Briggs v. Partridge*, 64 N. Y. 357, 21 Am. Rep. 617; *Tuthill v. Wilson*, 90 N. Y. 423; *Elliott v. Brady*, 192 N. Y. 221, 85 N. E. 69, 18 L. R. A. (N. S.) 600, 127 Am. St. 898; *Weber v. Columbia Amusement Co.*, 160 N. Y. App. D. 835, 146 N. Y. S. 53; *Bryson v. Lucas*, 84 N. C. 680, 37 Am. Rep. 634; *Quigley v. DeHaas*, 82 Pa. St. 267; *Steele v. McElroy*, 1 Sneed, 341. *Cf.* *Moore v. Granby Mining, etc., Co.*, 80 Mo. 86; *O'Brien v. Clement*, 160 N. Y. S. 975; *Whitehead v. Reddick*, 12 Ired. L. 95; *Kempner v. Dillard*, 100 Tex. 505, 101 S. W. 437, 123 Am. St. 822; *Stowell v. Eldred*, 39 Wis. 614.

⁷² *Moore*, pl. 191, p. 70. *Philadelphia, etc., R. Co. v. Howard*, 13 How. 307, 337, 14 L. Ed. 157; *Whitney v. Wyman*, 101 U. S. 392, 395, 25 L. Ed. 1050; *Northwestern Distilling Co. v. Brant*, 69 Ill. 658, 18 Am. Rep. 631; *Townsend v. Corning*, 23 Wend. 435.

if the instrument reads "I covenant," and is signed, "A. B." But the covenantor may be separately named in the body of the instrument. The proper way in which a sealed contract should be made on behalf of a principal is by stating the covenant as the principal's and the execution of the deed as his. But though it is desirable for the agent to indicate that the principal's name has been signed by the agent, and not by the principal personally, it is legally a sufficient execution to bind the principal if the agent, without disclosing in the body of the instrument or in the signature that the principal was not acting personally signs the name of the principal.⁷³ It is also immaterial by what words the instrument indicates that the execution is the act of the principal—not of the agent. A contract signed "M. W." for "J. B." is the contract of J. B. as much as if signed J. B. by M. W.;⁷⁴ but it is insufficient to establish a covenant as the principal's where the covenant is stated to be that of "A. B. Agent," and this has been so held even though the instrument describes the authority enabling the agent to execute the instrument. It is the personal covenant of the agent.⁷⁵ The addition of the word "Agent" even

⁷³ *Wilks v. Back*, 2 East, 142; *Forseyth v. Day*, 41 Me. 382; *Berkey v. Judd*, 22 Minn. 287; *Devinney v. Reynolds*, 1 W. & S. 328. The statement in *Wood v. Goodridge*, 6 Cush. 117, 52 Am. Dec. 771, that it should appear on the face of the instrument that it was executed by an agent and by virtue of authority delegated to him, cannot be supported.

⁷⁴ *Wilks v. Back*, 2 East, 142; *Sun Printing & Publishing Assoc. v. Moore*, 183 U. S. 642, 648, 22 S. Ct. Rep. 240, 46 L. Ed. 366, aff'g, 101 Fed. 591, 41 C. C. A. 506; *Northwestern Distilling Co. v. Brant*, 69 Ill. 658, 660, 18 Am. Rep. 631; *Bradstreet v. Baker*, 14 R. I. 546; *Mussey v. Scott*, 7 Cush. 215, 54 Am. Dec. 719.

⁷⁵ *Lutz v. Linthicum*, 8 Pet. 165, 8 L. Ed. 904; *Jones v. Morris*, 61 Ala. 518; *Fisher v. Salmon*, 1 Cal. 413, 54 Am. Dec. 297; *Deming v. Bullitt*, 1 Blackf. 241; *Banks v. Sharp*, 6 J. J. Marsh. 180;

Stinchfield v. Little, 1 Me. 231, 10 Am. Dec. 65; *Tippets v. Walker*, 4 Mass. 595; *Fullam v. West Brookfield*, 9 Allen, 1; *Endsley v. Strock*, 50 Mo. 508; *Dayton v. Warne*, 43 N. J. L. 659; *Taft v. Brewster*, 9 Johns. 334, 6 Am. Dec. 280; *White v. Skinner*, 13 Johns. 307, 7 Am. Dec. 381; *Kiersted v. Orange &c. R. Co.*, 69 N. Y. 343, 25 Am. Rep. 199; *Locke v. Alexander*, 2 Hawks, 155, 11 Am. Dec. 750; *Bryson v. Lucas*, 84 N. C. 680, 37 Am. Rep. 634; *Quigley v. DeHaas*, 82 Pa. St. 267; *Roberts v. Button*, 14 Vt. 195, 204; *Gear v. Shaw*, 1 Pinney, 608, 615; *North v. Henneberry*, 44 Wis. 306. See also *White v. Cuyler*, 6 T. R. 176; *Stinchcomb v. Marsh*, 15 Gratt. 202; *Cullen v. Nickerson*, 10 U. Can. C. P. 549. In *Welsh v. Usher*, 2 Hill Ch. (S. C.) 167, 29 Am. Dec. 63, it was held that though a bill of sale of the principal's ship, executed in the agent's name was wholly inoperative at law, it amounted

though followed by the name of the principal, is regarded as mere *descriptio personæ* as if it were "A. B., Farmer," or, "A. B. Gentleman." If, however, the covenant in the body of the deed is clearly expressed to be that of the principal, a signature, as agent or as officer of a corporation will be sufficient to indicate that the seal is that of the principal.⁷⁶ If the agent sign individually such a covenant of the principal, without words indicating his agency, though the covenant is not that of the principal, the agent also cannot be held liable as a covenantor, since the covenant in the body of the instrument is that of the principal.⁷⁷ Similar principles are applicable to rights under sealed instruments as to duties. The principal cannot sue upon a covenant though made with reference to his business and for his benefit unless he is the covenantee, and if the agent is named as the covenantee, though he is stated in the covenant to be the agent of a named principal, these words are mere *descriptio personæ*.⁷⁸ Where the form of the instrument does not accurately express the intention of the parties the possibility of equitable reformation should be considered.⁷⁹

§ 297. When simple contracts binding the principal may be implied.

If the principal takes the benefit of a covenant made in fact on his behalf, but so written that the covenant is not that of the agent because the promise is not expressed to be his, nor that of the principal because the seal is that of the agent, the

to such an agreement as a court of equity would give effect to, against creditors of the principal.

⁷⁶ Consolidated Coal Co. v. Peers, 150 Ill. 344, 37 N. E. 937; Johnston v. Crawley, 25 Ga. 316, 71 Am. Dec. 173; Reynolds' Heirs v. Glasgow Academy, 6 Dana, 37; Mill Dam Foundry v. Hovey, 21 Pick. 417; Wiley v. Board of Education, 11 Minn. 371; Turner v. Kingston, etc., Co., 106 Tenn. 1, 53 S. W. 854. But see Hatch's Lessee v. Barr, 1 Ohio, * 390; Brown v. Farmers' Supply Co., 23 Oreg. 541, 32 Pac. 548; Miller v. Rutland, etc., R. Co., 36 Vt. 452. Even though the principal is a

corporation it may thus adopt a seal, not stated to be the corporate seal. Cases *supra*.

⁷⁷ Randall v. Van Vechten, 19 Johns. 60, 10 Am. Dec. 193; Sherman v. Fitch, 98 Mass. 59, 64; Whitford v. Laidler, 94 N. Y. 145, 46 Am. Rep. 131; Hopkins v. Mehaffy, 11 S. & R. 126.

⁷⁸ Berkeley v. Hardy, 5 B. & C. 355; Sheldon v. Dunlap, 1 Harrison (N. J.), 245; Buffalo Catholic Institute v. Bitter, 87 N. Y. 250. See also Norris v. Dains, 52 Oh. St. 215, 39 N. E. 660, 49 Am. St. Rep. 716.

⁷⁹ See *infra*, § 302.

principal will become liable on a contract implied in fact if he take advantage of the covenant and treat it as his own, unless the contract is of such a nature that a seal is requisite to its validity.⁸⁰ And indeed if the principal authorized the making of the contract and a seal is not essential to its validity, and the court finds that the intent was that the contract should be that of the principal, the instrument if it states a promise of the principal may take effect as a simple contract of the principal though signed and sealed by the agent individually.⁸¹ Indeed some cases have gone further, following the analogy of cases which hold that an agent, who has not authority under seal enabling him to enter into a sealed contract for his principal, may bind the principal by a simple contract, when he attempts to enter into a sealed contract on his behalf.⁸² They have held that an undisclosed principal may be charged on a contract entered into by his agent, though the contract is under seal, if the seal was not necessary for the existence of the contract.⁸³ The contrary view, however, as to this last point has been strongly taken in New York,⁸⁴ and it seems with reason. Unlike the cases where the agent had purported to enter into a sealed contract for his principal but without the requisite authority, there is here a valid contract under seal. It seems difficult to find in addition to this contract under seal of the agent a simple contract also on which to hold the undisclosed principal. Nor can a sealed instrument when dishonored be disregarded and suit brought on principles of quasi-contract, against the principal for the value of the consideration received by him.⁸⁵ Where seals

⁸⁰ See cases in the preceding section; also *Williams v. Uncompahgre Canal Co.*, 13 Col. 469, 22 Pac. 806.

⁸¹ This was so held in regard to instruments expressed to be the covenants of a corporation but signed by the agent in his own name and sealed with his individual seal in *Sherman v. Fitch*, 98 Mass. 59; *Blanchard v. Blackstone*, 102 Mass. 343. See also *Purvance v. Sutherland*, 2 Ohio St. 478.

⁸² See *supra*, § 275.

⁸³ *Lancaster v. Knickerbocker Ice Co.*, 153 Pa. 427, 26 Atl. 251; *Stowell*

v. Eldred, 39 Wis. 614; *Kirschbom v. Bonzel*, 67 Wis. 178, 29 N. W. 907; See also *Love v. Sierra Nevada, etc., Co.*, 32 Cal. 639, 91 Am. Dec. 602.

⁸⁴ *Briggs v. Partridge*, 64 N. Y. 357, 21 Am. Rep. 617; *Schaefer v. Henkel*, 75 N. Y. 378; *Henricus v. Englert*, 137 N. Y. 488, 33 N. E. 550; *Spencer v. Huntington*, 100 N. Y. App. Div. 463, 91 N. Y. S. 561; *Stanton v. Granger*, 125 N. Y. App. Div. 174, 109 N. Y. S. 134.

⁸⁵ *Coaling Coal Co. v. Howard*, 130 Ga. 807, 811, 61 S. E. 987; *Kiersted v.*

have been altogether deprived of their common-law efficacy, it is probable that the principles stated in the preceding section as applicable to informal written contracts would be applied rather than those stated in this section.⁸⁶

§ 298. Only parties to negotiable instruments are liable thereon.

A bill of exchange or promissory note is a formal instrument though of a mercantile character, and it is generally held that no one is liable on such an instrument whose name does not appear upon it as a signer. Unless it appears, therefore, from the instrument itself, that the obligation is made on behalf of a principal named in the paper, the agent is liable and the principal is not.⁸⁷ Even though it clearly appears that an instrument relates to the principal's business, the agent if he signs the instrument individually becomes personally liable. Thus if the agent draws on his principal for the principal's debt, the agent is liable on the bill if it is dishonored.⁸⁸ So though

Orange, etc., R. Co., 69 N. Y. 343, 25 Am. Rep. 199; *cf.* the rule in regard to negotiable instruments, *infra*, § 303.

* *Gibbs v. Dickson*, 33 Ark. 107; *Streeter v. Janu*, 90 Minn. 393, 96 N. W. 1128; *cp. Jones v. Morris*, 61 Ala. 518, 524; *Sanger v. Warren*, 91 Tex. 472, 44 S. W. 477, 66 Am. St. Rep. 913.

* *Leadbitter v. Farrow*, 5 M. & S. 345; *Price v. Taylor*, 5 H. & N. 540; *Dutton v. Marsh*, L. R. 6 Q. B. 361; *In re Adanson Fibre Co.*, L. R. 9 Ch. 635; *Cragin v. Lovell*, 109 U. S. 194, 3 S. Ct. 132, 27 L. Ed. 903; *Knott v. Venable*, 42 Ala. 186; *Moragne v. Richmond Locomotive Works*, 124 Ala. 537, 27 So. 240; *Pease v. Pease*, 35 Conn. 131, 95 Am. Dec. 225; *Graham v. Campbell*, 56 Ga. 258; *Coaling Coal Co. v. Howard*, 130 Ga. 807, 811, 61 S. E. 987; *New York Life Ins. Co. v. Martindale*, 75 Kans. 142, 88 Pac. 559, 21 L. R. A. (N. S.) 1045; *Fuller v. Hooper*, 3 Gray, 334, 341; *Williams v. Robbins*, 16 Gray, 77, 77 Am. Dec.

396; *Sparks v. Dispatch Transfer Co.*, 104 Mo. 531, 15 S. W. 417, 12 L. R. A. 714, 24 Am. St. Rep. 351; *Farrell v. Reed*, 46 Neb. 258, 64 N. W. 959; *Chandler v. Coe*, 54 N. H. 561; *Pentz v. Stanton*, 10 Wend. 271, 25 Am. Dec. 558; *Manufacturers' Bank v. Love*, 13 N. Y. App. D. 561, 43 N. Y. S. 812; *Ranger v. Thalmann*, 84 N. Y. App. Div. 341, 82 N. Y. S. 846, *affd.* 178 N. Y. 574, 70 N. E. 1108; *National German Am. Bank v. Lang*, 2 N. Dak. 66, 49 N. W. 414; *Anderton v. Shoup*, 17 Oh. St. 125; *Bank v. Cook*, 38 Oh. St. 442; *Arnold v. Sprague*, 34 Vt. 402. But see *contra Haskell v. Cornish*, 13 Cal. 45.

* *Leadbitter v. Farrow*, 5 M. & S. 345; *Newhall v. Dunlap*, 14 Me. 180, 31 Am. Dec. 45; *Mahew v. Prince*, 11 Mass. 54; *Conant v. Alvord*, 166 Mass. 311, 44 N. E. 250. The law is otherwise in Louisiana. *Krumbhaar v. Ludeling*, 3 Martin (O. S.), 640; *Wolfe v. Jewett*, 10 La. 383; *Lincoln v. Smith*, 11 La. 11. So if an agent indorses to his

a draft contains a direction to charge the payment to the principal's account, the agent, if he signs individually, is personally liable.⁸⁹ But if such an instrument is signed with the addition of words stating that the signer is an agent or corporate officer, the principal, not the agent, is liable.⁹⁰

§ 299. What signatures to negotiable instruments bind the principal.

The signature by the agent of the principal's name alone is sufficient to bind the principal if the agent was duly authorized.⁹¹ So a signature of the agent stated to be "on account of" the principal,⁹² or "on behalf of,"⁹³ or "for" the principal,⁹⁴ makes the instrument his obligation. But it is generally held that the mere addition of the word "agent" or such official designations as—"president," "treasurer," "trustee," in the absence of words in the body of the instrument showing a different intent, is to be treated as matter of description, and

principal a bill received in the principal's business the agent is liable. *Goupy v. Harden*, 7 Taunt. 160.

⁸⁹ *Thomas v. Bishop*, 2 Str. 955; *Newhall v. Dunlap*, 14 Me. 180, 31 Am. Dec. 45; *Bank of British North America v. Hooper*, 5 Gray, 567, 66 Am. Dec. 390; *Bass v. O'Brien*, 12 Gray, 477. The law is otherwise in Louisiana. *Maher v. Overton*, 9 La. 115; *Milligan v. Lyle*, 24 La. Ann. 144. See also *Wallis v. Johnson School Township*, 75 Ind. 368. In *Olcott v. Tioga R. Co.*, 40 Barb. 179, affd. in 27 N. Y. 546, 84 Am. Dec. 298, a draft signed by "A" with the addition "President" of a named corporation, drawn on B, named as Treasurer of another corporation, with direction to "charge motive power and account," was held the bill of the corporation, and not of A individually. In this case, however, there was the further circumstance that the bill was dated at the office of the corporation.

⁹⁰ *Witte v. Derby Fishing Co.*, 2 Conn. 260; *Tripp v. Swansey Paper*

Co., 13 Pick. 291; *Fuller v. Hooper*, 3 Gray, 334; *Davis v. Henderson*, 25 Miss. 549.

⁹¹ *Second Nat. Bank v. Martin*, 82 Ia. 442, 48 N. W. 735; *Young v. Perry*, 42 N. Y. App. 247, 59 N. Y. S. 19. In these cases the name of a corporation was signed without indication of the officer or agent who wrote the signature.

⁹² *Lindus v. Merlose*, 2 H. & N. 293, 3 H. & N. 177; *Gadd v. Houghton*, 1 Ex. D. 357.

⁹³ *Aggs v. Nicholson*, 1 H. & N. 165.

⁹⁴ *Alexander v. Sizer*, L. R. 4 Ex. 102; *Sheridan v. Carpenter*, 61 Me. 83; *Tucker Manufacturing Co. v. Fairbanks*, 98 Mass. 101, 104; *Olcott v. Little*, 9 N. H. 259, 32 Am. Dec. 357. See also cases to the same effect as to sealed instruments, *supra*, n. 74. It was so held as to a charter party in *Sun Printing & Publishing Assoc. v. Moore*, 183 U. S. 642, 648, 22 Sup. Ct. Rep. 240, 46 L. Ed. 366, affg. 41 C. C. A. 506, 101 Fed. 591. But in *Early v. Wilkinson*, 9 Gratt. 68, where the

the agent or official is personally the party.⁹⁵ Even though the signature to the instrument has added to it not simply the word agent, or the name of a corporate office which the signer holds, but also states the name of the principal or the corporation of which the signer is an officer, as "A. B. agent for C. D." or "X. Y., President of the Z Corporation," the same rule is applied. The obligation is that of the agent,⁹⁶ except as the

words following the agent's signature "For Sam'l H. Early" were inclosed in brackets, the court held that a note so signed was that of the agent.

* *Rew v. Pettet*, 1 Ad. & El. 196 ("Churchwardens for the Parish of C" and "Overseer" added after the names of signers); *Metcalf v. Williams*, 104 U. S. 93, 98, 26 L. Ed. 665; *Richmond Locomotive Works v. Moragne*, 119 Ala. 80, 24 So. 834 ("Board of Business Managers"); *Moragne v. Richmond Locomotive Works*, 124 Ala. 537, 24 So. 240; *Conner v. Clark*, 12 Cal. 168, 73 Am. Dec. 529 ("Trustee"); *Hobson v. Hassett*, 76 Cal. 203, 18 Pac. 320, 9 Am. St. Rep. 193 ("President"); *San Bernardino Nat. Bank v. Bank of Andreson (Cal.)*, 32 Pac. 168 ("President," "Secretary"); *Hall v. Bradbury*, 40 Conn. 32 ("Agent"); *Johnston v. Allis*, 71 Conn. 207, 41 Atl. 816 ("Trustee"); *Graham v. Campbell*, 56 Ga. 258, 262 ("Agent"); *Bedell v. Scarlett*, 75 Ga. 52 ("Agent"); *Burkhalter v. Perry*, 127 Ga. 438, 56 S. E. 631, 119 Am. St. Rep. 343 ("Agent"); *Coaling Coal Co. v. Howard*, 130 Ga. 807, 811, 61 S. E. 987 ("Agent," "Trustee"); *School Trustees v. Rautenberg*, 88 Ill. 219 ("School Trustees"); *Hackmack v. Wiebrock*, 172 Ill. 98, 49 N. E. 984 ("Pres.," "Sec'y."); *Prescott v. Hixon*, 22 Ind. App. 139, 53 N. E. 391, 72 Am. St. Rep. 291 ("President," "Secretary"); *Jump v. Sparling*, 218 Mass. 324, 105 N. E. 878 (general statement), *Leach v. Blow*, 16 Miss. 221, 228 ("Trustees"); *Farrell v. Reed*, 46 Neb. 258, 64 N. W. 969 ("Trustee"); *Pents v. Stanton*, 10

Wend. 271, 25 Am. Dec. 558 ("Agent"); *Chemung Canal Bank v. Supervisors*, 5 Denio, 517 ("Supervisors"); *Casco Nat. Bank v. Clark*, 139 N. Y. 307, 34 N. E. 908, 36 Am. St. Rep. 705 ("Pres.," "Treas."); *First Nat. Bank v. Stuetzer*, 80 Hun, 435, 30 N. Y. S. 83, affd., 150 N. Y. 455 ("President" "Treasurer"); *Cortland Wagon Co. v. Lynch*, 82 Hun, 173, 31 N. Y. S. 325 ("Agt."); *Manufacturers' Bank v. Love*, 13 N. Y. App. Div. 561, 43 N. Y. S. 812 ("Agent"); *Anderton v. Shoup*, 17 Oh. St. 125 ("Agent"); *Ohio Nat. Bank v. Cook*, 38 Oh. St. 442 ("Treas."); *Guthrie v. Imbrie*, 12 Or. 182, 6 Pac. 664, 53 Am. Rep. 331 ("Pres.," "Sec. G. M. Co."); *Manufacturers' Bank v. Follett*, 11 R. I. 92, 23 Am. Rep. 418 ("Agent"); *Arnold v. Sprague*, 34 Vt. 402, 409 ("Agent"); *Rand v. Hale*, 3 W. Va. 495, 100 Am. Dec. 761 ("Pres."); *Hamilton v. Jones*, Rap. Jud. Quebec, 10 C. S. 496 (attorney). See further in regard to signatures of trustees, *infra*, § 312.

* *Rew v. Pettet*, 1 Ad. & E. 196 ("Churchwardens for the Parish of C"); *Courtauld v. Saunders*, 16 L. T. (N. S.) 562 (Directors "of the Financial Insurance Company, Limited"); *Tannatt v. Rocky Mountain Nat. Bank*, 1 Col. 278, 9 Am. Rep. 156 ("Agent for S. Taylor"); *Burlingame v. Brewster*, 79 Ill. 515, 22 Am. Rep. 177 ("As trustees of First Universalist Society of Erlville"); *McNeil v. Shober, etc., Co.*, 144 Ill. 238, 33 N. E. 31 ("President World's Pastime Exposition Company"); *Hays v. Crutcher*, 54 Ind. 260 ("Trustees of the First

Uniform Negotiable Instruments Law may have changed the law. This result is more necessarily reached in regard to a note signed by an officer of a corporation, where the body of the note states "I" promise to pay;⁹⁷ though the same result has been reached where a note read "we" promise, and was signed by a single person with the addition of his official title in a specified corporation.^{97a}

Universal Church of Pierceton"); *Hayes v. Matthews*, 63 Ind. 412, 30 Am. Rep. 226 ("Trustees of the First Universalist Church of Pierceton, Indiana"); *Hayes v. Brubaker*, 65 Ind. 27 ("Trustees of the First Universalist Church of Pierceton"); *Williams v. Second Nat. Bank*, 83 Ind. 237 ("Trustees Perry Lodge 37, F. & A. M."); *McClellan v. Robe*, 93 Ind. 298 ("Trustees for Greenwood Lodge, No. 192, F. & A. M."); *Coburn v. Omega Lodge*, 71 Iowa, 581, 32 N. W. 513 ("Trustees Omega Lodge"); *Webb v. Burke*, 5 B. Mon. 51 ("Agent for Samuel Burke"); *Burbank v. Posey*, 7 Bush, 372 ("President of the Henderson Coal Co."); *Sheridan v. Carpenter*, 61 Me. 83 ("Treasurer of St. Paul's Parish"); *Mellen v. Moore*, 68 Me. 390, 28 Am. Rep. 77 ("Treasurer of Mechanic Falls Dairying Association"); *Rendell v. Harriman*, 75 Me. 497, 46 Am. Rep. 421 ("President and Directors of Stockton Cheese Company"); *Sumwalt v. Ridgeley*, 20 Md. 107 ("Treasurer of St. Stephen's Epcl Church fund"); *Haverhill Ins. Co. v. Newhall*, 1 Allen, 130 (President of the Dorchester Avenue Railroad Company); *Tucker Mfg. Co. v. Fairbanks*, 98 Mass. 101 ("Agts. Piscataqua F. & M. Ins. Co."); *Davis v. England*, 141 Mass. 587, 6 N. E. 731 ("Pres. and Treas. Chelsea Iron Foundry"); *Tilden v. Barnard*, 43 Mich. 376, 5 N. W. 420, 38 Am. Rep. 197 (Vestryman Grace Church); *Fowler v. Atkinson*, 6 Minn. 578 ("Trustees of School District No. 5"); *Byars v. Doores*, 20 Mo. 284 (Attorney

for Elias French"); *Savage v. Rix*, 9 N. H. 263 ("Whitefield Road Committee." The note began "We jointly and severally promise"); *Terhune v. Parrott*, 59 N. J. L. 16, 34 Atl. 4 ("President of Long Branch Hotel & Cottage Co."); *Barker v. Mechanic Ins. Co.*, 3 Wend. 94, 20 Am. Dec. 664 (President of the Mechanic Fire Ins. Co."); *Hills v. Bannister*, 8 Cow. 31 ("Trustees of Union Religious Society, Phelps"); *Merchants' Bank v. Hayes*, 7 Hun, 530 ("Attorney for the Estate of L. Hayes"); *DeWitt v. Walton*, 9 N. Y. 571 ("Agent for the Churchman"); *Robinson v. Kanawha Valley Bank*, 44 Oh. St. 441, 8 N. E. 583, 58 Am. Rep. 829 ("Agent Kanawha & Ohio Coal Co."); *Keokuk Falls Imp. Co. v. Kingsland, etc., Co.*, 5 Okla. 32, 47 Pac. 484 ("As Directors Keokuk Falls Improvement Co."); *Early v. Wilkinson*, 9 Gratt. 68 ("For Sam'l H. Early"); *Scott v. Baker*, 3 W. Va. 285 ("President Blannerhassett Oil Co."); *Exchange Bank v. Lewis County*, 28 W. Va. 273 ("Agent for Lewis County"). But see *Johnson v. Smith*, 21 Conn. 627, where a note signed by three persons with the addition: "Vestrymen of the Episcopal Society" was held to bind the society.

⁹⁷ *Chamberlain v. Pacific Wool-Growing Co.*, 54 Cal. 103 (cf. *McCormick v. Stockton R. Co.*, 130 Cal. 100, 62 Pac. 267); *Sturdivant v. Hull*, 59 Me. 172, 8 Am. Rep. 409; *Wyman v. Gray*, 7 Harr. & J. 409; *Haverhill Mut. Ins. Co. v. Newhall*, 1 Allen, 130; *Davis v. England*, 141 Mass. 587, 6 N. E. 731.

^{97a} *Mellen v. Moore*, 68 Me. 390, 28

Sometimes a note signed by a corporation has added to the signature of the corporation the names of officers with their official designations as a note signed "A. B. Co." and under this signature the further signatures "X. Y. President," "Y. Z. Treasurer." It is open to argument whether such an instrument is intended to be merely the obligation of the corporation executed by its officers, or is intended to be the joint obligation of the corporation and its officers. By the weight of authority such an instrument is held to import without ambiguity the sole liability of the corporation.⁸⁸ In a few States, however, it has been held that the corporation and the individuals are both liable.⁸⁹ The courts of other States hold with considerable reason that such an instrument is not without ambiguity, and that parol evidence should be admitted to clear up the ambiguity.¹

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Am. Rep. 77; *McClure v. Livermore*, 78 Me. 390, 6 Atl. 11.

⁸⁸ *Chapman v. Smethurst*, [1909] 1 K. B. 927 (rev'g., [1909] 1 K. B. 73); *Falk v. Moebs*, 127 U. S. 597, 8 S. Ct. R. 1319, 32 L. Ed. 266; *Gold, etc., Co. v. Dennia*, 21 Colo. App. 284, 121 Pac. 677; *Farmers', etc., Bank v. Colby*, 64 Cal. 352, 28 Pac. 118; *Castle v. Belfast Foundry Co.*, 72 Me. 167; *Gleason v. Sanitary, etc., Co.*, 93 Me. 544, 45 Atl. 825, 74 Am. St. Rep. 370; *Dra- per v. Massachusetts Steam Heating Co.*, 5 Allen, 338; *Miller v. Roach*, 150 Mass. 140, 22 N. E. 634, 6 L. R. A. 71; *English, etc., Co. v. Globe, etc., Co.*, 70 Neb. 435, 97 N. W. 612; *Reeve v. First Nat. Bank*, 54 N. J. L. 208, 23 Atl. 853, 16 L. R. A. 143, 33 Am. St. Rep. 675; *Wilson v. Fite* (Tenn.), 46 S. W. 1056; *Liebscher v. Kraus*, 74 Wis. 387, 43 N. W. 166, 5 L. R. A. 496, 17 Am. St. Rep. 171. See also *Scanlan v. Keith*, 102 Ill. 634, 40 Am. Rep. 624; *Lathan v. Houston Flour Mills*, 68 Tex. 127, 3 S. W. 462.

⁸⁹ *Heffner v. Brownell*, 75 Iowa, 341, 39 N. W. 640; *Mathews v. Dubuque Mattress Co.*, 87 Ia. 246, 54 N. W. 225,

19 L. R. A. 676; *Keokuk Falls Imp. Co. v. Kingsland, etc., Mfg. Co.*, 5 Okl. 32, 47 Pac. 484. In *Savings Bank, etc., v. Central Market Co.*, 122 Cal. 28, 54 Pac. 273, the note was signed by a corporation and by several individuals "as stockholders." It was held that all were liable. But these decisions it seems should be revised if the same question should arise after the enactment of the Negotiable Instrument Law.

¹ *Briel v. Exchange Nat. Bank*, 172 Ala. 475, 55 So. 808, 180 Ala. 576, 61 So. 277; *Bean v. Pioneer Mining Co.*, 66 Cal. 451, 6 Pac. 86, 56 Am. Rep. 106; *Swarts v. Cohen*, 11 Ind. App. 20, 38 N. E. 536; *Western, etc., Co. v. Lackman*, 75 Kans. 34, 88 Pac. 527; *Brunswick-Balke, etc., Co. v. Boutell*, 45 Minn. 21, 47 N. W. 261. Where the signature of the officer was not followed by his official title, it was held that he might show by parol evidence that he was secretary of the corporation and signed the note merely as such. *Germania Nat. Bank v. Mariner*, 129 Wis. 544, 109 N. W. 574.

changes many of the results stated in this section.² Signatures to non-negotiable notes and other non-negotiable instruments would not be controlled, however, by the statute.

§ 300. Adoption by a principal or a corporation of the signature of an agent or officer.

As a party to a negotiable instrument may adopt as a business designation any name which he sees fit,³ as indeed a party to any contract may,⁴ it has been urged with some force that under this rule the name of an agent or official, followed by a statement of his agency or office, is properly to be regarded as a business designation of the principal. If the facts bear out the contention that the name of the agent or official was thus intended and do not rather show that the name of the individual was intended, the suggestion seems sound.⁵ The principle has been fully recognized in regard to the name of a cashier or other officer of a financial corporation to which the name of his office is added. This has often been held a designation of the corporation.⁶ Conversely it

² Section 20 of the Statute provides: "Where the instrument contains or a person adds to his signature words indicating that he signs for or on behalf of a principal, or in a representative capacity, he is not liable on the instrument if he was duly authorized; but the mere addition of words describing him as an agent, or as filling a representative character, without disclosing his principal, does not exempt him from personal liability." See *infra*, § 1144.

³ *Pease v. Pease*, 35 Conn. 131, 95 Am. Dec. 225; *Chemical Natl. Bank v. City Bank*, 156 Ill. 149, 40 N. E. 328; *Fuller v. Hooper*, 3 Gray, 334; *Chandler v. Coe*, 54 N. H. 561; *DeWitt v. Walton*, 9 N. Y. 571; *Froelich v. Froelich Trading Co.*, 120 N. C. 39, 26 S. E. 647.

⁴ *Cherry v. City Nat. Bank*, 144 Fed. 587, 75 C. C. A. 343; *Smith v. Robins*, 236 Fed. 114, 149 C. C. A. 324.

⁵ See *Edmunds v. Bushell*, L. R. 1 Q. B. 97; *Flower v. Commercial Trust Co.*, 223 Fed. 318, 138 C. C. A. 580; *Ocilla Southern R. Co. v. Morton*, 13 Ga. App. 504, 79 S. E. 480; *Barlow v. Congregational Society*, 8 Allen, 460; *Bank of New York v. Bank of Ohio*, 29 N. Y. 619. Cf. *Heffron v. Pollard*, 73 Tex. 96, 11 S. W. 165, where parol evidence was held inadmissible to show that a contract signed by the agent in the name of the principal, by himself as agent was intended as the contract of the agent, the name of the principal being used as the agent's business designation.

⁶ *Baldwin v. Bank of Newbury*, 1 Wall. 234, 17 L. Ed. 534; *New England, etc., Co. v. Gay*, 33 Fed. 636; *Stamford Bank v. Ferris*, 17 Conn. 259; *Collins v. Johnson*, 16 Ga. 458; *Coal; ing, etc., Co. v. Howard*, 130 Ga. 807; *McIntire v. Preston*, 10 Ill. 48, 48 Am. Dec. 321; *Nave v. First Nat. Bank*, 87 Ind. 204; *Erwin Lane Paper*

would seem that the agent may adopt the principal's name as his own business designation, but a case where this was true in fact would be unusual.⁷

§ 301. The body of the instrument may explain the meaning of the signature.

If a negotiable instrument states that the promise is that of the principal, it seems immaterial in what form the agent signs it. Though it is necessary that the instrument be signed, it is not necessary, if it is delivered by the obligor, or by one who has authority to bind him, that the signature be subscribed⁸ and even though the agent signed his individual name without addition, it would seem that the reasonable construction of the instrument is that the principal promises by his agent, the signer. Certainly where the signature states the agency by the addition of the word "agent" or the like, the obligation will be that of the principal.⁹ A variety of differences in expression in the body of the instrument may tend to show an intention to make the obligation that of the principal or of the agent. The instrument must be read

Co. v. Farmers' Nat. Bank, 130 Ind. 367, 30 N. E. 411, 30 Am. St. Rep. 246; *Hodge v. Farmers' Bank*, 7 Ind. App. 94, 34 N. E. 123; *Midland, etc., Co. v. Citizens', etc., Bank*, 34 Ind. App. 107, 72 N. E. 290; *Pratt v. Topeka Bank*, 12 Kans. 570; *Folger v. Chase*, 18 Pick. 63; *Webster v. Wray*, 19 Neb. 558, 27 N. W. 644, 56 Am. Rep. 754; *Water-vliet Bank v. White*, 1 Denio, 608; *Bank of Genesee v. Patchin Bank*, 19 N. Y. 312; *Lake Shore Nat. Bank v. Butler Colliery Co.*, 51 Hun, 63, 3 N. Y. S. 771; *Société, etc., v. Mackintosh*, 5 Utah, 568, 18 Pac. 363; *Houghton v. First Natl. Bank*, 26 Wis. 663, 7 Am. Rep. 107. In *National City Bank v. Westcott*, 118 N. Y. 468, 474, 23 N. E. 900, 16 Am. St. Rep. 771, it is suggested that this principle might be applied even though the officer did not affix his official title after his signature. See the provision of the Negotiable

Instrumental Law quoted *supra*, n. 2, and see *infra*, § 1144.

⁷ In *Kansas Nat. Bank v. Bay*, 62 Kan. 692, 64 Pac. 596, 54 L. R. A. 408, 84 Am. St. Rep. 417, the agent without authority, and for his personal benefit gave a note signed with the principal's name. The agent was held not liable to the holder, because the court found the agent did not intend to bind himself personally.

⁸ *Daniel, Neg. Inst.*, § 74.

⁹ *Fairlie v. Fenton*, L. R. 5 Exch. 169; *Shaver v. Ocean Min. Co.*, 21 Cal. 45; *Pearse v. Welborn*, 42 Ind. 331; *Armstrong v. Kirkpatrick*, 79 Ind. 527; *Yowell v. Dodd*, 3 Bush, 581, 96 Am. Dec. 256; *Jefts v. York*, 4 Cush. 371, 50 Am. Dec. 791, 10 Cush. 392; *Whitney v. Stow*, 111 Mass. 368; *Shotwell v. M'Kown*, 5 N. J. L. 828. So held even though the instrument was under seal in *Bradstreet v. Baker*, 14 R. 5. 146.

as a whole and subject to ordinary principles of construction.¹⁰

Words written or printed on the margin of an instrument can have no greater effect than parol evidence. Such words are not part of the instrument itself whose meaning the court is seeking to determine.¹¹

The fact that the seal of a corporation with its name stamped thereon is attached to a document has often been relied on to show that the obligation was that of the corporation, and not that of an officer who signed in a form that would, apart from the seal, bind him individually. It has indeed been held in England that if the obligation otherwise appeared to be that of the individual the seal would not change this liability;¹² but generally, and it seems rightly, such a seal is held to show that the execution of the instrument was intended to be that of the corporation and not that of the officer personally.¹³

¹⁰ A contract whereby the plaintiff agreed to build a garage "for the Barker Auto Company," signed by the defendants, who were husband and wife, individually, containing no words purporting to bind the corporation, or indicating that the signers acted officially or as agents, was held the contract of its signers, and not of the corporation. *Nystrom v. Barker*, 88 Conn. 382, 91 Atl. 649.

¹¹ *Price v. Taylor*, 5 H. & N. 540; *Cooley v. Esteban*, 26 La. Ann. 515; *Merchants' Nat. Bank v. Clark*, 64 Hun, 175, 19 N. Y. S. 136; *Casco Nat. Bank v. Clark*, 139 N. Y. 307, 34 N. E. 908, 36 Am. St. Rep. 705; *First Nat. Bank v. Wallis*, 150 N. Y. 455, 44 N. E. 1038. But see *Carpenter v. Farnsworth*, 106 Mass. 561, 8 Am. Rep. 360, where a check signed by "A, Treasurer," was held to be the check of a corporation the name of which was printed in the margin. This decision seems to come within the principal stated, *supra*, that evidence is admissible to show that the signature though apparently that of the agent was not made as his though under the supposi-

tion that it rendered the principal liable, but was made as the business signature of the corporation. Other decisions holding an instrument bound the principal or corporation though signed in a form which would usually bind the agent or officer personally because of the name of the principal or corporation in the margin, together with other circumstances tending to show the obligation was intended to be that of the principal are, *Hitchcock v. Buchanan*, 105 U. S. 416, 26 L. Ed. 1078; *Sayre v. Nichols*, 7 Cal. 535, 541, 68 Am. Dec. 280; *Fuller v. Hooper*, 3 Gray, 334, 341; *Chipman v. Foster*, 119 Mass. 189; *Van Leuvan v. First Nat. Bank*, 6 Lans. 373, aff'd in 54 N. Y. 671; *Schaefer v. Bidwell*, 9 Nev. 209. In all these cases the obligation was held that of the principal. In some of them it seems that the court was rather reforming the instrument under consideration than interpreting it.

¹² *Dutton v. Marsh*, L. R. 6 Q. B. 361.

¹³ *Scanlan v. Keith*, 102 Ill. 634, 40 Am. Rep. 624; *Reed v. Fleming*, 209 Ill. 390, 70 N. E. 667; *Means v. Swornstedt*, 32 Ind. 87, 2 Am. Rep. 330;

§ 302. Reformation of instrument and admission of parol evidence.

If it can be shown clearly that both parties intended that the principal and the principal only should be bound, a bill in equity may be maintained to reform a contract expressed in such a way as to bind the agent;¹⁴ and in many jurisdictions without resort to proceedings to reform the contract, parol evidence is admitted to show that the obligation was intended and understood to be that of the principal. The Supreme Court of the United States has said:—"The ordinary rule undoubtedly is, that if a person merely adds to the signature of his name the word 'agent,' 'trustee,' 'treasurer,' etc., without disclosing his principal, he is personally bound. The appendix is regarded as a mere *descriptio personæ*. It does not of itself make third persons chargeable with notice of any representative relation of the signer. But if he be in fact a mere agent, trustee, or officer of some principal, and is in the habit of expressing, in that way, his representative character in his dealings with a particular party, who recognizes him in that character, it would be contrary to justice and truth to construe the documents thus made and used as his personal obligations, contrary to the intent of the parties."¹⁵

Miller v. Roach, 150 Mass. 140, 22 N. E. 634, 6 L. R. A. 71; *Hood v. Hallenbeck*, 7 Hun, 362; *Guthrie v. Imbrie*, 12 Or. 182, 6 Pac. 664, 53 Am. Rep. 331.

¹⁴ *Lawrence County Bank v. Arndt*, 69 Ark. 406, 65 S. W. 1052; *Prescott v. Hixon*, 22 Ind. App. 139, 72 Am. St. Rep. 291 (notes signed by officers of a corporation with the official titles of the signers added, but no mention of the corporation in the body of the instrument); *Eustis Mfg. Co. v. Saco Brick Co.*, 198 Mass. 212, 84 N. E. 449 (a written contract binding both principal and agent). See also *Love v. Sierra Nevada, etc., Co.*, 32 Cal. 639, 91 Am. Dec. 602 (a mortgage under seal); *Richmond v. Ogden St. Ry. Co.*, 44 Ore. 48, 74 Pac. 333.

¹⁵ *Metcalfe v. Williams*, 104 U. S. 93,

98, 26 L. Ed. 665. In this case a draft was signed "W. V. Pres't." and "A. Sec'y." It was held that this was the draft of a corporation whose name did not appear on the instrument, parol evidence being admitted to show that W was the Vice President, and A, the Secretary of the corporation. And see also, permitting parol evidence, *Lynch v. McDonald*, 155 Cal. 704, 102 Pac. 918; *Wagner v. Brinkerhoff*, 123 Ala. 516, 26 So. 117; *Lewis v. Mutual L. Ins. Co.*, 8 Colo. App. 368, 46 Pac. 621; *Second, etc., Bank v. Midland, etc., Co.*, 155 Ind. 581, 58 N. E. 833, 52 L. R. A. 307; *Kline v. Bank of Tescott*, 50 Kans. 91, 31 Pac. 688, 18 L. R. A. 533, 34 Am. St. Rep. 107; *Rowell v. Oleson*, 32 Minn. 288, 20 N. W. 277; *Brunswick-Balke, etc., Co. v. Boutell*, 45 Minn. 21, 47 N. W. 261; *Souhegan Bank v.*

But those who take such negotiable instruments for value with no other notice of the intent of the original parties than the form of the instrument gives, cannot have their rights changed by parol evidence showing such intent.¹⁶ And in some jurisdictions such parol evidence would not be admitted even as between the original parties.¹⁷

In discussions of the admissibility of parol evidence two lines of thought are often somewhat obscured. As a negotiable instrument is a formal contract, no one not named in the contract as an obligor can be held liable upon it. The obligations of the parties must be gathered from within the four corners of the instrument. But evidence of the circumstances under which a writing was given is always admissible to aid the court in determining the true meaning of the words in the document. Accordingly if it can be shown that the signature "A. B. Agent" or "A. B. Agent for C. D." is a method of signature adopted by the principal for business purposes, this would seem properly admissible in any jurisdiction. But the mere fact that a note thus signed was given in the course of the principal's business, or even facts showing that the parties to the transaction supposed such a signature rendered the principal liable, not the agent, does not show that the signature was regarded as that of the principal. It rather tends to show that the parties made a mistake of law in supposing that the rule in regard to formal contracts was similar to that in regard to oral contracts. If, however, the parties did in good faith suppose that a transaction in the form adopted would be in law that of the principal

Boardman, 46 Minn. 293, 48 N. W. 1116; *Martin v. Smith*, 65 Miss. 1, 3 So. 33; *Knippenberg v. Greenwood Min. Co.*, 39 Mont. 11, 101 Pac. 159; *Reeve v. First Nat. Bank*, 54 N. J. L. 208, 210, 23 Atl. 853, 16 L. R. A. 143, 33 Am. St. Rep. 675; *Terhune v. Parrott*, 59 N. J. L. 16, 35 Atl. 4; *Simanton v. Vliet*, 61 N. J. L. 595, 40 Atl. 595, *Vliet v. Simanton*, 63 N. J. L. 458, 43 Atl. 738; *Phelps v. Weber*, 84 N. J. L. 630, 87 Atl. 469; *Megowan v. Peterson*, 173 N. Y. 1, 65 N. E. 738; *Bush v. Gilmore*, 45 N. Y. App. Div. 89, 61 N. Y. S.

682; *Crandall v. Rollins*, 83 N. Y. App. Div. 618, 82 N. Y. S. 317; *Small v. Elliott*, 12 S. Dak. 570, 82 N. W. 92, 76 Am. St. Rep. 630.

¹⁶ *Riordan v. Thornsby*, 178 Ky. 324, 198 S. W. 920; *First Nat. Bank v. Stuetzer*, 80 Hun, 435, 30 N. Y. S. 83, aff'd, 150 N. Y. 455, 44 N. E. 1038, and see cases in the preceding note.

¹⁷ *Mathews v. Dubuque Mattress Co.*, 87 Ia. 246, 54 N. W. 225, 19 L. R. A. 676; *Davis v. England*, 141 Mass. 587, 6 N. E. 731.

and not of the agent, a reformation of the obligation might properly be made by a court of equity,¹⁸ and there can be no doubt that this function of a court of equity has often been adopted in effect by courts of law through the short cut of admitting parol evidence to indicate the real intent of the parties, and then giving effect to that intent. Many of the cases upon such notes as are here under discussion must be explained in this way, since the inquiry of the court seems rather to have been aimed at discovering whom the parties understood to be liable rather than at discovering the meaning of the words contained in the instrument. The only objection to such an equitable short cut at law is that the same weight of evidence to prove an intent at variance with the writing is not apt to be required where parol evidence is admitted at law as where resort is had to an equitable proceeding.

§ 303. A principal not liable on a negotiable instrument may be liable on its dishonor.

The principal though he is not liable, whether disclosed or not, upon a negotiable instrument signed by his agent personally, may nevertheless be liable as a debtor for the price or the value of any consideration received by him, if the negotiable instrument is dishonored,¹⁹ unless the instrument was taken in absolute payment.²⁰

§ 304. Only parties to negotiable instruments have the right to enforce them.

The formal character of negotiable instruments makes it as impossible to give rights thereon to one who is not a party, as to hold liable one who has not signed the instrument.²¹ There seems no reason for a different construction of the mean-

¹⁸ See *supra*, n. 14, and *infra*, § 1585.

¹⁹ *Bentley v. Griffin*, 5 Taunt. * 356; *Coaling Coal Co. v. Howard*, 130 Ga. 807, 61 S. E. 987; *Pentz v. Stanton*, 10 Wend. 271, 25 Am. Dec. 558; *Harper v. Tiffin Nat. Bank*, 54 Ohio St. 425, 44 N. E. 97. In *Kenyon v. Williams*, 19 Ind. 44, the court held that if the contract was within the scope of the

agency, a court of equity would enforce the obligation against the principal; and see *infra*, § 313, in regard to the enforcement of the obligations of trustees and other fiduciaries against the estate which they represent.

²⁰ See cases in the preceding note.

²¹ See cases in the following note.

ing of the name of a person with the addition "agent," "administrator," "guardian," "treasurer," or the like when the name is that of the payee of a note from that applicable when the name is that of an obligor. Accordingly it is generally held that such an addition to the name of the payee is merely matter of description and the instrument is payable to the individual.²² In most jurisdictions, however, if it were shown by parol evidence that the consideration moved from a corporation to whose officer, named as such, the instrument was in terms payable, the obligation would be held to run to the corporation, either because the name of the agent or officer was treated as the business designation of the principal or corporation, or apart from that reason.²³ Even though the legal payee of an

²² *Randoll v. Bell*, 1 M. & S. *715; *Castleberry v. Fennel*, 4 Ala. 642 ("Agent for G. A. K."); *Moore v. Penn*, 5 Ala. 135; *Ord v. McKee*, 5 Cal. 515 ("Agent"); *Saffold v. Banks*, 60 Ga. 289 ("Administrator of A"); *Zellner v. Cleveland*, 69 Ga. 631 ("Guardian of A"); *Chadsey v. McCreery*, 27 Ill. 253 ("Treasurer" of a named corporation); *Hately v. Pike*, 162 Ill. 241, 246, 44 N. E. 441, 53 Am. St. Rep. 304; *Shepherd v. Evans*, 9 Ind. 260 ("Guardian"); *Heavenridge v. Mondy*, 34 Ind. 28 ("Agent for A"); *Ratcliff v. Everman*, 87 Ind. 446 ("Administrator of A"); *Fuller v. Hooper*, 3 Gray, 334, 341; *Toledo Agricultural Works v. Heisser*, 51 Mo. 128 ("Agent"); *Grist v. Backhouse*, 4 Dev. & Batt. 362 ("Agent of A"); *Gard v. Neff*, 39 Ohio St. 607 ("Guardian of A").

²³ *Baldwin v. Bank of Newbury*, 1 Wall. 234, 17 L. Ed. 534; *Davies v. Byrne*, 10 Ga. 329; *Vater v. Lewis*, 36 Ind. 288, 10 Am. Rep. 29 ("S, Treasurer of the I. M. B. Co."); *Nave v. First Bank*, 87 Ind. 204; *Lovejoy v. Citizens' Bank*, 23 Kans. 331; *Nichols v. Frothingham*, 45 Me. 220, 71 Am. Dec. 539; *Barney v. Newcomb*, 9 Cush. 46; *Garton v. Union Bank*, 34 Mich. 279; *Lacey v. Central Bank*, 4

Neb. 179; *Babcock v. Beman*, 11 N. Y. 200; *First Nat. Bank v. Hall*, 44 N. Y. 395, 4 Am. R.p. 698. Sometimes the determination of who is the payee is aided by other terms of the instrument. In *Falk v. Moebs*, 127 U. S. 597, 8 S. Ct. 1319, 32 L. Ed. 266, a promissory note signed by a corporation by M, "Sec. & Treas." was in terms made payable to M, "Sec. & Treas." The note was indorsed in the same form. It was held that the note was payable to and indorsed by the corporation, and that there was no ambiguity which would render admissible evidence to show an intention to bind M personally. But see the contrary decision of *Hately v. Pike*, 162 Ill. 241, 44 N. E. 441, 53 Am. St. Rep. 304, and cf. *Souhegan Bank v. Boardman*, 46 Minn. 293, 48 N. W. 1116, where a note signed by a corporation by "C, Sec'y," made payable to "B, Treasurer," and indorsed by "B, Treasurer," was held to show *prima facie* an individual contract of indorsement. In Vermont, it seems that the party beneficially interested in negotiable paper is allowed to sue thereon as in the case of informal simple contracts. *Rutland & Burlington R. Co. v. Cole*, 24 Vt. 33; *Valiquette v. Clark Bros. Coal Mining Co.*, 83 Vermont, 538,

instrument in the form under consideration is the agent or officer, the words of description added indicate that the obligation is held in a fiduciary capacity.²⁴ An attempt is not infrequently made to make a negotiable instrument payable to one who holds an office and his successors, the intent being to have the holder of the office, as such, the payee. If the office is in a corporation, such an obligation would probably be held payable in legal effect to the corporation,²⁵ but where the office is in an unincorporated association, having no legal entity, such a result cannot well be reached;²⁶ and an instrument of this character has been held payable in effect to the person or persons who fulfil the description at the time the instrument was delivered.²⁷ Under the Negotiable Instruments Law, however, it seems that such an instrument would be given the effect which it was intended to have, and with each change in the person holding the office, there would be a change in the payee of the instrument.²⁸

§ 305. Public agents.

The general principles governing an agent's liability for contracts made on behalf of his principal are subject to an exception in the case of public agents. It is a rule of presumption that a contract made by a public agent, as such, does not make him personally liable though made under such circumstances or so executed that he would be liable if he were a private agent.²⁹ This presumption is applicable to sealed

77 Atl. 869, 34 L. R. A. (N. S.) 440, 138 Am. St. Rep. 1104.

²⁴ *Davidson v. Dallas*, 8 Cal. 227, 247.

²⁵ See *Manice v. Manice*, 43 N. Y. 303, 314, 387.

²⁶ It would be possible to say that the note was in effect payable to the unincorporated association, that is, all its members jointly, but it seems clear that this is not the intention of the parties, the form of the instrument being probably dictated by a desire to avoid the difficulties connected with an instrument payable to a large changing body.

²⁷ *Davis v. Garr*, 6 N. Y. 124, 55 Am. Dec. 387.

²⁸ Negotiable Instruments Law, Sec. 8 (6), provides that an instrument may be drawn payable to the order of the holder of an office for the time being.

²⁹ *Macbeath v. Haldimand*, 1 T. R. 172; *Palmer v. Hutchinson*, 6 App. Cas. 619; *Parks v. Ross*, 11 How. 362, 13 L. Ed. 730; *Dwinelle v. Henriquez*, 1 Cal. 387; *Ogden v. Raymond*, 22 Conn. 379, 58 Am. Dec. 429; *Sparta School Township v. Mendell*, 138 Ind. 188, 37 N. E. 604; *Simonds v. Heard*, 23 Pick. 120, 34 Am. Dec. 41; *Reed v.*

instruments,³⁰ and negotiable instruments.³¹ The distinction between public agents and private agents is based on policy, and in case of officers of municipalities capable of acquiring rights and incurring liabilities under contracts, the exception is held inapplicable, and the same rules are enforced as in the case of private agents.³² The rule distinguishing public agents from private agents is one of presumption only, and if it is clear that the intention was to make a contract on the personal credit of a public agent, he will be bound.³³

§ 306. Promoters.

Contracts are frequently made by promoters on behalf of corporations which it is expected will be organized. Often under the terms of these contracts if the corporation were already in existence, the contract would be that of the corporation and not of the promoter. But as it is impossible for the corporation to contract before it comes into existence, the contract is treated as that of the promoter even though the language of the contract is appropriate for a contract by the corporation.³⁴ Not only it is impossible for the corporation to

Conway, 26 Mo. 13; *Hammarskold v. Bull*, 11 Rich. L. 493.

³⁰ *Macbeath v. Haldimand*, 1 T. R. 172; *Hodgson v. Dexter*, 1 Cranch, 345, 2 L. Ed. 130; *Knight v. Clark*, 48 N. J. L. 22, 2 Atl. 780, 57 Am. Rep. 534.

³¹ *School Town of Monticello v. Kendall*, 72 Ind. 91, 37 Am. Rep. 139; *Hodges v. Runyan*, 30 Mo. 491. See, however, *Wing v. Glick*, 56 Ia. 473, 9 N. W. 384, 41 Am. Rep. 118; *Fowler v. Atkinson*, 6 Minn. 578; *Trustees of Schools of Cahokia v. Rautenberg*, 88 Ill. 219, where it was held that unless the body of a negotiable instrument contained some indication that the obligation was intended as an official one, the rules applicable to private agents apply and that the addition of the office of the public agent to the signature would not free him from liability.

³² *Hall v. Cookrell*, 28 Ala. 507; *Brown v. Bradlee*, 156 Mass. 28, 30

N. E. 85, 15 L. R. A. 509, 32 Am. St. Rep. 430; *Simonds v. Heard*, 23 Pick. 120, 34 Am. Dec. 41; *Providence v. Miller*, 11 R. I. 272, 23 Am. Rep. 453.

³³ *Auty v. Hutchinson*, 6 C. B. 266; *Brown v. Bradlee*, 156 Mass. 28, 30 N. E. 85, 15 L. R. A. 509, 32 Am. St. Rep. 430; *Brown v. Rundlett*, 15 N. H. 360; *Nichols v. Moody*, 22 Barb. 611; *Walker v. Swartwout*, 12 Johns. 444, 7 Am. Dec. 334; *Osborne v. Kerr*, 12 Wend. 179; *Hammarskold v. Bull*, 9 Rich. Law, 474.

³⁴ *Kelner v. Baxter*, L. R. 2. C. P. 174; *Weiss v. Arnold Print Works*, 188 Fed. 688; *Hersey v. Tully*, 8 Col. App. 110, 44 Pac. 854; *Carmody v. Powers*, 60 Mich. 26, 28 N. W. 801; *O'Rourke v. Geary*, 207 Pa. 240, 56 Atl. 541. See also *Tanner v. Sinaloa Land &c. Co.*, 43 Utah, 14, 134 Pac. 586, Ann. Cas. 1916 C. 100. *Cf. Feitel v. Dreyfous*, 117 La. 756, 42 So. 259.

become liable before it comes into existence, but its mere incorporation will not of itself charge it with liability for contracts which prior thereto promoters purported to make in its behalf.³⁵ The corporation, however, may enter into contracts based on agreements previously made; thus subscriptions to stock in a corporation thereafter to be formed, amount to offers to the corporation which subsequently may be accepted by it;³⁶ though, until acceptance, the subscriber may withdraw.³⁷ The principle governing other contracts intended to be made on behalf of the future corporation is the same. Though it cannot when formed ratify the action of the promoter since it is an essential of ratification that the principal should have been in existence and capable of contracting at the time the agent acted,³⁸ the corporation either by formal action, or without such action if the contract is of a sort which requires no formality, may become bound as a party to the contract by adoption or novation.³⁹

³⁵ *Kelner v. Baxter*, L. R. 2 C. P. 174; *United German Silver Co. v. Bronson*, 92 Conn. 266, 102 Atl. 647. In *Pennell v. Lothrop*, 191 Mass. 357, 359, 77 N. E. 842, speaking of a contract prepared on behalf of the corporation before its incorporation, the court said: "Such a contract, as between the corporation and any other party, would have its inception when entered into by the corporation, and would require, to make it valid, the existence of all such elements as are necessary in other contracts."

³⁶ *Athol Music Hall Co. v. Carey*, 116 Mass. 471.

³⁷ *Bryant's Pond Steam-Mill Co. v. Felt*, 87 Me. 234, 32 Atl. 888, 33 L. R. A. 593; *Hudson Real Estate Co. v. Tower*, 156 Mass. 82, 30 N. E. 465, 32 Am. St. Rep. 434, 161 Mass. 10, 36 N. E. 680, 42 Am. St. Rep. 379; and see *supra*, § 118.

³⁸ See *supra*, § 278. But see *Stanton v. New York &c. R. Co.*, 59 Conn. 272, 22 Atl. 300, 21 Am. St. Rep. 110.

³⁹ *Whitney v. Wyman*, 101 U. S. 392, 25 L. Ed. 1050; *In re Ballou*, 215 Fed.

810; *Moore &c. Co. v. Towers &c. Co.*, 87 Ala. 206, 6 So. 41, 13 Am. St. Rep. 23; *United German Silver Co. v. Bronson*, 92 Conn. 266, 102 Atl. 647; *Chicago Building & Mfg. Co. v. Talbotton Creamery & Mfg. Co.*, 106 Ga. 84, 31 S. E. 809; *Louis Cook Mfg. Co. v. Randall*, 62 Ia. 244, 17 N. W. 507; *Belfast v. Belfast Water Co.*, 115 Me. 234, 98 Atl. 738, L. R. A. 1917 B, 908; *McArthur v. Times Printing Co.*, 48 Minn. 319, 51 N. W. 216, 31 Am. St. Rep. 653; *The Paxton Cattle Co. v. First Natl. Bank*, 21 Neb. 621, 33 N. W. 271, 59 Am. Rep. 852; *Oakes v. Cattaraugus Water Co.*, 143 N. Y. 430, 38 N. E. 461, 26 L. R. A. 544; *Seymour v. Spring Forest Association*, 144 N. Y. 333, 39 N. E. 365, 26 L. R. A. 859; *Morgan v. Bon Bon Co.*, 222 N. Y. 22, 118 N. E. 205; *Schreyer v. Turner, etc., Co.*, 29 Oreg. 1, 43 Pac. 719; *Huron Printing Co. v. Kittleson*, 4 S. Dak. 520, 57 S. W. 233; *Pittsburg, etc., Mining Co. v. Quintrell*, 91 Tenn. 693, 20 S. W. 248; *Weatherford, etc., Ry. Co. v. Granger*, 86 Tex. 350, 24 S. W. 795, 40 Am. St. Rep. 837; *Buffington*

The cases generally speak of the obligation of the corporation as created by adoption, but novation seems the more accurate term. If the assent of the corporation to the bargain is merely an adoption of it, the promoter apparently must still remain liable.⁴⁰ But it seems more nearly to correspond with the intentions of the parties to suppose that when the corporation assents to the contract, it assents to take the place of the promoter—a change of parties to which the other side of the contract assented in advance. There would then be a novation which would discharge the promoter at the same time the corporation assumed the obligation.⁴¹

§ 307. Unincorporated associations.

Numerous societies exist composed of a large and changing membership which are not incorporated. Within this class are clubs for social purposes, charitable and political societies, and also associations whose object is the transaction of business for profit.

The common law recognized no entity in such associations. The act of an officer or agent of such a society bound others, if at all, as individuals. Whether members become so bound as individuals depends on the law of agency and partnership. If the association is formed for conducting business for the purpose of profit, it is a partnership and the liability of the individual members upon the debts incurred or contracts made on behalf of the association by officers or individual members, is governed by the law of partnership.⁴² Such an unincorpo-

v. Bardon, 80 Wis. 635, 50 N. W. 776. Cf. *Abbott v. Hapgood*, 150 Mass. 248, 22 N. E. 907, 5 L. R. A. 586, 15 Am. St. Rep. 193, and cases cited; *Koppel v. Massachusetts Brick Co.*, 192 Mass. 223, 78 N. E. 128.

⁴⁰ See *Kelner v. Baxter*, L. R. 2 C. P. 174.

⁴¹ See *O'Rorke v. Geary*, 207 Pa. 240, 243, 56 Atl. 541.

The promoter was held discharged in the following cases: *Chicago Building & Mfg. Co. v. Talbotton Creamery & Mfg. Co.*, 106 Ga. 84, 31 S. E. 809; *Smith v. Parker*, 148 Ind. 127, 45

N. E. 770; *Van Vlieden v. Welles*, 6 Johns. 85; *Shields v. Clifton Hill Land Co.*, 94 Tenn. 123, 28 S. W. 668, 26 L. R. A. 509, 45 Am. St. Rep. 700; *Ennis Cotton Oil Co. v. Burks* (Tex. Civ. App.), 39 S. W. 966.

⁴² *Hodgson v. Baldwin*, 65 Ill. 532; *Manning v. Gasharie*, 27 Ind. 399; *English v. Wall*, 12 Rob. (La.) 132; *Beaman v. Whitney*, 20 Me. 413; *Atkins v. Hunt*, 14 N. H. 205; *Farnum v. Patch*, 60 N. H. 294, 49 Am. Rep. 313; *Edgerly v. Gardner*, 9 Neb. 130, 1 N. W. 1004; *Wells v. Gates*, 18 Barb. 554; *Imperial Shale Brick Co. v. Jew-*

rated association for the transaction of business frequently follows in its organization the analogy of a corporation. Transferable certificates are issued showing the share of the holder in the common enterprise, and by-laws are adopted and officers elected as if the association were a corporation. It is, however, a partnership, and the individual members are liable, as partners, on obligations incurred by the officers within the scope of their authority.⁴³ This is true though the association by the terms of its organization is coöperative and the surplus above "dividends" of six per cent to the shareholders is to be distributed to purchasers.⁴⁴ Unlike ordinary partnerships the death of one member of such a joint-stock association does not dissolve the partnership as to the survivors;⁴⁵ nor does the transfer of shares.⁴⁶ Unlike ordinary partnerships also, the control of the business is ordinarily vested in officers or managers, and no implied power exists in other members to bind their associates.⁴⁷

One who becomes a member is not liable upon obligations created before he joined the association unless for sufficient consideration he has assumed such liability.⁴⁸ In that event

ett, 169 N. Y. 143, 62 N. E. 167; *Smith v. Hollister*, 32 Vt. 695; *Stimson v. Lewis*, 36 Vt. 91; *Tenney v. New Engl. Protec. Union*, 37 Vt. 64; *Henry v. Jackson*, 37 Vt. 431. See also *Williams v. Milton*, 215 Mass. 1, 102 N. E. 355.

⁴³ *Perring v. Hone*, 4 Bing. 28; *Fox v. Clifton*, 6 Bing. 776; *Merchants' Nat. Bank v. Wehrmann*, 202 U. S. 295, 300, 26 S. Ct. 613, 50 L. Ed. 1036; *Davis v. Beverly*, 2 Cranch C. C. 35; *Grady v. Robinson*, 28 Ala. 289; *McConnell v. Denver*, 35 Cal. 365, 95 Am. Dec. 107; *Bennett v. Lathrop*, 71 Conn. 613, 42 Atl. 634; *Pettis v. Atkins*, 60 Ill. 454; *Haney etc., Mfg. Co. v. Adaza Coöperative Creamery*, 108 Ia. 313, 79 N. W. 79; *Frost v. Walker*, 60 Me. 468; *Tyrrell v. Washburn*, 6 Allen, 466; *Ashley v. Dowling*, 203 Mass. 311; *Willson v. Owen*, 30 Mich. 474; *Atkins v. Hunt*, 14 N. H. 205; *Rianhard v. Hovey*, 13

Oh. 300; *Hess v. Werts*, 4 S. & R. 356; *Shamburg v. Abbott*, 112 Pa. St. 6, 4 Atl. 518; *Hardy v. Norfolk Mfg. Co.*, 80 Va. 404; *Kimmins v. Wilson*, 8 W. Va. 584; *Werner v. Leisen*, 31 Wis. 169.

⁴⁴ *Ashley v. Dowling*, 203 Mass. 311, 89 N. E. 434, 133 Am. St. Rep. 296.

⁴⁵ *Baird's Case*, L. R. 5 Ch. 725; *Tyrrell v. Washburn*, 6 Allen, 466; *Taber v. Breck*, 192 Mass. 355, 78 N. E. 472; *Walker v. Wait*, 50 Vt. 668.

⁴⁶ *Troy Iron &c. Factory v. Winslow*, 45 Barb. 231; *Cothran v. Perry*, 8 W. & S. 262, and see cases in the preceding note.

⁴⁷ *Greenwood's Case*, 3 De G. M. & G. 459, 477.

⁴⁸ *Hornberger v. Orchard*, 39 Neb. 639, 58 N. W. 425; *Fuller v. Rowe*, 57 N. Y. 23; *Barry v. Nuckolls*, 2 Humph. 324. Nor is he liable for obligations incurred after he has ceased to be a member to the knowledge of the plain-

his liability would be determined by the principles governing contracts to assume and pay debts due to third persons.⁴⁹

§ 308. Unincorporated associations which are not partnerships.

Associations which do not conduct business for the purposes of profit are not partnerships but their members become liable for obligations incurred in behalf of the association within the scope of the authority of the agent attempting to create the liability. The distinction between an association which is a partnership and one which is not, is mainly in that the relation of partners to one another implies an authority in itself, whereas the liability of members of an association which is not a partnership for the acts of its officers or other members, must be determined on general principles of agency.

Becoming a member of a society in itself may involve assent to the articles of agreement or by-laws which state the purpose and nature of the association, and it is at least true that one who becomes a member of a club with stated dues thereby agrees to pay them.⁵⁰ Whether this is an enforceable obligation is a question not without difficulty. A man cannot contract with himself, nor can a contract exist in which the promisor is also one of several joint promisees, or where one of several joint promisors is a promisee,⁵¹ but where the duty to pay is clear, the difficulty would probably be dealt with to-day as avoidable by proceeding in equity or by assignment to a third person of the right of the associated members.⁵² In this connection may be considered the obligation which a partner may be under to contribute to his partnership. Liability on obligations made on

tiff. *Rhoads v. Fitzpatrick*, 166 Pa. 294, 31 Atl. 79.

⁴⁹ See *infra*, § 361.

⁵⁰ *Raggett v. Bishop*, 2 C. & P. 343 (action was brought in the name of the "Master" of the club); *Anderson v. Amidon*, 114 Minn. 202, 130 N. W. 1002, 34 L. R. A. (N. S.) 647 (action was brought by an assignee of the club); cf. *LaFond v. Deems*, 81 N. Y. 507, where the court said that payment of dues could not be compelled.

⁵¹ *Harmer v. Steele*, 4 Exch. 1, 1 Ames Cas. Bills & Notes, 820 and note, p. 824; *Harrah v. Jacobs*, 75 Ia. 72, 39 N. W. 187, 1 L. R. A. 152; *Dillenbeck v. Dygart*, 97 N. Y. 303, 49 Am. Rep. 525. See also *infra*, § 333, and Neg. Inst. Law, Sec. 119, (5), *infra*, § 1189.

⁵² *Anderson v. Amidon*, 114 Minn. 202, 130 N. W. 1002, 34 L. R. A. (N. S.) 647.

behalf of the association with third persons are free from difficulty in principle. In so far as the obligation was created in a manner authorized by articles of agreement or by-laws, the individual members are liable; beyond that each one is liable only so far as he has personally assented to the transaction in question.⁵³ Those who are bound are presumably bound jointly.⁵⁴ Unless bound by their implied agreement when they joined an association, members are not liable for obligations unauthorized by them, though authorized by the majority of their fellow members.⁵⁵

§ 309. Procedure in enforcing rights and liabilities of unincorporated associations.

The difficulty of procedure in actions by or against the members of an unincorporated association where the members are numerous, has led to the enactment in England, and some of the United States, of statutes authorizing suits in the name

⁵³ *Flemyng v. Hector*, 2 M. & W. 172; *Cockerell v. Ancompte*, 2 C. B. (N. S.) 440; *Davison v. Holden*, 55 Conn. 103, 10 Atl. 515, 3 Am. St. Rep. 40; *Lewis v. Tilton*, 64 Ia. 220, 19 N. W. 911, 52 Am. Rep. 436; *Reding v. Anderson*, 72 Ia. 498, 34 N. W. 300; *Newell v. Borden*, 128 Mass. 31; *Volger v. Ray*, 131 Mass. 439; *Ray v. Powers*, 134 Mass. 22; *Clark v. O'Rourke*, 111 Mich. 108, 69 N. W. 147, 66 Am. St. Rep. 389; *Jenkinson v. Wynner*, 125 Mich. 89, 83 N. W. 1012; *Detroit Life Guard Band v. First Michigan Infantry*, 134 Mich. 598, 96 N. W. 934; *Heath v. Goslin*, 80 Mo. 310, 50 Am. Rep. 505; *McCabe v. Goodfellow*, 133 N. Y. 89, 30 N. E. 728, 17 L. R. A. 204; *Lightbourn v. Walsh*, 97 App. Div. 187, 89 N. Y. S. 856; *Hosman v. Kinneally*, 43 N. Y. Misc. 76, 86 N. Y. S. 263; *Devoss v. Gray*, 22 Ohio St. 159, 45 N. Y. Misc. 411, 90 N. Y. S. 357; *Ash v. Guie*, 97 Pa. 493, 39 Am. Rep. 818; *Winona Lumber Co. v. Church*, 6 S. Dak. 498, 62 N. W. 107; *Fredendall v. Taylor*, 23 Wis. 538, 99 Am. Dec. 203. In the case of McCabe

v. Goodfellow, and *Hosman v. Kinneally*, *supra*, the court found the authority of the managers was confined to expenditures to the extent of a contributed fund, and that there was no power to bind individual members beyond that, even for contracts of a kind contemplated in the purposes of the association, but in the latter case property turned over to the members of the association had been increased in value by the discharge of liens. These liens had been paid from the fund contributed for carrying on business, and a third person who had contracted with the managers of the association was held entitled to enforce his claim against such property of the association to the extent of the funds used to discharge the liens.

⁵⁴ See *infra*, § 322.

⁵⁵ *Willcox v. Arnold*, 162 Mass. 577, 39 N. E. 414. In this case all the members of a college class but one voted to publish a class book. It was held that all but the non-assenting member were liable for the expenses of publication.

of the association.⁵⁶ Apart from such statutes, the rules of procedure requiring all who are jointly entitled to sue, or jointly liable to be joined as defendants are applicable.⁵⁷

It is sometimes difficult to tell in case of written contracts whether the intent was to bind personally an agent or officer of an unincorporated society, or to bind the society itself; that is, all its members. There is no distinction in principle, however, between such a case where the principal is an incorporated society, from cases where the principal is an individual or corporation.⁵⁸ It is to be observed, however, that where the principal is an unincorporated association, and the agent is a member of it, the agent becomes liable personally, whether he enters into obligations on behalf of the association or on his own behalf. If he contracted on behalf of the association he is entitled by plea in abatement to demand that the other members be joined as defendants, but he cannot himself escape liability.⁵⁹

§ 310. Executors and administrators are liable personally on their contracts.

For debts and obligations of a deceased person his executor or administrator is not personally responsible. The right of the creditor is limited by the assets of the estate. The executor or administrator in theory continues the person of the deceased for the purpose of being sued as well as of bringing action, but such judgments as are rendered against the personal representative for debts of the deceased, can be satisfied only out of the property of the latter.⁶⁰ Any contract made after

⁵⁶ See *Taff Vale Ry. Co. v. Amalgamated Society*, [1901] A. C. 426; *Davison v. Holden*, 55 Conn. 103, 10 Atl. 515, 3 Am. St. Rep. 40; *Detroit Life Guard Band v. First Michigan Infantry*, 134 Mich. 598, 96 N. W. 934; *St. Paul Typothetæ v. St. Paul Book Binders' Union*, 94 Minn. 351, 102 N. W. 725; *Curran v. Galen*, 152 N. Y. 33, 46 N. E. 297, 37 L. R. A. 802, 57 Am. St. Rep. 496; *Wunch v. Shankland*, 59 N. Y. App. D. 482, 69 N. Y. S. 349.

⁵⁷ *Karges Furniture Co. v. Amal-*

gamated Woodworkers, 165 Ind. 421, 75 N. E. 877, 2 L. R. A. (N. S.) 788.

⁵⁸ As to contracts of this sort, see *supra*, § 281. See also *Thompson v. Garrison*, 22 Kans. 765, where an invitation by the elders of a church in behalf of the congregation was held to bind the signers.

⁵⁹ *Thompson v. Garrison*, 22 Kans. 765; *Detroit Life Guard Band v. First Michigan Infantry*, 134 Mich. 598, 96 N. W. 934.

⁶⁰ See *Williams on Executors* (7th Am. ed.), *1593 *et seq.* As to what

the testator's death by an executor or administrator is necessarily his personal contract, as the common law does not recognize the estate of a deceased person as an entity.⁶¹ This is true even though the contract is a proper one, and perhaps directed by the testator's will. Thus if an executor is authorized by will or otherwise to carry on the testator's business, he becomes personally liable for the debts so incurred.⁶² So contracts for funeral expenses;⁶³ or other contracts properly entered into for the administration of the estate,⁶⁴ as where an executor employs counsel in matters relating to the estate, bind the executor personally.⁶⁵ But it is otherwise of quasi-contractual obligations. If an executor or administrator receives, as part of the testator's

contracts of a deceased person cease to be obligatory upon his estate see *infra*, § 1940. A contract to pay money after one's own death is valid. *Charron v. Day*, 228 Mass. 305, 117 N. E. 347.

⁶¹ *Lyman v. National Bank of the Republic*, 181 Mass. 437, 438, 63 N. E. 923, and see cases in the following notes.

⁶² *In re Johnson*, 15 Ch. D. 548; *Dowse v. Gorton*, [1891] A. C. 190; *Foxworth v. White*, 72 Ala. 224; *Roses' Estate*, 80 Cal. 166, 22 Pac. 86; *Stephens v. James*, 77 Ga. 139, 3 S. E. 16; *Miller v. Didisheim*, 95 Ill. App. 321; *Howe v. Richardson*, 186 Mass. 259, 71 N. E. 543; *Laible v. Ferry*, 32 N. J. Eq. 791; *Doolittle v. Willet*, 57 N. J. L. 398, 31 Atl. 385; *Willis v. Sharp*, 113 N. Y. 586, 21 N. E. 705, 4 L. R. A. 493; *Decillis v. Mascelli*, 152 N. Y. App. D. 304, 306, 136 N. Y. S. 573; *Braun v. Braun*, 14 Manitoba, 346. *Cf. Dwyer v. Kalteyer*, 68 Tex. 554, 5 S. W. 75, holding that an executor is not liable to creditors where a statute authorized the executor to continue the business. And *Fleming v. Kelly*, 18 Col. App. 23, 69 Pac. 272, holding the executor not liable where the business was carried on under the order of the Probate Court.

⁶³ *Brice v. Wilson*, 8 A. & E. 349, n.; *Corner v. Shew*, 3 M. & W. 350; *Trueman v. Tilden*, 6 N. H. 201. For such expenses, unless actually contracted for by the representative, it seems his liability would be limited to the extent that there were assets in the estate. See besides cases cited above, *Hapgood v. Houghton*, 10 Pick. 154; *Patterson v. Patterson*, 59 N. Y. 574; *France's Estate*, 75 Pa. 220.

⁶⁴ *Farhall v. Farhall*, L. R. 7 Ch. App. 123; *Massey v. Doke*, 123 Ark. 211, 185 S. W. 271; *Taylor v. Mygatt*, 26 Conn. 184; *Bott v. Barr*, 95 Ind. 243; *Manning v. Osgood*, 151 Mass. 148, 23 N. E. 732; *O'Brien v. Jackson*, 167 N. Y. 31, 60 N. E. 238; *LeBaron v. Barker*, 143 N. Y. App. D. 492, 127 N. Y. S. 979.

⁶⁵ *Tucker v. Grace*, 61 Ark. 410, 33 S. W. 530; *McKee v. Soher*, 138 Cal. 367, 71 Pac. 438, 649; *Long v. Rodman*, 58 Ind. 58; *Clark v. Sayre*, 122 Iowa, 591, 98 N. W. 484; *Brown v. Quinton*, 80 Kans. 44, 102 Pac. 242, 25 L. R. A. (N. S.) 71; *Clopton v. Gholson*, 53 Miss. 466; *Howell v. Myer*, 105 Miss. 771, 63 So. 233; *State ex rel. Kelly v. Second Judicial Dist. Court*, 25 Mont. 33, 63 Pac. 717; *Wight v. Dolenty*, 53 Mont. 168, 162 Pac. 387; *Wait v. Holt*, 58 N. H. 467; *Platt v. Platt*, 105 N. Y. 488, 12 N. E. 22; *Parker v.*

estate, assets which equitably belong to another, the obligation to restore them to the true owner runs against the executor or administrator in his official capacity as continuing in law the person of the deceased, and judgment will be given against the goods of the estate.⁶⁶ And similarly if a payment is made on behalf of the estate or a benefit conferred upon it by a third person under such circumstances that had a similar payment or benefit been rendered to a living person, a quasi-contractual right against him would have existed, such a quasi-contractual right also arises against the executor or administrator of the estate in question, in his official capacity and judgment will go against the goods of the deceased.⁶⁷ As the contracts of an executor or administrator bind him personally, if on his death an administrator *de bonis non* is appointed, the latter is not liable even upon contracts rightfully made by his predecessor in office.⁶⁸

§ 311. Executors and administrators may by special stipulation exempt themselves from personal liability.

Even though the consequence of a stipulation in an agreement with an executor or administrator that he shall be subject to no personal liability is that no contract whatever arises for lack of a contracting party, plain words of exemption must be and are given effect.⁶⁹ Though no contract with the

Day, 155 N. Y. 383, 49 N. E. 1046; *In re Nocton's Est.*, 162 N. Y. S. 215; *Besancon v. Wegner*, 16 N. Dak. 240, 112 N. W. 965; *Thomas v. Moore*, 52 Ohio St. 200, 39 N. E. 803; *Waite v. Willis*, 42 Ore. 288, 70 Pac. 1034; *In re Sullivan's Estate*, 36 Wash. 217, 78 Pac. 945; *Thompson v. Mann*, 65 W. Va. 648, 64 S. E. 920, 22 L. R. A. (N. S.) 1094, 131 Am. St. Rep. 987. But see *Greene v. Grimshaw*, 11 Ill. 389.

⁶⁶ *De Valengin's Adm. v. Duffy*, 14 Pet. 290, 291, 10 L. Ed. 457; *Terry v. Furguson, Adm.*, 8 Port. (Ala.) 500; *Crowder v. Shackelford*, 35 Miss. 321, 359; *Scheibeler v. Albee*, 114 N. Y. App. D. 146, 99 N. Y. S. 706; *Conger v. Atwood*, 28 Ohio St. 134, 22 Am. Rep. 362; *Thomas v. Moore*, 52 Ohio St. 200, 205, 39 N. E. 803.

⁶⁷ *Ashby v. Ashby*, 7 B. & C. 444; *Haynes v. Forehaw*, 11 Hare, 93, 104; *Steele v. McDowell*, 9 Sm. & M. 193; *Wall v. Kellogg's Ex.*, 16 N. Y. 385; *Arbuckle v. Tracy*, 15 Oh. 432; *Conger v. Atwood*, 28 Ohio St. 134, 141, 22 Am. Rep. 362; *cf. Farhall v. Farhall*, L. R. 7 Ch. App. 123.

⁶⁸ *Ferrin v. Myrick*, 41 N. Y. 315; *Fitzsimmons v. Safe Deposit & Trust Co.*, 189 Pa. 514, 42 Atl. 41.

⁶⁹ *Long v. Rodman*, 58 Ind. 58, 62; *Grafton Nat. Bank v. Wing*, 172 Mass. 513, 52 N. E. 1067, 43 L. R. A. 831, 70 Am. St. Rep. 303; *Germania Bank v. Michaud*, 62 Minn. 459, 65 N. W. 70, 30 L. R. A. 286, 54 Am. St. Rep. 653; *Douglass v. Leonard*, 17 N. Y. S. 591, 593.

estate, as such, is possible, it is possible that the executor shall agree to perform only to the extent that the assets of the testator's estate permit, and that the person with whom the executor contracts shall accept such a limited promise in return for his own promise or performance.^{69a} Probably such an agreement often more nearly expresses the intent of the parties than the obligation which is inferred by the law generally prevailing. In a New York case,⁷⁰ Selden, J., said: "I am of opinion, that where the contract itself is ostensibly made in behalf of the estate, and relates exclusively to matters in which the executor or administrator has no personal interest, if the latter, in making the contract, describes himself as executor, &c., the presumption is, that he intended to bind the estate and not himself. This would be found in most cases to be in accordance with the facts, and such I think is the legal inference." It is probable that this language in freeing the executor from liabilities goes beyond the warrant of most decisions though not beyond what is reasonable. According to the weight of authority even though the identification of the estate for which the executor is acting is disclosed, and though the business concerns the estate, in the absence of language necessarily showing a contrary intent, the executor entering into a contract binds himself personally.⁷¹ In view of the fact that unless the executor or administrator is a party to a contract made by him, no contract can exist, it follows in formal contracts, such as negotiable instruments, even more clearly than in regard to such instruments signed by agents or by officers of a corporation with the addition of an official designation,⁷² that the signature of an executor or administrator with the addition of his title renders him personally liable.⁷³ A note, however, which is signed "Estate of A,

^{69a} See *infra*, § 312, as to such promises by trustees.

⁷⁰ *Chouteau v. Suydam*, 21 N. Y. 179, 182.

⁷¹ See cases cited in preceding section.

⁷² See *supra*, § 299, as to such obligations.

⁷³ *Childs v. Monins*, 2 B. & B. 460; *Christian v. Morris*, 50 Ala. 585;

Higgins v. Driggs, 21 Fla. 103; *McFarlin v. Stinson*, 56 Ga. 396; *Lynch v. Kirby*, 65 Ga. 279; *Deas v. McRea*, 65 Ga. 531; *Hopson v. Johnson*, 110 Ga. 283, 34 S. E. 848; *Glisson v. Weil*, 117 Ga. 842, 45 S. E. 221; *Dunne v. Deery*, 40 Ia. 251; *Rittenhouse v. Ammerman*, 64 Mo. 197, 27 Am. Rep. 215; *Orne v. Ritchie*, 12 Phila. 231; *East Tennessee Iron Manufacturing Co. v. Gaskell*, 2

B executor" has been held not to impose a personal obligation upon the executor,⁷⁴ though the result of so holding, is that no valid note exists.

And it seems that the Uniform Negotiable Instruments Law gives the same effect to any negotiable bill or note where the executor being authorized so to do signs as such and discloses either in the body of the instrument or in the signature the estate for which he is acting.⁷⁵

The executor or administrator is entitled to indemnity from the testator's estate for all liabilities rightfully incurred⁷⁶ and creditors may by subrogation enforce this right of indemnity against the estate, in case of inability to collect their claims from the executor or administrator because of insolvency or other reason.⁷⁷ But a direct action for judgment against the goods of the deceased or a direct enforcement in the Probate Court of their claims by the creditors is not permissible.⁷⁸ And it should be observed that the authority of an executor or administrator implied from his office, to enter into executory contracts on behalf of his estate is quite limited. It is beyond the scope of this book to consider in detail when his contract is of such a character that he is entitled to indemnification

Lea, 742. So in a written contract for the sale of land one who promises in the first person is liable personally, though he adds to his signature the designation of administrator of a named estate. *Melone v. Ruffino*, 129 Cal. 514, 62 Pac. 93, 79 Am. St. Rep. 127. But see *contra*, *Chouteau v. Suydam*, 21 N. Y. 179.

⁷⁴ *Grafton Natl. Bank v. Wing*, 172 Mass. 513, 52 N. E. 1067, 43 L. R. A. 831, 70 Am. St. Rep. 303. See also *Germania Bank v. Michaud*, 62 Minn. 459, 65 N. W. 70, 30 L. R. A. 286, 54 Am. St. Rep. 653, and *infra*, § 312, as to similar notes given by trustees.

⁷⁵ See *infra*, § 1144.

⁷⁶ *Tucker v. Grace*, 61 Ark. 410, 33 S. W. 530.

⁷⁷ *Dowse v. Gorton*, [1891] A. C. 190; *Ferrin v. Myrick*, 41 N. Y. 315, 325; *Willis v. Sharp*, 113 N. Y. 586, 21 N. E.

705, 4 L. R. A. 493, 115 N. Y. 396, 22 N. E. 149, 5 L. R. A. 636; *O'Brien v. Jackson*, 167 N. Y. 31, 60 N. E. 238; *LeBaron v. Barker*, 143 N. Y. App. D. 492, 127 N. Y. S. 979; *Douglas v. Fraser*, 2 McCord Ch. 105. But see *contra*, *Wade v. Pope*, 44 Ala. 690. See also the discussion of Alabama decisions in *Etowah Mining Co. v. Wills Valley Mining Co.*, 143 Ala. 623, 39 So. 336. See further the discussion of a similar right against a trust estate, *infra*, § 313.

⁷⁸ *Farhall v. Farhall*, L. R. 7 Ch. App. 123; *Pike v. Thomas*, 62 Ark. 223, 35 S. W. 212, 65 Ark. 437, 47 S. W. 110; *Parker v. Mayo*, 72 Ark. 513, 83 S. W. 324; *Ferrin v. Myrick*, 41 N. Y. 315; *LeBaron v. Barker*, 143 N. Y. App. D. 492, 127 N. Y. S. 979. But see *contra*, *Long v. Rodman*, 58 Ind. 58.

from the estate, and when, because he has gone beyond his legal authority, the liability originally cast upon him by his contracts cannot be shifted.

§ 312. Trustees are liable personally on their contracts.

The contracts of trustees even more clearly than those of executors must bind the fiduciary personally if binding as contracts at all. The Common Law at least recognized the possibility of a judgment against an executor or administrator as such, by virtue of which execution would issue against the goods of the deceased, but no similar judgment against a trustee was possible at law. Any judgment against him in an action at law must be against him personally, and his contracts though incurred with reference to the trust are his personal obligations.⁷⁹ Trustees who are thus obliged to meet liabilities on behalf of the trust estate, are entitled to reimbursement and indemnity from it, to the extent that such liabilities were rightfully incurred.⁸⁰

⁷⁹ *Duvall v. Craig*, 2 Wheat. 45, 4 L. Ed. 180; *Taylor v. Davis' Adm.*, 110 U. S. 330, 4 S. Ct. 147, 28 L. Ed. 163; *Wade v. Pope*, 44 Ala. 690; *Johnson v. Leman*, 131 Ill. 609, 23 N. E. 435, 7 L. R. A. 656, 19 Am. St. Rep. 63; *Dinsmoor v. Bressler*, 56 Ill. App. 207; *Bloom v. Wolfe*, 50 Ia. 286; *Farmers', etc., Bank v. Deposit Co.*, 108 Ky. 384, 56 S. W. 671; *Everett v. Drew*, 129 Mass. 150; *Odd Fellows Assoc. v. McAllister*, 153 Mass. 292, 26 N. E. 862, 11 L. R. A. 172; *Hussey v. Arnold*, 185 Mass. 202, 70 N. E. 87; *King v. Stowell*, 211 Mass. 246, 98 N. E. 91; *Packard v. Kingman*, 109 Mich. 497, 67 N. W. 551; *McGovern v. Bennett*, 146 Mich. 558, 109 N. W. 1055; *Feldman v. Preston*, 194 Mich. 352, 160 N. W. 655; *Truesdale v. Philadelphia Trust, etc., Co.*, 63 Minn. 49, 65 N. W. 133; *Norton v. Phelps*, 54 Miss. 467; *Koken Iron Works v. Kinealy*, 86 Mo. App. 199; *Noyes v. Blakeman*, 6 N. Y. 567; *United States Trust Co. v. Stanton*, 139 N. Y. 531, 533, 34 N. E. 1098;

Mander v. Low, 12 N. Y. Misc. 316, 33 N. Y. S. 719; *Mitchell v. Whitlock*, 121 N. C. 166, 28 S. E. 292; *Ogden Ry. Co. v. Wright*, 31 Oreg. 150, 49 Pac. 975; *Ransau v. Davis*, 85 Oreg. 26, 165 Pac. 1180; *Fehlinger v. Wood*, 134 Pa. St. 517, 19 Atl. 746; *Williams Nat. Bank v. Groton Mfg. Co.*, 16 R. I. 504, 17 Atl. 170; *McIntyre v. Williamson*, 72 Vt. 183, 47 Atl. 786, 82 Am. St. Rep. 929; *Poindexter v. Burwell*, 82 Va. 507; *Carr v. Branch*, 85 Va. 597, 8 S. E. 476. This is true though the instrument creating the trust empowers the trustee to bind the estate. *Connally v. Lyons*, 82 Tex. 664, 18 S. W. 799, 27 Am. St. Rep. 935.

⁸⁰ *Nelson v. Duncombe*, 9 Beav. 211; *Chester v. Rolfe*, 4 De G. M. & G. 798; *Gisborn v. Charter Oak Life Ins. Co.*, 142 U. S. 326, 12 S. Ct. 277, 35 L. Ed. 1029; *Mitau v. Roddan*, 149 Cal. 1, 84 Pac. 145; *Thome v. Allen*, 24 Ky. L. Rep. 987, 70 S. W. 410; *Hayes v. Hall*, 188 Mass. 510, 74 N. E. 935; *King v. Stowell*, 211 Mass. 246,

Those who have contracted with the trustee have ordinarily no right on this account to a remedy against the *cestui que trust*,⁸¹ or the trust estate,⁸² unless the contract relates to land or other unique property belonging to the trust. Such a contract if the trustee was authorized to make it, equity will specifically enforce by compelling the trustee to convey.⁸³ In a few States, moreover, by statute, an action is allowed against the trustee in his representative capacity for the enforcement of all claims rightfully created incurred by the trustee in behalf of the estate.⁸⁴ As a trustee's contract is his personal

250, 98 N. E. 91; Truesdale v. Philadelphia Trust Co., 63 Minn. 49, 51, 65 N. W. 133; Fearn v. Mayers, 53 Miss. 458; Matter of Nesbit, 140 N. Y. 609, 35 N. E. 942; Steinway v. Steinway, 112 N. Y. App. D. 18, 98 N. Y. S. 99. As to the right of the trustee to claim reimbursement from the *cestui que trust* personally, if the trust estate is insufficient, see 14 Harv. L. Rev. 539, criticising the case of Hardoon v. Belilios, 83 L. T. Rep. 573, where the Privy Council held a *cestui que trust* personally bound to indemnify his trustee from liability for calls on stock which the trust estate was inadequate to meet, though the trust was not undertaken at the request of the *cestui que trust*. Cf. Fraser v. Murdoch, 6 App. Cas. 855, per Lord Blackburn. Where the trust is undertaken at the request of the *cestui que trust*, there seems no reason to doubt that a personal obligation to indemnify the trustee arises. Griswell v. Bristowe, L. R. 4 C. P. 36; Hemming v. Maddick, L. R. 7 Ch. 395. See also Hanover Nat. Bank v. Cocke, 127 N. C. 467, 37 S. E. 507.

⁸¹ Hartley v. Phillips, 198 Pa. 9, 47 Atl. 929.

⁸² Farhall v. Farhall, L. R. 7 Ch. 123; Taylor v. Crook, 136 Ala. 354, 34 So. 905; Etowah Min. Co. v. Wills Valley Min. Co., 143 Ala. 623, 39 So. 336; Johnson v. Leman, 131 Ill. 609, 23 N. E. 435, 7 L. R. A. 656, 19 Am. St.

Rep. 63; Hussey v. Arnold, 185 Mass. 202, 70 N. E. 87; Truesdale v. Philadelphia Trust Co., 63 Minn. 49, 52, 65 N. W. 133; School District v. Peterson, 74 Minn. 122, 76 N. W. 1126; Hudson v. Wright, 204 Mo. 412, 103 S. W. ; 8 Mulrein v. Smillie, 25 N. Y. App. D. 135, 48 N. Y. S. 994; Decillis v. Mascelli, 152 N. Y. App. D. 304, 136 N. Y. S. 573; Wright v. Franklin Bank, 59 Ohio St. 80, 51 N. E. 876; Rennselaer, etc., R. Co. v. Miller, 47 Vt. 146. Compare Yerkes v. Richards, 170 Pa. 346, 32 Atl. 1089. See further, § 313.

⁸³ Judge v. Pfaff, 171 Mass. 195, 50 N. E. 524.

⁸⁴ Ala. Code (1907), 6085-6089 (only if the trustee is insolvent, and the trustee may also be held personally); Taylor v. Crook, 136 Ala. 354, 375, 34 So. 905, 96 Am. St. Rep. 26; Dantzler v. McInnis, 151 Ala. 293, 44 So. 193, 13 L. R. A. (N. S.) 297, 125 Am. St. Rep. 28; Calif. Civ. Code, § 2267; Conn. Gen. Statutes (1902), Sec. 739 (but the trustee may also be held personally); Georgia Code, Secs. 3786-3791 (see Bailie v. Carolina Loan Assoc., 100 Ga. 20, 28 S. E. 274; Riggins v. Adair, 105 Ga. 727, 31 S. E. 743; Sanders v. Houston Guano Co., 107 Ga. 49, 55, 32 S. E. 610); Mont. Civ. Code, § 3020; No. Carolina Code (1905), Secs. 627-629; N. Dak. Comp. L. (1913), § 6305; S. Dak. Civ. Code (1913) § 1642.

obligation, a successor in the trust is not liable for the contracts of his predecessor;⁸⁴ but the trustee himself, though no longer such, or if he is dead his personal representative, would remain bound.⁸⁵ It is possible by clear language for a trustee to indicate that no personal liability on his part is contemplated, and such language will be given effect.⁸⁶ Where personal liability is thus excluded, the creditor's only remedy is by bill in equity to subject the trust estate to his claim.⁸⁷ It is possible for the trustee instead of excluding personal liability altogether, to limit his liability to the amount of the assets in the trust estate from which he can claim reimbursement.⁸⁸ Apart from statute, the mere description of an obligor as trustee or as trustee of a named estate does not exclude personal liability,⁸⁹ while a signature "as trustee but not individually"

⁸⁴ *Foots v. Cotting*, 195 Mass. 55, 60, 80 N. E. 600; *United States Trust Co. v. Stanton*, 139 N. Y. 531, 34 N. E. 1098. But see *Yerkes v. Richards*, 170 Pa. 346, 32 Atl. 1089.

⁸⁵ See *Bangor v. Peirce*, 106 Me. 527, 76 Atl. 945, 29 L. R. A. (N. S.) 770.

⁸⁶ *Glenn v. Allison*, 58 Md. 527; *Shoe & Leather Nat. Bank v. Dix*, 123 Mass. 148, 25 Am. Rep. 49; *Hussey v. Arnold*, 185 Mass. 202, 70 N. E. 87; *Rand v. Farquhar*, 226 Mass. 91, 115 N. E. 286; *Packard v. Kingman*, 109 Mich. 497, 507, 67 N. W. 551; *New v. Nicoll*, 73 N. Y. 127, 29 Am. Rep. 111; *Randall v. Dusenbury*, 39 N. Y. Super. 174, affd. 63 N. Y. 645; *Fehlinger v. Wood*, 134 Pa. 517, 523, 19 Atl. 746; *McIntyre v. Williamson*, 72 Vt. 183, 47 Atl. 786. It was held by Warrington, J., in *Watling v. Lewis*, [1911] 1 Ch. 414, that a provision in a trustee's contract excluding all personal liability was repugnant to the promise itself, and therefore void. The same judge followed this decision in *In re Robinson's Settlement*, but the case was reversed by the Court of Appeal on other grounds in [1912], 1 Ch. 717, and one member of the court at least seemed of the opinion that the trustees were not bound personally in any event.

Whatever the law of England on the subject may be, it seems clear that in the United States, the proposition of the text would everywhere be accepted. But the fact that the instrument creating the trust exempts the trustee from personal liability does not prevent the trustee from being liable if he contracts in a way which is regarded as creating a personal contract. *American Smelting Co. v. Converse*, 175 Mass. 449, 56 N. E. 594.

⁸⁷ *Gisborn v. Charter Oak L. I. Co.*, 142 U. S. 326, 35 L. Ed. 1029, 12 S. Ct. 277; *King v. Stowell*, 211 Mass. 246, 251, 98 N. E. 91; *Noyes v. Blakeman*, 6 N. Y. 567; *New v. Nicoll*, 73 N. Y. 127, 29 Am. Rep. 111; *O'Brien v. Jackson*, 167 N. Y. 31, 33, 60 N. E. 238; *Fehlinger v. Wood*, 134 Pa. 517, 19 Atl. 746; *Wadsworth v. Arnold*, 24 R. I. 32, 51 Atl. 1041. Cf. *Bank of Topeka v. Eaton*, 100 Fed. 8, 107 Fed. 1003, 47 C. C. A. 140.

⁸⁸ *Williams v. Hathaway*, 6 Ch. D. 544; *Shoe & Leather Natl. Bank v. Dix*, 123 Mass. 148, 25 Am. Rep. 49.

⁸⁹ *Muir v. City of Glasgow Bank*, 4 A. C. 337; *Duvall v. Craig*, 2 Wheat. 45, 4 L. Ed. 180; *Taylor v. Davis' Adm.*, 110 U. S. 330, 4 Sup. Ct. 147, 28 L. Ed. 163; *Savings & Loan Society*

or "as trustee but not otherwise" does exclude such liability.⁹⁰ The Uniform Negotiable Instruments Law, has had a double effect in changing the law, so far as such instruments are concerned. On the one hand a trustee who is authorized to make a negotiable instrument will not be personally liable, if the body of the instrument or the form of his signature discloses the identity of the trust estate.⁹¹ On the other hand, if the trustee was not so authorized, though the form of the instrument would naturally exclude the inference of liability, he is bound.⁹²

A note signed in such a form as to bind the trustee personally may be reformed if both parties intended that the trust estate only should be bound, provided the rights of *bona fide* purchasers have not intervened.⁹³

§ 313. Enforcement of claims against the trust estate.

If the trustee's insolvency or other cause prevents one who has contracted with a trustee with reference to the trust business from obtaining adequate relief by an action at law against the trustee, a bill in equity may be maintained to subject the assets of the trust to the claim.⁹⁴ This right is

v. Burke, 151 Cal. 616, 91 Pac. 504; *Philip Carey Co. v. Pingree*, 223 Mass. 352, 111 N. E. 857; *Feldman v. Preston*, 194 Mich. 352, 160 N. W. 655; *Ogden Ry. Co. v. Wright*, 31 Ore. 150, 49 Pac. 975; *Roger Williams Nat. Bank v. Groton Mfg. Co.*, 16 R. I. 504, 17 Atl. 170; *McIntyre v. Williamson*, 72 Vt. 183, 47 Atl. 786. But see *contra*, *Printup v. Trammel*, 25 Ga. 240. Cf. *Stevenson v. Polk*, 71 Ia. 278, 32 N. W. 340. See further, *supra*, § 299. So an indorsement by a trustee of negotiable paper payable to him as such binds him personally. *Tradesmen's Nat. Bank v. Looney*, 99 Tenn. 278, 42 S. W. 149, 38 L. R. A. 837, 63 Am. St. Rep. 830.

⁹⁰ *Thayer v. Wendell*, 1 Gall. 37; *Glenn v. Allison*, 58 Md. 527; *Shoe & Leather Nat. Bank v. Dix*, 123 Mass. 148, 25 Am. Rep. 49; *Packard v. Kingman*, 109 Mich. 497, 67 N. W. 551;

Brackett v. Ostrander, 126 N. Y. App. Div. 529, 110 N. Y. S. 779.

⁹¹ See *infra*, § 1144. In *Megowan v. Peterson*, 173 N. Y. 1, 65 N. E. 738; *Kerby v. Ruegamer*, 107 N. Y. App. D. 491, 95 N. Y. S. 408, the trustees were held not personally liable to payees who knew that the notes were intended to be made on behalf of a certain trust estate though the identity of the estate was not disclosed on the instrument. This is, however, reformation at law. See *infra*, § 1599.

⁹² *Tuttle v. First Nat. Bank*, 187 Mass. 533, 73 N. E. 560, 105 Am. St. 420; *Dunham v. Blood*, 207 Mass. 512, 93 N. E. 804; *McGovern v. Bennett*, 146 Mich. 558, 109 N. W. 1055.

⁹³ *Richmond v. Ogden St. Ry. Co.*, 44 Ore. 48, 74 Pac. 333. See also *supra*, n. 91.

⁹⁴ *In re Frith*, [1902] 1 Ch. 342; *Wylly v. Collins*, 9 Ga. 223; *Gaudy v.*

not dependent on any power the trustee may or may not have under the terms of the trust, to impose a charge upon the trust property. It is sufficient that the trustee was authorized by the terms of the trust to incur such an obligation as that in question. The equity of the creditor thereupon arises by operation of law, either by virtue of a right of subrogation to have applied to the payment of the claim the trustee's right against the trust estate as an asset of the trustee; or by virtue of a broader and less exactly defined equity that the transaction having been entered upon for the benefit of the trust estate, the estate should be answerable. On either view if the powers conferred by the trust have been exceeded and the trust estate has not been unjustly enriched by means of the contract, the creditor's sole recourse is to the personal liability of the trustee.⁹⁵ But the result reached under the two theories differs where because of the trustee's unfaithful administration of the trust there is no balance due from the trust estate to the trustee on an accounting. On the theory of subrogation, which is that generally adopted, the creditor can get no relief.⁹⁶ But if the basis of relief is that the contract was made on behalf of the trust estate, and that though not recognized as a legal entity, the estate is none the less the real principal in the transaction, and ought, therefore, equitably to pay, a default on the part of the trustee

Babbitt, 56 Ga. 640; *Jackson v. Pool*, 73 Ga. 801; *Mason v. Pomeroy*, 151 Mass. 164, 24 N. E. 202, 7 L. R. A. 771; *King v. Stowell*, 211 Mass. 246, 250, 98 N. E. 91; *Norton v. Phelps*, 54 Miss. 467; *Bushong v. Taylor*, 82 Mo. 260; *Ferrin v. Myrick*, 41 N. Y. 315; *Wadsworth v. Arnold*, 24 R. I. 32, 51 Atl. 1041; *Cater v. Eveleigh*, 4 Desaus. 19, 6 Am. Dec. 596; *Montgomery v. Eveleigh*, 1 McCord Ch. 267; *Magwood v. Johnson*, 1 Hill's Ch. 228; *Tennant v. Stoney*, 1 Rich. Eq. 222, 243, 44 Am. Dec. 213; *Owens v. Mitchell*, 38 Tex. 588. But see *Worrall v. Harford*, 8 Ves. Jr. 4, 8; *Mulhall v. Williams*, 32 Ala. 489, and Alabama decisions reviewed in *Etowah Mining*

Co. v. Wills Valley Mining Co., 143 Ala. 623, 39 So. 336.

⁹⁵ *In re Richardson*, [1911] 2 K. B. 705; *Tuttle v. First Nat. Bank*, 187 Mass. 533, 73 N. E. 560; *Dunham v. Blood*, 207 Mass. 512, 93 N. E. 804; *King v. Stowell*, 211 Mass. 246, 250, 98 N. E. 91. See also *Jessup v. Smith*, 170 N. Y. App. D. 605, 156 N. Y. S. 553.

⁹⁶ *In re Johnson*, 15 Ch. D. 548; *Strickland v. Symons*, 26 Ch. D. 245; *In re Evans*, 34 Ch. D. 597; *In re Gorton*, 40 Ch. D. 536; *In re British Power &c. Co.*, [1910] 2 Ch. 470; *In re Morris*, 23 L. R. Ir. 333; *Hewitt v. Phelps*, 105 U. S. 393, 26 L. Ed. 1072; *Dantzler v. McInnis*, 151 Ala. 293, 44 So. 193, 13 L. R. A. (N. S.) 297, 125 Am.

would not impair the creditor's right to reach the estate.⁷⁷ It must be remembered that what is nominally a trust may be in reality and in legal effect an unincorporated association or partnership, the so-called trustees being more properly designated as agents.⁷⁸

§ 314. Guardians.

The rules applicable to guardians of minors or lunatics are similar to those governing contracts of trustees. The guardian is bound individually by his contracts on behalf of the estate.⁷⁹ Nor does it change the rule that the contract purported to be made "as guardian."¹ Nor can the guardian directly bind the ward.² Accordingly though the guardian resigns his office he remains subject to contractual liabilities incurred while holding it;³ but where the guardian is insolvent, equity will allow the creditor to enforce against the ward's estate obligations rightfully incurred by the guardian with reference to it.⁴

St. Rep. 28; *King v. Stowell*, 211 Mass. 246, 251, 98 N. E. 91; *Clopton v. Gholson*, 53 Miss. 466; *Wells-Stone Mercantile Co. v. Aultman*, 9 N. Dak. 520, 84 N. W. 375.

⁷⁷ This view was taken in *Wylly v. Collins*, 9 Ga. 223; *Sanders v. Houston Guano & Co.*, 107 Ga. 49, 32 S. E. 610; *Courier Journal Co. v. Columbia Fire Ins. Co.*, 21 Ky. L. Rep. 1258, 54 S. W. 966; *Manderson's Appeal*, 113 Pa. 631, 6 Atl. 893, *Yerkes v. Richards*, 170 Pa. 346, 32 Atl. 1089, and is forceably advocated in an article by Louis D. Brandeis in 15 Am. L. Rev. 449. Even on the theory of subrogation default by only one of two or more trustees will not bar recovery against the trust estate. *Mason v. Pomeroy*, 151 Mass. 164, 24 N. E. 202, 7 L. R. A. 771. See generally on Liabilities in the Administration of Trusts, 28 Harv. L. Rev. 8, by Professor Scott.

⁷⁸ See *Williams v. Milton*, 215 Mass. 1, 102 N. E. 355.

⁷⁹ *Simms v. Norris & Co.*, 5 Ala. 42; *Poole v. Wilkinson*, 42 Ga. 539; *Sperry v. Fanning*, 80 Ill. 371; *Tobin v. Addison*, 2 Strob. Law, 3; *Andrus v. Blazzard*, 23 Utah, 233, 63 Pac. 888, 54 L. R. A. 354. So a conservator of an insane person's estate. *Day v. Old Colony Trust Co.*, 228 Mass. 225, 117 N. E. 252.

¹ *Sperry v. Fanning*, 80 Ill. 371. As to the effect of the Negotiable Inst. Law, see *supra*, § 312.

² *Pearl v. McDowell*, 3 J. J. Marsh. 658, 20 Am. Dec. 199; *Jones v. Brewer*, 1 Pick. 313, 316; *Forster v. Fuller*, 6 Mass. 58; *Tenney v. Evans*, 14 N. H. 343, 351.

³ *Stevenson v. Bruce*, 10 Ind. 397.

⁴ *Poole v. Wilkinson*, 42 Ga. 539; *Owens v. Mitchell*, 38 Tex. 588. See also *Westmoreland v. Davis*, 1 Ala. 299; *Copley v. O'Neil*, 39 How. Pr. 41, 47.

§ 315. Receivers.

A receiver is an officer appointed by the court to take possession but not the title of property pending further proceedings involving it.⁵ Unless authorized by the court so to do, a receiver is not justified in incurring any other obligations than those required for the preservation of the property in his hands. Not infrequently, however, the interests of those having claims against the property, and in the case of public service corporations the interests of the public demand the continuance of a business. Such continuance is frequently authorized by the court, and this necessarily involves the making of contracts by the receiver. It is true in regard to such contracts, as in regard to those of executors or trustees, that unless the receiver is the contracting party, there can be no contracting party. At least, this is true if the receiver is appointed by the court at the instance of creditors and not at the instance of the owners of the property. If the receiver is by the assent of the owners of the property virtually made their agent, he may have power like any agent to bind his principal;⁶ but if appointed and acting *in invitum*, so far as the owners of the property are concerned, he is certainly not their agent, and though he may bind the property put in his hands by the court, he cannot impose a personal obligation on its owners.⁷ Of course, also he can impose no obligation on the court. Therefore, unless he is personally liable, no one is liable. For this reason the English court has applied the rule applicable to contracts of fiduciaries,

⁵ *Pennsylvania Steel Co. v. New York City Ry.*, 198 Fed. 721, 117 C. C. A. 503. In some States statutory receivers are made virtually assignees and vested with title.

⁶ In *Owen v. Cronk*, [1895] 1 Q. B. 265, a receiver was appointed by trustees in accordance with the provisions of the trust deed to carry on business. It was held that this receiver was a mere agent of the trustees and was not liable as a contractor to those to whom he disclosed the nature of his employment.

⁷ In *Burt v. Bull*, [1895] 1 Q. B. 276, receivers of a corporation signed an order in the name of the corporation, of which they were receivers, by themselves as receivers and managers. The court held that the receivers were not the agents of the Company. Lopes, L. J., saying "the Company after their appointment had no control over the business. It could give no orders and make no contracts. The defendants could not be said to be agents for anybody."

and holds that unless he expressly and clearly excludes such liability by the terms of the agreement in question, the receiver is personally liable even on authorized contracts,⁸ and must seek indemnity from the estate in his hands so far as that estate is sufficient for the purpose. In the United States the hardship of such a rule has led the courts to an opposite result. It is indeed conceded that a receiver may bind himself personally and that whether he has done so is a question of fact;⁹ but unless he expressly assumes a personal obligation, the mere fact that he is acting as receiver frees him from personal responsibility so long as he is acting within the authority given him by the court.¹⁰ The right of one who makes an agreement with a receiver is in effect a right *in rem* against the property or fund in the receiver's hands, and the court may authorize the receiver to create such rights by entering into contracts even extending beyond the probable duration of the receivership.¹¹ The protection from personal liability thus afforded the receiver, exists only where he is acting in conformity with the directions of the court. On contracts outside these limits he is personally liable.¹² As a receiver is an officer of the court, suit may not be brought against him in his official capacity without leave first obtained from the court which appointed him,¹³

⁸ *Burt v. Bull*, [1895] 1 Q. B. 276.

⁹ *Cake v. Mohun*, 164 U. S. 311, 17 S. Ct. 100, 41 L. Ed. 447.

¹⁰ *Farmers' Loan & Trust Co. v. Central Railroad*, 7 Fed. 537; *In re Kalb & Berger Mfg. Co.*, 165 Fed. 895, 91 C. C. A. 573; *Hillsboro, etc., Co. v. Ingalls*, 60 Fla. 105, 53 So. 930; *Shannon v. Mastin*, 135 Mo. App. 50, 114 S. W. 1127; *Vanderbilt v. Central Railroad Co.*, 43 N. J. Eq. 669, 12 Atl. 188; *Sager Mfg. Co. v. Smith*, 45 N. Y. App. Div. 358, 60 N. Y. S. 849 (affd. without opinion in 167 N. Y. 600, 60 N. E. 1120). *Cf. Guimarin v. Southern L. & T. Co.*, 106 S. Car. 37, 90 S. E. 319, where the fact that letters forming a contract were signed with the addition "Receiver" was held not to relieve the receiver of personal lia-

bility, whereas, if he had signed "as receiver" he would have been.

¹¹ *Gay v. Hudson River Elec. Power Co.*, 173 Fed. 1003, 177 Fed. 1003, 100 C. C. A. 665.

¹² *In re Kalb & Berger Mfg. Co.*, 165 Fed. 895, 91 C. C. A. 573; *Peoria Steam Marble Works v. Hickey*, 110 Ia. 276, 81 N. W. 473, 80 Am. St. Rep. 296. See also earlier New York cases cited and discussed in *Sager Mfg. Co. v. Smith*, 45 N. Y. App. Div. 358, 60 N. Y. S. 849 (affd. without opinion in 167 N. Y. 600, 60 N. E. 1120).

¹³ *Porter v. Sabin*, 149 U. S. 473, 13 S. Ct. 1008, 37 L. Ed. 815; *Bishop v. McKillican*, 124 Cal. 321, 57 Pac. 76, 71 Am. St. Rep. 68; *Peirce v. Jones*, 24 Ind. App. 286, 56 N. E. 683; *Darner v. Gatewood*, 2 Nebr. Unoff. 561, 89

unless a Statute permits suit to be brought without leave.¹⁴ It may be assumed that the obligation of a trustee in bankruptcy on contracts made for the benefit of the bankrupt estate is subject to the same limitations that are applicable to a receiver.¹⁵ How far contracts entered into by one for whose property a receiver is subsequently appointed are affected by the bankruptcy or insolvency which usually accompanies or follows receivership is elsewhere considered.¹⁶

N. W. 603; *Simmons v. Taylor*, 106 Tenn. 729, 63 S. W. 1123.

¹⁴ By section 3 of the Judiciary Act of 1887, corrected by the Act of March 13, 1888 (25 Stat. at L. 433), it is provided: That "every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice."

This statute has been construed as allowing a receiver appointed by a Federal court to be sued without leave of court not only in Federal courts but in State courts. *McNulta v. Lochridge*, 141 U. S. 327, 12 S. Ct. 11,

35 L. Ed. 796; *Texas, etc., R. Co. v. Johnson*, 151 U. S. 81, 14 S. Ct. 250, 38 L. Ed. 81; *Central Trust Co. v. East Tennessee, etc., Ry. Co.*, 59 Fed. 523; *McNulta v. Lochridge*, 137 Ill. 270, 27 N. E. 452, 31 Am. St. Rep. 362; *Malott v. Shimer*, 153 Ind. 35, 54 N. E. 101, 74 Am. St. Rep. 278; *Dillingham v. Russell*, 73 Tex. 47, 11 S. W. 139, 15 Am. St. Rep. 753. The statute applies to receivers appointed in bankruptcy proceedings, as well as to other receivers. *In re Kalb & Berger Mfg. Co.*, 165 Fed. 895, 91 C. C. C. 573. See further as to local statutes, or rules of court allowing suit, without leave of court first obtained, against receivers appointed by state courts. *Hayes v. Brotzman*, 46 Md. 519; *Rockwell v. Merwin*, 45 N. Y. 166.

¹⁵ See *In re Hunter*, 151 Fed. 904; *In re Kalb & Berger Mfg. Co.*, 165 Fed. 895, 91 C. C. A. 573.

¹⁶ *Infra*, §§ 880, 1980 *et seq.*

CHAPTER XII

JOINT DUTIES AND RIGHTS UNDER CONTRACTS

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§ 316. Nature of joint duties.

The primary conception of a joint duty or obligation under a contract is that two or more persons are together bound as if they were a single person. This conception is possible in reasoning concerning the nature of a contract, and the enforcement by it of legal action and by judgment. The idea ceases to be practical when a judgment has been rendered against joint contractors and the plaintiff wishes to satisfy that judgment. If indeed the joint promisors owned property jointly, it would be possible to hold that an execution under a joint judgment should be levied solely upon the joint property of the debtors. Frequently, however, joint promisors own no property jointly; and even when they do, as in the case of partners, the execution may be levied wholly on the individual property of a single one of them.¹ Though joint promisors, therefore, are liable as an indivisible unit in legal theory until the moment comes for the satisfaction of the plaintiff's claim out of their property, the property of each then becomes liable severally for the whole of the debt. It is also true that together with their liability as a unit, each was conceived in a somewhat metaphysical way to be bound individually though not subject to be sued alone.²

It has been said that a joint agreement by several to perform an act may be resolved into an agreement by all, or some, or one of them to do it;³ but it is conceived that this analysis is not accurate. A joint agreement is an agreement by all, that the act promised shall be done. The act promised frequently by the terms of the promise may be performable

¹ *Abbot v. Smith*, 2 W. Bl. 947, 949; *Miller v. Mynn*, 1 E. & E. 1075; *Leinkauff v. Munter*, 76 Ala. 194; *Clayton v. May*, 68 Ga. 27; *Hardy v. Overman*, 36 Ind. 549; *Bray v. Seligman*, 75 Mo. 31; *Randolph v. Daly*, 16 N. J. Eq. 313; *Saunders v. Reilly*, 105 N. Y. 12, 21, 12 N. E. 170, 59 Am. Rep. 472. If

a joint defendant dies after judgment, the judgment continues to bind the survivors. *Ex parte Christy*, 2 D. & Ch. 155, 169.

² See *infra*, § 327.

³ *Griffith on Joint Rights and Liabilities*, 2.

by any one of the promisors, sometimes by only one of them. Sometimes it may require joint action of all the promisors and sometimes it may be performable only by a third person. Thus A and B may jointly promise that they together will do an act, that one of them severally shall do an act, or that a third person shall do an act.⁴

It must be observed, however, that most promised acts, though the promise states that the performance of them shall be by a particular person, may, nevertheless, legally be performed by some one else as agent or assignee. When A promises that he will pay money he may pay it by the hand of B. Similarly when A and B promise that they will pay money, they need not actually pay the money jointly; not only either A or B may pay it, but they may delegate C to pay it in their behalf. It is only when the act to be performed is personal in its character that it can be performed only by the person named in the promise. A promise by A and B that C shall paint a portrait or that B shall paint a portrait, or that A and B together shall collaborate on a portrait, can only be performed in accordance with its terms. Accordingly, as a contract to employ is held to be personal, a contract by A and B that they will employ C can be performed only by A and B jointly. Therefore, the death of one member of partnership is generally held to dissolve

⁴ Illustrations of these distinctions may be found in the cases. In *Copland v. Laporte*, 3 A. & E. 517, L. & R. covenanted that they would pay rent, and, further, that L. would keep the premises in repair. This was held not only a joint covenant by L. & R. that they would pay rent, but also a joint covenant that L. would keep the premises in repair. In *White v. Tyndall*, 13 App. Cas. 263, G. W. & A. W. covenanted that they, or some one of them, should pay the reserved rent. This was held a joint covenant. It must be distinguished from several covenants by G. W. that he will pay the rent and by A. W. that he also shall be liable for the rent. In *Walter v. Rafalsky*, 113 N. Y. App. D. 223, 98 N. Y. S. 915, *affd.* 186 N. Y. 543, 79 N.

E. 1118, several persons agreed jointly that one of them should buy stock from the plaintiff. In *Thompson v. Crocker, Rice* (S. Car.), 23, two persons executed an instrument as follows: "I promise.....to execute a.....mortgage to T. for any piece of land he may wish, to pay him a debt of \$150, which we owe him." One of the signers subsequently executed the mortgage to T which he accepted. It was held that the written instrument was an acknowledgment of a joint debt; and notwithstanding the delivery of a several mortgage, the debt remained joint. It will be seen that this promise was several that one of the debtors should give the mortgage but both the debtors still remained bound to pay the debt.

a contract made by the firm to employ a servant.⁵ Whether the courts have not gone too far in considering a contract to employ necessarily personal in its nature is a question immaterial for discussion in this connection.⁶ The question by whom performance must be rendered was thus summarized in a recent case:

"Whether or not the contract was of such a character as to require the personal service of all the three joint contractors in its performance and to be terminated by the death of one or of two of them is to be determined by a construction of the contract itself and depends upon the intention of the parties."⁷ But by whomsoever the act contracted for is to be done, the unexcused failure to perform it renders liable all who have contracted that it shall be done.

§ 317. Nature of joint rights.

In an entirely analogous way several persons, who are promisees under a contract, may be treated as a unit and, thereby, together become entitled to the performance of the promise.

In case of joint promisees, it would be conceivable not simply to require their joinder in the action, but also to require their joinder in the seizure of any property of the defendant taken in satisfaction of the claim; or in the receipt of any performance from the promisor given without litigation. But though each joint promisee is not regarded as individually entitled to the full performance of the promise in the same way that a joint promisor is subjected to entire liability for it, a somewhat similar effect is produced by implying an agency on the part of each joint promisee to receive or collect performance on behalf of all those entitled to it.⁸

⁵ *Tasker v. Shepherd*, 6 H. & N. 575; *Cowasjee Nanabhoy v. Lallbhoy Vullubhoy*, L. R. 3 Ind. App. 200; *Brace v. Calder*, [1895] 2 Q. B. 253; *Hoey v. McEwan*, 5 Sess. Cas. 3d ed. Ser. 814; *Griggs v. Swift*, 82 Ga. 392, 9 S. E. 1062, 5 L. R. A. 405, 14 Am. St. Rep. 176; *Greenburg v. Early*, 30 Abb. (N. C.) 300, 303. But see *Phillips v. Alhambra Palace Co.*, [1901] 1 K. B. 59; *Hughes v. Gross*, 166 Mass. 61,

43 N. E. 1031, 32 L. R. A. 620, 55 Am. St. Rep. 375; *Nickerson v. Russell*, 172 Mass. 584, 53 N. E. 141; *Ferreira v. Sayres*, 5 W. & S. 210.

⁶ See *infra*, § 1941.

⁷ *Babcock v. Farwell*, 245 Ill. 14, 44, 91 N. E. 683, 137 Am. St. Rep. 284.

⁸ *Osborn v. Martha's Vineyard R. Co.*, 140 Mass. 549, 5 N. E. 486. See also *Wallace v. Kelsall*, 7 M. & W. 264; *Husband v. Davis*, 10 C. B. 645.

§ 318. Antiquity of the law of joint obligations.

The law of joint rights and duties is of considerable antiquity. It was derived from the law of joint tenancy in real property; the courts endeavoring to apply to joint covenants the principles which were early established in regard to joint estates. How far early doctrines have gradually developed into different modern rules will appear in the discussion of the separate features of joint rights and duties.

§ 319. Joint obligations in the civil law.

The Roman law, like the common law, recognized the possibility of a community of obligations for the payment of the same debt, but the lines of distinction drawn in the Roman law are not the same as those of the common law. In the first place, in direct contrast with the rule of the common law, a collective promise by several persons in the Roman law, presumptively made each of them liable for only a ratable share of the thing promised;⁹ and such is the rule of the modern civil law.¹⁰

A promise to several collectively in the Roman law likewise, presumptively entitled each of them to only a ratable share of the performance.¹¹ But in the case of a correal obligation or of a solidary obligation, some of the incidents of the English law of several liability for the same debt may be found. It is a matter of dispute among Roman lawyers whether any distinction existed between a solidary obligation and a correal obligation.¹² The distinction, whether actually existing or not, has no analogy in English or American law, and need not be dwelt upon. It is enough to say that it was of the essence of a correal obligation that each co-debtor was individually liable for the whole debt, and each co-creditor had full authority to enforce the obligation. The correal debtor, therefore, resem-

⁹ Sohm's Institutes, Sec. 74, n. 1.

Sentell, 153 U. S. 465, 38 L. Ed. 785.

¹⁰ 3 Larombière Obligations, 256, *et seq.* See also the German Civil Code, Secs. 420 *et seq.* Such also is the law of Louisiana: "A joint obligation under the law of Louisiana binds the several parties thereto only for their proportion of the debt." *Groves v.*

¹¹ Hunter's Roman Law (3d ed.), 554.

¹² In support of the distinction between the two, see Sohm's Institutes, Sec. 74. In opposition to the distinction see Hunter's Roman Law (3d ed.), 561.

bled a debtor severally liable for the same debt with others under the English law, but in the Roman law the conception seems to have been that there was but one obligation, although that might be enforced against any of the correal debtors. Similarly where there were several creditors the right might be enforced by any one of them; but an action by one destroyed not only his own right of action but that of each of the other correal creditors. In short, in the correal obligation, the right and duty was looked upon as one and indivisible, but each party liable or entitled might give or demand performance.¹³

§ 320. Obligor may be bound jointly and severally.

Where several persons bind themselves for the same performance, they may not only bind themselves either jointly or each one separately, but also they may bind themselves jointly and at the same time each bind himself separately for the same performance. In such a case the promisee, like the holder of a promissory note on which a number of indorsers have been charged, is entitled to but a single performance, but is entitled to enforce that performance under more than one obligation.

Where parties are under joint and several duties there is, in legal effect, one more contract than there are obligors. Each obligor has separately contracted, and all of them have together contracted jointly.¹⁴

Under such a contract each obligor is liable severally for the whole duty. A contract such as is often entered into where each obligor binds himself for a ratable or other portion of the total performance, is not properly called joint and several, even though all the obligors jointly bind themselves for the whole performance, since the several contracts of the obligors are not for the same performance as the joint contract; though it must be admitted that there is here one of the too frequent ambiguities in Anglo-American legal terminology, since "several" obligations or liabilities are spoken of both where the obligations

¹³ See Sohm's *Institutes*, Sec. 74; *States v. Cushman*, 2 Sumn. 426; *Hunter's Roman Law* (3d ed.), 561. *People v. Harrison*, 82 Ill. 84; *Sharpe*

¹⁴ *Bolton v. Lee*, 2 Lev. 56; *Ex parte* *v. Baker*, 51 Ind. App. 547, 99 N. E. 44; *Turner v. Whitmore*, 63 Me. 526.

and liabilities relate to the same performance, which when once rendered discharges all the obligors, and also where the obligations or liabilities relate to different performances.¹⁶

§ 321. Obligees may not be entitled jointly and severally.

It was decided in *Slingsby's case*¹⁸ that joint and several rights could not be created under a contract; and this principle has been regarded as settled ever since that decision,¹⁷ though there are not many modern decisions on the point, and though the logic of the rule has been questioned.¹⁸

If the question is analyzed it will be found that there is this measure of reason in the rule of *Slingsby's case*. It X is bound to A, B and C, to give them something jointly, an obligation to A alone to give him that thing will not be a contract for the same performance and it is of the essence of joint and several contracts that each of the several contracts shall be for the same performance as the joint contract. But, on the other hand, there is no logical reason why X should not bind himself by a separate promise to A to perform to A, B and C. This would be a contract for the benefit of a third person. It is perhaps due to the objection of the English law to recognize such contracts that joint and several rights have been regarded as

¹⁶ In Louisiana, the term "several contract" is used to denote a contract which imposes different obligations upon the several promisors; but the Louisiana terminology is borrowed from the Civil Law. See La. Code, §§ 2077 *et seq.* In *Krbel v. Krbel*, 84 Neb. 160, 120 N. W. 935, also, the contract before the court is called "joint and several," though the several liabilities were for different performances than the joint liability, and the correctness of the decision depends upon that circumstance. See *infra*, § 334.

¹⁷ 5 Coke, 18 b.

¹⁸ *Eccleston v. Clipsham*, 1 Wms. Saund. 153; *Withers v. Bircham*, 3 B. & C. 254; *Bradburne v. Botfield*, 14 M. & W. 559; *Eveleth v. Sawyer*, 96 Me. 227, 52 Atl. 639. But see *Collyer v. Cook*, 28 Ind. App. 272, 62 N. E.

655, where the court held without adverting to the rule of *Slingsby's case*, that notes payable to "the order of A or B" gave to each a separate right of action as well as a joint right. See further as to such notes, *Passut v. Heubner*, 81 N. Y. Misc. 249, 142 N. Y. S. 546; *Uniform Neg. Inst. Law*, Sec. 8 (5).

¹⁹ In *Keightley v. Watson*, 3 Exch. 716, 726, Rolfe, B., said: "If they [the parties] so word one covenant as to make it a joint and separate covenant, had it not been otherwise decided, I confess I should have seen nothing extraordinary in holding that if they choose so to contract as to impose upon themselves that burthen, and state it to be both joint and several, the court ought to so construe it."

impossible. It is to be noticed, however, that if the performance of the promise (as a promise to go to Rome) does not require any coöperation of other persons as by receiving the performance, there is no logical difficulty in promising several persons jointly, and also each of them severally that the specific thing shall be done.¹⁹

§ 322. When obligors are bound jointly.

Following the analogy of the rule of real property that an estate granted to two persons created a joint tenancy rather than a tenancy in common, it was early held and, except as changed by statute,²⁰ the law remains that promises by two or more persons create a joint duty unless the contrary is stated.²¹ "It is a general presumption of law when two or more persons undertake an obligation that they undertake jointly, words of severance are necessary to overcome this primary presumption."²² The fact that the interests of the obligors in the contract are diverse, does not prevent the duty from being joint.²³ But where, as in a subscription paper,

¹⁹ Thus in *Bro. Abr. Covenant* 49, the case is stated of a covenant made with twenty persons, and with each of them to make certain sea banks. Failure to perform the promise resulted in damages to the land to two, and they were allowed to sue without the others. Brooke adds that "it seems that each should bring an action by himself." It is difficult to find any logical objection to such separate actions, and also it would seem that there had been a violation of a covenant made jointly to the twenty. *Slingsby's Case*, 5 Coke, 18 b, would, however, probably be regarded generally as having settled the law that a right cannot be joint and several.

²⁰ See *infra*, § 336.

²¹ *Sheppard's Touchstone*, 375; *Fors-ter v. Taylor*, 3 Camp. 49; *White v. Tyndall*, 13 A. C. 263; *Armstrong v. Cahill*, 6 L. R. Ir. 440; *Noyes v. Barnard*, 63 Fed. 782, 11 C. C. A. 424; *Milner Bank &c. Co. v. Whipple's Est.*,

61 Colo. 252, 156 Pac. 1098; *Eller v. Lacy*, 137 Ind. 436, 36 N. E. 1088; *Nabors v. Producers' Oil Co.*, 140 La. 985, 74 So. 527, L. R. A. 1917 D. 1115; *New Haven & Northampton Co. v. Hayden*, 119 Mass. 361; *Eveleth v. Sawyer*, 96 Me. 227, 52 Atl. 639; *Hill v. Combs*, 92 Mo. App. 242; *Turley v. Thomas*, 31 Nev. 181, 101 Pac. 568, 135 Am. St. 667; *Alpaugh v. Wood*, 53 N. J. L. 638, 23 Atl. 261; *Kortvelly-essy v. Manhattan Cooperage Co.*, 162 N. Y. App. Div. 285, 147 N. Y. S. 586; *Turley v. Thomas*, 31 Nev. 181, 101 Pac. 568; *Clements v. Miller*, 13 N. Dak. 176, 100 N. W. 239; *Pittsley v. King*, 206 Pa. 193, 55 Atl. 920; *Mintz v. Tri-County Natural Gas Co.*, 259 Pa. 477, 103 Atl. 285; *Morrison v. American Surety Co.*, 224 Pa. 41, 73 Atl. 10; *Smith v. Doty*, 91 Wash. 315, 157 Pac. 881; *Elliott v. Bell*, 37 W. Va. 834, 17 S. E. 399.

²² *Philadelphia v. Reeves*, 48 Pa. 472.

²³ *Alpaugh v. Wood*, 53 N. J. L.

the obligors state the amount of the subscription of each, each is liable for only that amount, although there may be no words of severance in the promise. This may be contrary to early law, but it is supposed to be, and doubtless is, in accord with the intention of the parties.²⁴ And there may be other cases where the interests are so clearly several, that a court will disregard the ordinary presumption.²⁵ If by agreement or implication of law the contract of two or more obligors with their obligee is joint, the obligee is entitled to enforce the obligation as a joint one, and is not bound by any agreement, of which he was ignorant, of the obligors severally with one another, that each shall be liable for a ratable share.²⁶ Partners are always bound jointly and not severally for the debts and contracts of the firm, unless it is otherwise provided by local statutes;²⁷ but under the statutes or decisions of many jurisdictions their liability is both joint and several.²⁸ The members of such an unincorporated association as amounts to a partnership in legal

638, 23 Atl. 261; *Philadelphia v. Reeves*, 48 Pa. 472. Under the California Civil Code, however (§ 1659), if all the promisors receive some benefit, the obligation is presumed to be joint and several; and see *Smith v. Woodward*, 51 Cal. 311, 117 Pac. 140; *Rutherford v. Holbert*, 42 Okl. 735, 142 Pac. 1099, L. R. A. 1915 B. 221.

²⁴ *Davis, etc., Co. v. Barber*, 51 Fed. 148; *Davis, etc., Co. v. Jones*, 66 Fed. 124; *Chicago, etc., Co. v. Graham*, 78 Fed. 83, 41 U. S. App. 680, 23 C. C. A. 657; *Landwerlen v. Wheeler*, 106 Fed. 523, 5 N. E. 888; *Price v. Railroad Co.*, 18 Ind. 137; *McArthur v. Board*, 119 Ia. 562, 93 N. W. 580; *Hall v. Thayer*, 12 Met. 130; *Davis v. Belford*, 70 Mich. 120, 37 N. W. 919; *Gibbons v. Bente*, 51 Minn. 499, 53 N. W. 756, 22 L. R. A. 80; *Cornish v. West*, 82 Minn. 107, 84 N. W. 750, 52 L. R. A. 355; *Lawson v. Muse*, 180 Mo. App. 35, 165 S. W. 396; *Frost v. Williams*, 2 S. Dak. 457, 50 N. W. 964; *Bank of American Fork v. Smith*, 44 Utah, 284, 140 Pac. 122; *Gibbons v. Grinsel*, 79 Wis. 365, 48 N. W. 255;

Hodges v. Nalty, 104 Wis. 464, 80 N. W. 726. See also *Collins v. Prosser*, 1 B. & C. 682, and *infra*, § 323, n. 36. Cf. *Davis v. Shafer*, 50 Fed. 764; *Darnell v. Lyon*, 85 Tex. 455, 22 S. W. 304, 960. See further 22 L. R. A. 80, n.; L. R. A. 1915 B, 224. Where subscribers do not define the amount for which each subscribes they are liable jointly for the total amount. See *Cornish v. West*, 82 Minn. 107, 84 N. W. 750.

²⁵ *Spangenberg v. Spangenberg*, 19 Cal. App. 439, 126 Pac. 379 (statutory); *Manistee Nav. Co. v. Louis Sands & Co.*, 174 Mich. 1, 140 N. W. 565.

²⁶ *Knowlton v. Parsons*, 198 Mass. 439, 84 N. E. 798.

²⁷ *Mason v. Eldred*, 6 Wall. 231, 18 L. Ed. 783; *Stover v. Stevens*, 21 Calif. App. 261, 131 Pac. 332; *Stewart v. Terwilliger*, 177 Mich. 313, 143 N. W. 17; *Parsons on Partnership* (4th ed.), § 262. Cf. 11 Cal. L. Rev. 101, by Professor Burdick.

²⁸ *In re Perkins' Est.*, 166 Mo. App. 170, 148 S. W. 969; *People v. Knapp*, 206 N. Y. 373, 99 N. E. 841.

effect are similarly liable.²⁹ The members of an unincorporated association which is not a partnership are bound on principles of agency to the extent which they have authorized their officers or fellow members to bind them.³⁰ It would seem generally true that the authority conferred is to bind as a body all those giving the authority, that is, that the liability created is joint.³¹ But it would doubtless be possible for members to authorize officers to bind each one of them individually, or even all of them jointly and each one of them severally.³²

§ 323. When obligors are bound severally.

It is wholly a question of construction whether each of several obligors makes a separate promise or whether they unitedly make a joint promise. This rule of construction is subject, however, to the presumption alluded to in the preceding section that the obligation created by the promise of several persons is joint unless the contrary is made evident. But anything in the language of the promisor which shows an intention that each shall be bound severally will be given effect. Appropriate language to create several promises is: "we each promise," or, "each of us promises," or any words of similar meaning.^{32a} The words "respective" or "respectively" may operate to sever a liability which would otherwise be joint.³³ So an agreement by which parties agree "each with the other that no one of them would sell" his stock without first giving the remaining corporators the right to purchase, is several.³⁴ The mere fact

²⁹ See *supra*, § 307; *Fowler v. Kennedy*, 2 Abb. Pr. 347.

³⁰ See *supra*, §§ 307, 308.

³¹ See *Everett v. Tindall*, 5 Esp. 169; *Kiersted v. Bennett*, 93 Me. 328, 45 Atl. 42; *Newell v. Borden*, 128 Mass. 31; *Detroit Life Guard Band v. First Michigan Infantry*, 134 Mich. 598, 96 N. W. 934; *Slocum v. Fairchild*, 7 Hill, 292.

³² In *Sheehy v. Blake*, 72 Wis. 411, 39 N. W. 479, 77 Wis. 394, 46 N. W. 537, and *Vader v. Ballou*, 151 Wis. 577, 139 N. W. 413, the liability was held joint and several. It is difficult to find any evidence of intent to create

other than a joint liability in these cases.

^{32a} *McArthur v. Board*, 119 Ia. 562, 93 N. W. 580; *Fuselier v. Lacour*, 3 La Ann. 162; *Larkin v. Butterfield*, 29 Mich. 254.

³³ *Ulman v. Manheimer*, 249 Fed. 691, 161 C. C. A. 601. See also *Patrick v. Royle*, 13 Q. B. 98, 112; *Alsop v. Russell*, 38 Conn. 99, 103; *Messer v. Jones*, 88 Me. 349, 34 Atl. 177; *Wolf v. Lake Erie Co.*, 55 Ohio St. 517, 45 N. E. 708, 36 L. R. A. 812.

³⁴ *Streator v. Paxton*, 201 Pa. 135, 50 Atl. 926.

that the obligors have a separate interest does not involve the consequence that their obligations are several, but, as has been said, in the case of subscription papers and other cases where a separate amount is attached to the name of each obligor, such promises as "we agree to pay the sums set opposite our respective names" have been held to create several promises³⁵—not it will be observed each for the same performance, but each for a different performance. It would be perfectly possible to assume a joint liability to pay each of these sums, but it would then be so unreasonable to divide the sums and set them opposite the different names that as a matter of construction it has been held separate obligations are intended.³⁶ And in subscription contracts the usual presumption that joint liability is intended is reversed and separate obligations are presumed;³⁷ though it is of course possible for subscribers jointly to agree to pay a gross sum.³⁸ The nature of the contract may also in other instances show an intention to give rise to a several rather than a joint liability; thus,—a contract to the following effect was held to create a several liability. "A, having this day loaned the N Mining Co. fifteen thousand dollars, we jointly and severally guarantee the repayment of said loan." Signed: B, C, A. Though this contract by its very terms is stated to be joint as well as several, the court held no joint liability could be created; for A, being the promisee, could not legally be a joint promisor, and the contract was therefore in legal effect the several obligation of B and C to A.³⁹

Likewise the circumstance that the promises are contained in separate instruments though in identical terms shows the

³⁵ See *supra*, § 322.

³⁶ *O'Connor v. Hooper*, 102 Cal. 528, 36 Pac. 939; *Robertson v. March*, 4 Ill. 198; *Landwerlen v. Wheeler*, 106 Ind. 523, 5 N. E. 888; *Davis v. Murray*, 102 Mich. 217, 60 N. W. 437; *Gibbons v. Bente*, 51 Minn. 499, 53 N. W. 756, 22 L. R. A. 80; *Davis v. Creamery Co.*, 48 Neb. 471, 67 N. W. 436; *Connecticut &c. R. R. Co. v. Bailey*, 24 Vt. 465; *Hodges v. Nalty*, 104 Wis. 464, 80 N. W. 726; *Chicago Bldg. & Mfg. Co.*

v. Higginbotham (Miss.), 29 So. 79. See also *Villard v. Moyer*, 123 N. Y. App. D. 629, 107 N. Y. S. 1054, and cases cited *supra*, § 322, *n.* 24.

³⁷ *Hall v. Thayer*, 12 Met. 130; *Davis v. Belford*, 70 Mich. 120, 37 N. W. 919.

³⁸ *Davis v. Shafer*, 50 Fed. 764.

³⁹ *Colt v. Learned*, 118 Mass. 380. See also *Smith v. Woodward*, 51 Col. 311, 117 Pac. 140; *Gaines v. Vandecar*, 59 Or. 187, 115 Pac. 721, 1122.

promises to be several.⁴⁰ It is possible in the same contract that some promises shall be joint and others by the same promisors shall be several.⁴¹

§ 324. When obligors are bound joint and severally.

Since, as has been seen, the mere fact that several persons binding themselves without words of severance creates a joint liability, it follows that in order to create in addition a several liability there must also be words by which each obligor binds himself separately as "we and each of us promise,"⁴² or at least an intention manifested in some way that the obligation shall be joint and several.⁴³ In one instance, by a special rule of construction, words have been held to amount to a joint and several promise, though not so in express terms. This is where a promise is expressed in the singular but is signed by several persons, as "I promise to pay," signed by A. B. and C.⁴⁴ By Statute in California,⁴⁵ it is provided that where all the parties who unite in a promise receive some benefit from the consideration, their promise is presumed to be joint and sev-

⁴⁰ *Virginia Coal Co. v. Virginia-Lee Co.*, 113 Va. 395, 74 S. E. 177.

⁴¹ *Buster v. Fletcher*, 22 Ida. 172, 125 Pac. 226; *Gibbons v. Bente*, 51 Minn. 499, 53 N. W. 756, 22 L. R. A. 80; *Krbel v. Krbel*, 84 Neb. 120, 120 N. W. 935. See also *People v. Hartley*, 21 Cal. 585, 82 Am. Dec. 758, and *supra*, § 320.

⁴² "If two, three, or more bind themselves in an obligation thus, *obligamus nos*, and say no more, the obligation is and shall be taken to be joint only, and not several." *Shep. Touch.* 375. See also *Rees v. Abbott*, Cowp. 832; *People v. Love*, 25 Cal. 520; *Jernigan v. Wimberly*, 1 Ga. 220; *Savannah & Co. Trust Co. v. Purvis*, 6 Ga. App. 275, 65 S. E. 35; *Pogue v. Clark*, 25 Ill. 333; *Harvey v. Irvine*, 11 Ia. 82; *Bank of Louisiana v. Sterling*, 2 La. 60, 62; *Mayor of New Orleans v. Ripley*, 5 La. 120, 122, 25 Am. Dec. 175; *Meyer v. Estes*, 164 Mass. 457, 41 N. E. 683, 32 L. R. A. 283; *Morrison v. American*

Surety Co., 224 Pa. 41, 73 Atl. 10. But see *contra*, *Morange v. Mudge*, 9 Abb. Prac. 243.

⁴³ *Virginia Coal Co. v. Virginia-Lee Co.*, 113 Va. 395, 74 S. E. 177.

⁴⁴ *March v. Ward*, *Peake's Cases* 130; *Scheid v. Leibshultz*, 51 Ind. 38; *Bank of Louisiana v. Sterling*, 2 La. 60, 62; *Mayor of New Orleans v. Ripley*, 5 La. 120, 122, 25 Am. Dec. 175; *Hemmenway v. Stone*, 7 Mass. 58, 5 Am. Dec. 28; *Van Alostyne v. Van Slyck*, 10 Barb. 383; *Dill v. White*, 52 Wis. 456, 9 N. W. 404. This is so provided as to bills and notes by the Negotiable Instruments Law, Sec. 17 (7), *infra*, § 1143, which has been passed in nearly all of the United States. *Cf. Brown v. Fitch*, 4 Vroom, 418.

⁴⁵ Civ. Code, § 1659. See also *Smith v. Woodward*, 51 Colo. 311, 117 Pac. 140; *Rutherford v. Holbert*, 42 Okl. 735, 142 Pac. 1099, L. R. A. 1915 B 221.

eral.⁴⁶ And in many other States all obligations, which at common law would be joint, by Statute create joint and several liabilities,⁴⁷ or create liabilities presumptively joint and several in the absence of something to show a contrary intention.⁴⁸ By the Uniform Negotiable Instruments Law ⁴⁹ the obligations of joint payees or joint indorsees who indorse, are joint and several. If a number of persons are bound jointly and severally, the obligee must either sue them all jointly, according to the rules governing joint liabilities, or sue any one or more of them separately; he cannot join any number less than the whole.⁵⁰

§ 325. When obligees are entitled jointly and when severally.

As has been seen ⁵¹ obligees, as a matter of law, cannot be entitled jointly and severally. It is necessary, therefore, to determine where there are several obligees whether their rights are joint or whether they are several. An important matter to observe here is whether the interests of the obligees are separate or whether they have between them but a single interest. It was at one time supposed that this test was so absolute that no words however express could justify construing the rights of obligees as separate if their interests were single or *vice versa*. But it is now well established that the rule is one of construction and creates merely a presumption, and that it is impossible to say that parties may not, if they please, use joint words so as to express a joint covenant, though their interests are several, but, "if there be words capable of two constructions, we must look to the interest of the parties which they intend to protect, and construe the words according to that interest."⁵²

⁴⁶ *Gummer v. Mairs*, 140 Cal. 535, 74 Pac. 26; *Bell v. Adams*, 150 Cal. 772, 90 Pac. 118.

⁴⁷ *Cole v. Harvey*, 142 Ia. 574, 120 N. W. 97; *Knapp v. Hanley*, 153 Mo. App. 169, 132 S. W. 747.

⁴⁸ *McMaster v. City Nat. Bank*, 23 Okl. 550, 101 Pac. 1103.

⁴⁹ Sec. 68, *infra*, § 1163.

⁵⁰ *Roll. Abr.* 148; *Streatfield v. Halliday*, 3 T. R. 779, 782; *Chicago & A. Ry. Co. v. New York & C. R. Co.*, 24

Fed. 516, 517; *Stevens v. Catlin*, 152 Ill. 56, 58, 37 N. E. 1023.

⁵¹ *Infra*, § 321.

⁵² *Keightley v. Watson*, 3 Exch. 716, per Parke, B. See also *James v. Emery*, 5 Price, 529, 533; *Sorsbie v. Park*, 12 M. & W. 146, 156; *Bradburne v. Botfield*, 14 M. & W. 559; *Farni v. Teson*, 1 Black, 309; *Beckwith v. Talbot*, 95 U. S. 289, 24 L. Ed. 496; *Atlanta & C. Ry. Co. v. Thomas*, 60 Fla. 412, 53 So. 510; *International Hotel Co. v.*

This rule is not always very easy to apply, though its validity must be regarded as established. As a further aid to construction, it has also been said that where the consideration furnished by obligees is several, their interests may *prima facie* be regarded as several and not joint, if other features of the contract do not clearly conflict with this construction.⁵³

A covenant by several continuing directors to indemnify several retiring directors was held to give a several right to each of the latter.⁵⁴ So a covenant to carry stock for several persons "pro rata according to their respective interests" in a corporation, was held to create several rights.⁵⁵ So a covenant in a deed, reciting the grant by another of two annuities to A and B respectively, and covenanting with A and B that the annuities should be paid by the covenantor, in case of the grantor's failure to pay them, was held to create several rights in A and B against the covenantor.⁵⁶ So a covenant guaranteeing two creditors payment of their claims against one who owed each of them, though there were no words of severance in the covenant, was held to give each covenantee a several right.⁵⁷ On the other hand, a covenant to coöwners of property in regard to the property, is a covenant to them jointly, whether they are joint tenants,⁵⁸ or tenants in common.⁵⁹

Flynn, 238 Ill. 636, 87 N. E. 855; Curry v. Kansas &c. Ry. Co., 58 Kans. 6, 48 Pac. 579; Nabors v. Producers' Oil Co., 140 La. 985, 74 So. 527, L. R. A. 1917 D. 1115; Emery v. Hitchcock, 12 Wend. 156; Emmuleth v. Home Benefit Assoc., 122 N. Y. 130, 25 N. E. 234, 9 L. R. A. 704; Anderson v. Nichols (Vt.), 107 Atl. 116.

⁵³ Spangenberg v. Spangenberg, 19 Cal. App. 439, 126 Pac. 379; Atlanta &c. Ry. Co. v. Thomas, 60 Fla. 412, 53 So. 510; L. L. Satler Lumber Co. v. Exler, 239 Pa. 135, 86 Atl. 793; Anderson v. Nichols (Vt.), 107 Atl. 116.

⁵⁴ Haddon v. Ayers, 1 E. & E. 118. See also Poole v. Hill, 6 M. & W. 835.

⁵⁵ Villard v. Moyer, 54 N. Y. Misc. 369, 104 N. Y. S. 537, 123 N. Y. App. Div. 629, 107 N. Y. S. 1054.

⁵⁶ Withers v. Bircham, 3 B. & C. 254.

See also Palmer v. Sparshott, 4 M. & G. 137.

⁵⁷ L. L. Satler Lumber Co. v. Exler, 239 Pa. 135, 86 Atl. 793.

⁵⁸ Pullen v. Palmer, 5 Mod. 72, 150, 151; and see Allen v. South Penn Oil Co., 72 W. Va. 155, 77 S. E. 905.

⁵⁹ Harrison v. Barnby, 5 T. R. 246, 249; Foley v. Addenbrooke, 4 Q. B. 197; Thompson v. Hakewill, 19 C. B. (N. S.) 713. See also Stevens v. Jackson, 180 Mich. 131, 146 N. W. 636. But if a covenant was originally made to one lessor and his interest afterwards passed to several persons, the covenant is thereby severed and each of the persons entitled could sue for a breach and recover the damages which he had personally suffered. Twynam v. Pickard, 2 B. & Ald. 105; Simpson v. Clayton, 4 Bing. (N. C.) 758, 781; Ackroyd

So a promise to two lawyers to pay a sum of money in return for certain services to be rendered by them in a suit, is joint.⁶⁰

Sometimes though there are several covenantees, but a single one of them is interested in the performance of the covenant, as where the covenant is to A and B to pay money to A. In such a case it is held that the right of action is joint and both must sue.⁶¹ Where a bond upon its face runs to two or more persons jointly, the action must be brought by all of them, no matter what may be the terms of defeasance.⁶² "If one of two covenantees does not execute the instrument he must join in the action, because whatever may be the beneficial interest of either, their legal interest is joint."⁶³

Where a promissory note or bill of exchange is payable to

v. Briggs, 14 W. R. 25; *Roberts v. Holland*, [1893] 1 Q. B. 665. But it seems that such persons could also join in a single action and recover all the damage to which they were in the aggregate entitled. *Kitchen v. Buckley*, 1 Lev. 109; Judicature Act, Order XVI. r. 1.

⁶⁰ *Frumberg v. Haderlein*, 167 Mo. App. 717, 151 S. W. 160.

⁶¹ *Anderson v. Martindale*, 1 East, 497; *Hopkinson v. Lee*, 6 Q. B. 964. In the latter case though the defendant covenanted with the plaintiff to pay him money, and "as a separate and distinct covenant" with C that he would pay the plaintiff money, it was held that the plaintiff alone could not sue on the covenant. *Cf. Keightley v. Watson*, 3 Exch. 716. There the defendants covenanted with K "and as a separate covenant" with D, that they, the defendants, would pay to K or to D in case D should have paid K, the sum of six thousand pounds; and, further, that the defendants would in the meantime pay K interest on the unpaid purchase money. In a suit for non-payment of interest, K sued alone, and was held entitled to recover. The court held that as to the principal indebtedness each promisee had a separate interest, and would therefore be entitled

to sue alone for that. As to the promise to pay interest, K alone was to derive any benefit from the performance of the promise. Had the promise to pay interest been jointly to K and B, both must have joined in the action, but as K not only was solely interested but was also the only party to whom the promise to pay interest was made, he must sue alone.

⁶² *Farni v. Tesson*, 1 Black, 309, 17 L. Ed. 67; *Phillips v. Singer Mfg. Co.*, 88 Ill. 305; *The International Hotel Co. v. Flynn*, 238 Ill. 636, 87 N. E. 855. In the case last cited the bond was made to two persons jointly, but the defeasance clause provided the penal sum should not be paid if the obligors paid the obligees such sums as might be awarded in certain litigation to "any one or more" of the obligees, "jointly or severally." It was held that an action on the bond could not be maintained by one only of two obligees, both being living.

⁶³ *Philadelphia, W. & B. R. Co. v. Howard*, 13 How. 307, 337, 14 L. Ed. 157; citing *Slingsby's Case*, 5 Coke, 18 b; *Petrie v. Bury*, 3 B. & C. 353; *Wetherell v. Langston*, 1 Exch. 634; quoted in *International Hotel Co. v. Flynn*, 238 Ill. 636, 643, 87 N. E. 855.

the order of A or B, the words were given by most courts, prior to the enactment of the Negotiable Instruments Law, a literal construction, and the instrument was held non-negotiable because of uncertainty as to the payee;⁶⁴ but a few decisions have held otherwise.⁶⁵ Under the Uniform Negotiable Instruments Law⁶⁶ it is made clear that such an instrument is negotiable, but it is not determined whether the interest of the payees is joint or alternative. Though there seems no logical reason for construing the word "or" as meaning "and," now that no disagreeable consequences will follow from giving the word its natural meaning, yet as the weight of authority prior to the enactment of the statute strongly supported the conclusion that the writing even though not negotiable was evidence of a joint right,⁶⁷ some courts are likely to continue to adopt this construction.⁶⁸ Such an instrument was given its literal meaning prior to the passage of the Act in a few cases,⁶⁹ and under the statute several decisions are to the same effect.⁷⁰

Where the two payees may be regarded as identified in interest as in the case of an instrument payable to a husband or his wife where the rights of a married woman are still governed by the common law,⁷¹ or to a company or its treasurer,⁷² there is no difficulty. In the one case the note is in legal

⁶⁴ *Blanckenhagen v. Blundell*, 2 B. & Ald. 417; *Musselman v. Oakes*, 19 Ill. 81, 68 Am. Dec. 583; *Bennington v. Dinamore*, 2 Gill. 348; *Osgood v. Pearsons*, 4 Gray, 455; *Carpenter v. Farnsworth*, 106 Mass. 561, 8 Am. Rep. 360; *Walrad v. Petrie*, 4 Wend. 575; *Quinby v. Merritt*, 11 Humph. 439, 440; *Reed v. Reed*, 11 Up. Can. Q. B. 26; *Inglis v. Wiseman*, 2 Mor. Dict. Decis. 1404.

⁶⁵ *Samuels v. Evans*, 1 McL. 473; *Spaulding v. Evans*, 2 McL. 139; *Fort v. Delee*, 22 La. Ann. 180; *Ellis v. McLemoor*, 1 Bail. 13; *Hopkins v. Halliburton*, 6 Tex. Civ. App. 451.

⁶⁶ Sec. 8, *infra*, § 1139.

⁶⁷ *Collyer v. Cook*, 28 Ind. App. 272, 275, 62 N. E. 655; *Carr v. Bauer*, 61 Ill. App. 504; *Osgood v. Pearsons*, 4 Gray, 455; *Willoughby v. Willoughby*,

5 N. H. 244; *Parker v. Carson*, 64 N. C. 563 (bond); *Westgate v. Healy*, 4 R. I. 523; *Quinby v. Merritt*, 11 Humph. 439, 440.

⁶⁸ *Passut v. Heubner*, 81 N. Y. Misc. 249, 142 N. Y. S. 546; *Smith v. Hairc*, 133 Tenn. 343, 181 S. W. 161.

⁶⁹ *Samuels v. Evans*, 1 McL. 473; *Spaulding v. Evans*, 2 McL. 139; *Ellis v. McLemoor*, 1 Bail. 13.

⁷⁰ *Union Bank v. Spies*, 151 Iowa, 178, 130 N. W. 928; *Voris v. Schoonover*, 91 Kan. 530, 138 Pac. 607, 50 L. R. A. (N. S.) 1097; *Page v. Ford*, 65 Oreg. 450, 131 Pac. 1013, 45 L. R. A. (N. S.) 247, Ann. Cas. 1915 A 1048.

⁷¹ *Young v. Ward*, 21 Ill. 223; *Smith v. Haire*, 133 Tenn. 343, 181 S. W. 161.

⁷² *Atlantic M. F. Ins. Co. v. Young*, 38 N. H. 451, 75 Am. Dec. 200.

effect payable to the husband; in the other, to the corporation.

§ 326. Incidents of procedure in the enforcement of contractual rights by joint obligees.

As a joint contractual right belongs to all of the obligees taken together, a declaration which showed the existence of such a right, at common law was open to demurrer, a motion in arrest of judgment or a writ of error, if any number less than all the obligees jointly entitled to the right were made plaintiffs.⁷³ Such a declaration was none the less demurrable though it did not appear from it that the omitted party was alive. His death should have been alleged.⁷⁴

The absence from the jurisdiction of one of the joint obligees was no excuse for not joining him as plaintiff since any of the obligees had implied authority to sue in the name of all, though bound to give bond to indemnify for costs any obligee who does not assent to the action.⁷⁵ If the non-joinder

⁷³ *Slingsby's Case*, 5 Coke's Rep. 18 b (writ of error); *Eccleston v. Clipham*, 1 Saund. 153 (arrest of judgment); *Pullen v. Palmer*, 5 Mod. 72; *Scott v. Godwin*, 1 B. & P. 67; *Petrie v. Bury*, 3 B. & C. 353; *Lane v. Drinkwater*, 1 C. M. & R. 599, s. c. 3 Dowl. 223 (arrest of judgment); *Foley v. Addenbrooke*, 4 Q. B. 197; *Berlin v. Sheffield Coal, I. & S. Co.*, 124 Ala. 322, 324, 26 So. 933; *Peck v. Lampkin* (Ala.), 75 So. 580; *Hays v. Lasater*, 3 Ark. 565; *Charles H. Thompson Co. v. Burns*, 199 Ill. App. 418; *Bell v. Layman*, 1 T. B. Mon. 39, 40, 15 Am. Dec. 83; *Halsey v. Norton*, 45 Miss. 703, 7 Am. Rep. 745; *Smith v. Miller*, 49 N. J. L. 521, 13 Atl. 39; *Ehle v. Purdy*, 6 Wend. 629; *Sweigart v. Berk*, 8 S. & R. 308 (writ of error); *May v. Slade*, 24 Tex. 205; *Galveston, H. & San Antonio R. R. Co. v. Le Gierse*, 51 Tex. 189; *Dawson v. George* (Tex. Civ. App.), 193 S. W. 495.

⁷⁴ *Y. B. 36 Hen. VI. f. 16, pl. 11*; *Osborne v. Crosbern*, 1 Sid. 238; *Scott*

v. Godwin, 1 B. & P. 67; *Hays v. Lasater*, 3 Ark. 565; *Gilbert v. Allen*, 57 Ind. 524, 526; *Porter v. Fletcher*, 25 Minn. 493; *Ehle v. Purdy*, 6 Wend. 629; *Sullivan v. New York & R. Cement Co.*, 119 N. Y. 348, 23 N. E. 820; *Sweigart v. Berk*, 8 S. & R. 308, 311.

⁷⁵ *Vernon v. Jefferys*, 2 Stra. 1146; *Petrie v. Bury*, 3 B. & C. 353; *Ingham Lumber Co. v. Ingersoll Co.*, 93 Ark. 447, 125 S. W. 139; *Darling v. Simpson*, 15 Me. 175; *Sweigart v. Berk*, 8 Serg. & R. 308. But in *Williams v. Pacific Surety Co.*, 66 Or. 151, 127 Pac. 145, the court held that under modern codes where the defendant is allowed to counterclaim, it was impossible to fix properly the amount of the bond which the obligee pressing the suit should bring, and, therefore, the old procedure should not be permitted, but that all difficulty was avoided by joining the absent or dissenting obligee as a defendant. This procedure was also held proper in *W. D. Reeves Lumber Co. v. Davis*, 124 Ark. 143, 187 S. W. 171;

of one or more obligees did not appear from the declaration the objection might be taken by a traverse of the obligation alleged in the contract to exist in favor of the plaintiffs.⁷⁶ An exception, however, existed in regard to executors or administrators, jointly entitled as such to enforce an obligation in favor of the deceased. The non-joinder of all the executors or administrators could be taken only by plea in abatement.⁷⁷

Under modern statutory rules of pleading it is now held in many jurisdictions that a failure to demur to the declaration waives a non-joinder of plaintiffs apparent from the declaration.⁷⁸ And now also in many jurisdictions objection to the non-joinder of a necessary joint plaintiff not apparent from the declaration, can be made only by an affirmative answer.⁷⁹

Dawson v. George (Tex. Civ. App.), 193 S. W. 495.

⁷⁶ *Leglise v. Champante*, 2 Stra. 820; *Graham v. Robertson*, 2 T. R. 282; *Hill v. Tucker*, 1 Taunt. 7; *Hatsall v. Griffith*, 2 Cr. & M. 679; *Chanter v. Leese*, 4 M. & W. 295; *Hopkinson v. Lee*, 6 Q. B. 964; *Newton v. Reardon*, 2 Cranch C. C. 49; *Jordan v. Wilkins*, 3 Wash. C. C. 110; *Duval v. Mayson*, 23 Ark. 30; *Tully v. Excelsior Works*, 115 Ill. 544, 5 N. E. 83; *Eveleth v. Sawyer*, 96 Me. 227, 52 Atl. 639; *Smith v. Crichton*, 33 Md. 103; *Wiggin v. Cummings*, 8 Allen, 353; *Blackburn v. Blackburn*, 132 Mich. 525, 94 N. W. 24; *Jensen v. Gamble*, 191 Mich. 233, 157 N. W. 440; *A. K. McInnis Lumber Co. v. Rather*, 111 Miss. 55, 71 So. 264; *Lemon v. Wheeler*, 96 Mo. App. 651, 70 S. W. 924; *Frumberg v. Haderlein*, 167 Mo. App. 717, 151 S. W. 160; *Pitkin v. Roby*, 43 N. H. 138; *Murray v. Pfeiffer*, 70 N. J. L. 768, 59 Atl. 147; *Ehle v. Purdy*, 6 Wend. 629; *Scott v. Brown*, 3 Jones (N. C.), 541, 67 Am. Dec. 256; *Hoard v. Wilcox*, 47 Pa. St. 51; *Clapp v. Pawtucket Inst.*, 15 R. I. 489, 8 Atl. 697, 2 Am. St. Rep. 915; *Gordon v. Goodwin*, 2 N. & McC. 70, 10 Am.

Dec. 573; *Hilliker v. Loop*, 5 Vt. 116, 26 Am. Dec. 286.

⁷⁷ 1 Wms. Saund. 291 g; *Hicks v. Branton*, 21 Ark. 186, 189; *Macon v. Davis*, 27 Ga. 113; *Lillard v. Lillard*, 5 B. Mon. 340; *Hunt v. Kearney*, 3 N. J. L. 529; *Packer v. Willson*, 15 Wend. 343, 345; *Gordon v. Goodwin*, 2 N. & McC. 70, 10 Am. Dec. 573.

⁷⁸ *Clark v. Gramlin*, 54 Ark. 525, 16 S. W. 475; *Dunn v. Tozer*, 10 Cal. 167; *Bouton v. Orr*, 51 Iowa, 473, 1 N. W. 704; *Parker v. Wiggins*, 10 Kans. 420; *Rittenhouse v. Clark*, 110 Ky. 147, 61 S. W. 33; *Combs v. Krish*, 27 Ky. Law Rep. 154, 84 S. W. 562; *Mason v. St. Paul F. & M. Ins. Co.*, 82 Minn. 336, 83 Am. St. Rep. 433; *Mechanics' Bank v. Gilpin*, 105 Mo. 17, 16 S. W. 524; *Castile v. Ford*, 53 Neb. 507, 73 N. W. 945; *Smith v. Miller*, 49 N. J. L. 521, 13 Atl. 39; *Potter v. Ellice*, 48 N. Y. 321; *Johnson v. Gooch*, 114 N. C. 62, 19 S. E. 62; *Ross v. Page*, 11 N. Dak. 458, 92 N. W. 822; *Wyman v. Herard*, 9 Okla. 35, 59 Pac. 1009; *Spencer v. Van Cott*, 2 Utah, 337; *Hannegan v. Roth*, 12 Wash. 695, 44 Pac. 256; *Dreutzer v. Lawrence*, 58 Wis. 594, 17 N. W. 423.

⁷⁹ *Berlin v. Sheffield Coal, I. & S.*

§ 327. Incidents of procedure in the enforcement of contractual duties against joint obligors.

As joint obligors were supposed to contract as one, it was fundamental in the common law that all of the joint obligors must be joined as defendants unless one or more of them had died, in which case, by the rule of survivorship the remaining obligors had imposed upon them the whole liability. A further exception has been universally introduced as to any one or more of the obligors who is beyond the jurisdiction of the court.⁸⁰ But at common law absence of a debtor from the jurisdiction gave ground for no exception.⁸¹ If, therefore, a plaintiff's declaration disclosed the non-joinder as a defendant of a living and joint obligor in the contract sued upon, the declaration was bad on general demurrer, or motion in arrest of judgment.⁸² But even when rules of pleading were stricter than they are at the present time the declaration was not demurrable unless it not only showed that a joint contractor had not been made a party defendant, but also that he was alive.⁸³

Co., 124 Ala. 322, 26 So. 933; Ah Tong v. Earle Fruit Co., 112 Cal. 679, 45 Pac. 7; Moore v. Harmon, 142 Ind. 555, 41 N. E. 599; Lillie v. Case, 54 Iowa, 177, 6 N. W. 254; Parker v. Wiggins, 10 Kans. 420; Moore v. Bevier, 60 Minn. 240, 62 N. W. 281; Dunn v. Hannibal & St. J. R. R. Co., 68 Mo. 268; Parchen v. Peck, 2 Mont. 567; Patchin v. Peck, 38 N. Y. 39; Meinhardt v. Excelsior Brewing Co., 82 N. Y. App. Div. 627, 81 N. Y. S. 1042; Johnson v. Gooch, 114 N. C. 62, 19 S. E. 62; Gilland v. Union Pacific Ry. Co., 6 Wyo. 185, 43 Pac. 508.

⁸⁰ See *infra*, § 329.

⁸¹ *Ibid.*

⁸² Horner v. Moor, 5 Burr. 2614; Gilman v. Rives, 10 Pet. 298, 300, 9 L. Ed. 432; Hamilton v. Buxton, 6 Ark. 24, 26; Belden v. Curtis, 48 Conn. 32 (motion in arrest of judgment); Raney v. McRea, 14 Ga. 589, 591, 60 Am. Dec. 660; Bragg v. Wetzels, 5 Blackf. 95 (writ of error); Waits v. Mo-

Clure, 10 Bush, 763; Smith v. Miller, 49 N. J. L. 521, 13 Atl. 39; Burgess v. Abbott, 6 Hill, 135; McArthur v. Ladd, 5 Oh. 514; Davis v. Willis, 47 Tex. 154; Needham v. Heath, 17 Vt. 223. But see *contra*, Gray v. Sharp, 62 N. J. L. 102, 40 Atl. 771.

⁸³ Ascue v. Hollingworth, 2 Cro. Eliz. 494, 544; Cabell v. Vaughan, 1 Saund. 291, s. c. *sub nom.* Chappel v. Vaughan, 1 Sid. 420, 1 Vent. 34, 2 Keb. 525, 528; Putt v. Vincent, 1 Vent. 76, s. c. *sub nom.* Putt v. Nosworthy, 1 Vent. 135; Anon., W. Jones, 303; Blackwell v. Ashton, Aleyn, 21; s. c. Sty. 50; Gilbert v. Bath, 1 Stra. 503; Morrison v. Trenchard, 4 M. & G. 709; Hamilton v. Buxton, 6 Ark. 24; Belden v. Curtis, 48 Conn. 32; Gilbert v. Allen, 57 Ind. 524; Commonwealth v. Davis, 9 B. Mon. 128; Lillard v. Planters' Bank, 4 Miss. 78, 82; Deegan v. Deegan, 22 Nev. 185, 37 Pac. 360, 58 Am. St. Rep. 742; Nealley v. Moulton, 12 N. H. 485, 488;

If the declaration failed to show the non-joinder of a jointly contracting defendant the defect was in early times brought out by traversing the promise alleged in the declaration.⁸⁴ And it is conceived that this was strictly logical. A promise by three jointly is a different thing from a promise by two or one. But in the case of sealed contracts the individual obligation attaching to each person who sealed the instrument was held to be such that the objection of non-joinder could not be taken by denial of the making of the bond but only by plea in abatement.⁸⁵

The hardship of the early rule as to simple contracts led to a change in the time of Lord Mansfield, when it was held that there too as well as in case of sealed instruments non-joinder which was not apparent in the declaration must be taken advantage of if at all, by plea in abatement,⁸⁶ and this new doctrine was thereafter followed in England;⁸⁷ and in the United States also the objection must now be taken by plea in abatement, or, where such pleas are abolished, by affirmative answer,⁸⁸ except as changed by statute. "If too

Smith v. Miller, 49 N. J. L. 521, 527, 13 Atl. 39; *Burgess v. Abbott*, 6 Hill. 135; *Geddis v. Hawk*, 10 S. & R. 33, 38; *Davis v. Willis*, 47 Tex. 154; *Needham v. Heath*, 17 Vt. 223. But see *contra*, *Cummings v. People*, 50 Ill. 132; *Sandusky v. Sidwell*, 173 Ill. 493, 50 N. E. 1003; *Powell v. People*, 214 Ill. 475, 73 N. E. 795, 105 Am. St. Rep. 117; *Harwood v. Roberts*, 5 Me. 441; *Richmond v. Toothaker*, 69 Me. 451; *State v. Chandler*, 79 Me. 172, 8 Atl. 553; *Merrick v. Trustees*, 8 Gill, 59, 74; *Kent v. Holliday*, 17 Md. 387; *Sanders v. Yonkers*, 63 N. Y. 489, 493; *McGregor v. Balch*, 17 Vt. 562, 567; *Leftwich v. Berkeley*, 1 Hen. & M. 61; *Newell v. Wood*, 1 Munf. 555.

⁸⁴ *Cole v. Wilkes*, Hutt. 121; *Boson v. Sandford*, 1 Show. 101, 2 Salk. 440, 3 Mod. 321, 3 Lev. 258; *Carth*. 58, s. c. *sub nom.* *Boulston v. Sandiford*, Skin. 278; *Dockwray v. Dickenson*, Skin. 640; *Scott v. Godwin*, 1 B. & P. 67, 75.

⁸⁵ Y. B. 28 Hen. VI. f. 3, pl. 11, *per*

Cokeworthy, J.; *Whelpdale's Case*, 5 Rep. 119; *Stead v. Moon*, Cro. Jac. 152; *Cabell v. Vaughan*, 1 Saund. 291; *Sayer v. Chaytor*, 1 Lutw. 695; *South v. Tanner*, 2 Taunt. 254.

⁸⁶ *Abbot v. Smith*, 2 W. Bl. 947; *Rice v. Shute*, 2 W. Bl. 695, s. c. 5 Burr. 2611.

⁸⁷ *Rees v. Abbott*, Cowp. 832; *Powell v. Layton*, 2 B. & P. (N. R.) 365; *Buddle v. Willson*, 6 T. R. 369; *Sheppard v. Baillie*, 6 T. R. 327, 329; *Richards v. Heather*, 1 B. & Ald. 29, 35; *Cocks v. Brewer*, 11 M. & W. 51.

⁸⁸ *Barry v. Foyles*, 1 Pet. 311, 7 L. Ed. 157; *Metcalf v. Williams*, 104 U. S. 93, 26 L. Ed. 665; *Boswell v. Morton*, 20 Ala. 235; *Hamilton v. Buxton*, 6 Ark. 24; *Pavisich v. Bean*, 48 Cal. 364; *Medano Ditch Co. v. Adams*, 29 Colo. 317, 68 Pac. 431; *Belden v. Curtis*, 48 Conn. 32; *Andrews v. Allen*, 4 Harringt. 452; *Hurly v. Roche*, 6 Fla. 746; *English v. Grant*, 102 Ga. 35, 29 S. E. 157; *Ross v. Allen*, 67 Ill. 317; *Boseker v.*

many persons be made defendants and the objection appear on the pleadings, either of the defendants may demur, move in arrest of judgment, or support a writ of error, and even if the objection do not appear upon the pleadings, the plaintiff may be nonsuited upon the trial if he fail in proving a joint contract."⁸⁰

§ 328. Incidents of procedure in the enforcement of joint and several duties.

Judgment in an action against A will not bar subsequent action for the same cause against B if there is no joint relation between them;⁸⁰ and as joint and several obligations involve separate obligations on the part of each obligor, a judgment in favor of or against one, is no bar to an action against another.⁸¹

Chamberlain, 160 Ind. 114, 117, 66 N. E. 448; Bonnon v. Urton, 3 Greene (Iowa), 228; Chicago & Atchison Bridge Co. v. Fowler, 55 Kans. 17, 39 Pac. 727; Waits v. McClure, 10 Bush, 763; McGreary v. Chandler, 58 Me. 537; Sittig v. Birkestack, 38 Md. 158; Townsend v. Wheatland, 186 Mass. 343; Dillenbeck v. Simons, 105 Mich. 373, 63 N. W. 438; McKnight v. Lowitz, 196 Mich. 368, 163 N. W. 94; Posch v. Lion Bonding & Surety Co., 137 Minn. 169, 163 N. W. 131; Lewis v. State, 65 Miss. 468, 4 So. 429; Duignan v. Montana Club, 16 Mont. 189, 40 Pac. 294; Bower v. Cassels, 59 Neb. 620, 81 N. W. 622; Deegan v. Deegan, 22 Nev. 185, 37 Pac. 360, 58 Am. St. Rep. 742; Gove v. Lawrence, 24 N. H. 128; Gray v. Sharp, 62 N. J. L. 102, 40 Atl. 771; Robertson v. Smith, 18 Johns. 459, 9 Am. Dec. 227; Johnson v. Gooch, 114 N. C. 62, 19 S. E. 62; McArthur v. Ladd, 5 Oh. 514; Collins v. Smith, 78 Pa. 423; Cone v. Cone, 61 S. C. 512, 39 S. E. 748; Carr v. Wright (Tex. Civ. App.), 190 S. W. 254; Hardy v. Cheney, 42 Vt. 417; Wilson v. McCormick, 86 Va. 995, 11 S. E. 976; Dickerson v. Spokane, 26 Wash. 292, 66 Pac. 381; Radant v. Werheim Co., 106 Wis. 600, 82 N. W. 562. But the objection when

apparent from the complaint was held ground of demurrer in *Hevia v. Wheelock*, 155 N. Y. App. Div. 387, 140 N. Y. S. 351; *Third Nat. Bank v. Graham*, 174 N. Y. App. D. 503, 161 N. Y. S. 159.

⁸⁰ 1 Chitty, Pleading (13th Am. from 7th Eng. ed.), 44; *Fairchild v. Llewellyn Realty Co.*, 82 N. J. L. 423, 82 Atl. 924. Cf. the following section *ad fin.*

⁸⁰ *Isaacs v. Salbstein*, [1916] 2 K. B. 139.

⁸¹ *Broome v. Wooton*, Yelv. 67, s. c. *sub nom. Brown v. Wootton*, Cro. Jac. 73; *Whiteacres v. Hamkison*, Cro. Chas. 75; *Higgen's Case*, 6 Coke, 44, b; *Watters v. Smith*, 2 B. & Ad. 889, 892; *Lechmere v. Fletcher*, 1 Cr. & M. 623; *Sessions v. Johnson*, 95 U. S. 347, 348, 24 L. Ed. 596; *United States v. Ames*, 99 U. S. 35, 25 L. Ed. 295; *Morgan v. Chester*, 4 Conn. 387, 389; *Stingley v. Kirkpatrick*, 8 Blackf. 186; *Simonds v. Center*, 6 Mass. 18. See also *Young v. Brown*, 10 Iowa, 537; *Vanuxen v. Burr*, 151 Mass. 386, 24 N. E. 773; *Townsend v. Riddle*, 2 N. H. 448, 450; *Schlesinger v. Perper*, 70 N. Y. Misc. 250, 126 N. Y. S. 731; *Noble v. Beeman-Spaulding-Woodward Co.*, 65 Or. 93, 131 Pac. 1006, 46 L. R. A. (N. S.) 162. As the liability of joint

Indeed the plaintiff may simultaneously bring separate actions against each of the obligors;⁹² but not a joint action against any number less than all.⁹³ Where, however, local practice allows the action to be discontinued against certain defendants and maintained as to another, all but one defendant may be dropped from the action, as stated in the next section. So that if an action is brought against two or more as joint and several debtors judgment may be given against one alone who is severally liable.⁹⁴

§ 329. Judgments for breach of joint duties must be joint.

As the obligation of joint promisors is a single obligation, a single judgment must be given against all the defendants or no judgment in favor of the plaintiff can be rendered.⁹⁵ Though several joint defendants are allowed the option of severing in their pleas as well as of joining in one plea,⁹⁶ yet as the cause of action is single, a successful plea in bar by one defendant will prevent the plaintiff from obtaining judgment in the action against any of the defendants;⁹⁷ and if a joint judgment cannot be supported as to one defendant, it is erroneous as to all.⁹⁸ So at common law if one of several joint contractors when served with process failed to appear, the plaintiff though he might obtain an interlocutory judgment by default, or issue execution against him, yet if the other defendants appeared and

tort-feasors is held in America to be joint and several, the principle finds frequent application in actions against tort-feasors. See *Cooley on Torts* (3d ed.), 231 *et seq.*; *Hunt v. New York &c. Co.*, 212 Mass. 102, 98 N. E. 787, 40 L. R. A. (N. S.) 778, *Cote v. New England Nav. Co.*, 213 Mass. 177, 99 N. E. 972; *Thoresen v. St. Paul &c. Lumber Co.*, 73 Wash. 99, 131 Pac. 645. In England, however, such tort-feasors are liable only jointly, and judgment against one is a bar to an action against the others. *Brinsmead v. Harrison*, L. R. 7 Q. B. 547.

⁹² *Sims v. McNeil*, 10 Humph. 500; *Simonds v. Center*, 6 Mass. 18.

⁹³ See *supra*, § 324, *ad fin.*

⁹⁴ *Winn v. Kansas City Belt Ry. Co.*, 245 Mo. 206, 151 S. W. 98 (tort).

⁹⁵ *Sharpe v. Baker*, 51 Ind. App. 547, 99 N. E. 44; *Wagenaar v. Beeman Woodward Co.*, 65 Ore. 109, 131 Pac. 1023; *Templeton v. Morrison*, 66 Ore. 493, 131 Pac. 319. Otherwise by statute in California. Code Civ. Proc. Sec. 578; *Shain v. Forbes*, 82 Cal. 577, 23 Pac. 198.

⁹⁶ *Chitty on Pleading* (8th Eng. Ed.), 565.

⁹⁷ *Minor v. Mechanics' Bank*, 1 Pet. 46, 7 L. Ed. 47; *Woodward v. Newhall*, 1 Pick. 500; *Taylor v. Beck*, 3 Rand. 316; *Brown's Adm. v. Johnson*, 13 Gratt. 644, 650.

⁹⁸ *Samonski v. Chicago City Ry. Co.*, 156 Ill. App. 297.

pleaded, the pleas of the latter defendants would inure to the benefit of all; so that if the issues raised by these pleas were found in favor of the defendants who set them up, the plaintiff could not retain his judgment against the defaulting defendant.⁹⁹ On the other hand, if the defendants who pleaded failed on the issues raised by their pleas, judgment went against all the defendants jointly.¹ The necessity of a joint judgment is also shown by the rule of the Federal courts that though one of several defendants sued on a joint contract in a State court is a non-resident of the State and files a separate answer, he cannot remove the litigation against him to the Federal court.² A few apparent exceptions, however, exist to the rule that the judgment must be given against all or none. Thus, if one of the joint obligors has become bankrupt, his discharge in bankruptcy being a personal defence to his liability, but not tending to show the non-existence of the plaintiff's joint right, may be pleaded by him separately, and the plaintiff may enter a *nolle prosequi* against him and obtain judgment against the other defendants.³ Even in such a case, however, it was necessary in England to join the discharged bankrupt,⁴ until the rule was changed by Statute,⁵ and some authorities in the United

⁹⁹ *Boulter v. Ford*, 1 Sid. 76; *Porter v. Harris*, 1 Lev. 63; *Morgan v. Edwards*, 6 Taunt. 395, 398.

¹ The Common Law Procedure Act, 15 and 16 Vict., c. 76, s. 33, allowed the plaintiff if his claim was liquidated to sign judgment against the defaulting defendant and issue execution; but should the plaintiff adopt this course he was held to abandon his right against the other defendants. As an alternative the plaintiff might proceed in the same way as before the passage of the act. Under the English Judicature Act Order XIII, rule 4, the plaintiff may take final judgment against the defaulting defendant without prejudice to his right to proceed with the action against those defendants who have appeared.

² *Louisville &c. R. Co. v. Ide*, 114 U. S. 52, 29 L. Ed. 63, 5 S. Ct. Rep. 735.

³ Under the early authorities it was

questioned whether a *nolle prosequi* did not operate as a total discharge of the defendant as to whom it was entered and, therefore, preclude the plaintiff from obtaining judgment against other joint obligors. But the later view regarded the *nolle prosequi* as not discharging the defendant against whom it was entered, but merely staying proceedings as to him. See *Wms. Saunders*, 207 n. Sec. 16 of the United States Bankruptcy Act of 1898 expressly provides that discharge of one co-debtor in bankruptcy shall not discharge the others.

⁴ *Noke v. Ingham*, 3 Esp. 77, n, 1 Wils. 89 s. c.; *Hawkins v. Ramsbottom*, 6 Taunt. 179; *Bovill v. Wood*, 2 M. & Sel. 23; *Moravia v. Hunter*, 2 M. & Sel. 444. See also *Ex parte Read*, 1 Ves. & B. 346, s. c. 1 Rose, 460.

⁵ 3 and 4 Wm. IV. c. 42, § 9.

States have followed the old English rule.⁶ But others, without the aid of a statute, follow the modern English law and sustain an action in which the discharged bankrupt is not joined.⁷ As there seems no objection to joining the discharged bankrupt even where the joinder is not required, the safer course, in case of doubt, is to do so.

Similarly one joint obligor may have and may plead the personal defense of the Statute of Limitations, though other defendants do not.⁸ Judgment may be rendered then in favor of such defendants as are entitled to set up the Statute, and against those who have not this personal defence.⁹

If a joint debtor is an infant, his infancy also may be pleaded successfully by him and yet judgment may be rendered against the other joint debtors.¹⁰ In several early cases in England¹¹ the contrary was held, but this was because the promise of an infant was then considered void, and hence it followed that no joint contract was ever entered into by the infant. And if two persons purport to enter into a joint contract but for any reason as, for instance, coverture at common law, no legal obligation arises so far as one of them is concerned, a plaintiff who sued them both jointly, at common law was nonsuited. He was obliged to begin a fresh action omitting the parties erroneously joined, and could not avoid the objection by entering a *nolle prosequi* as to such parties as should not have been joined.¹² Under modern statutes and practice doubtless everywhere the plaintiff could now discontinue as to defendants

⁶ *Jenks v. Opp*, 43 Ind. 108; *Camp v. Gifford*, 7 Hill, 169; *Roberts v. McLean*, 16 Vt. 608, 42 Am. Dec. 529.

⁷ *Belden v. Curtis*, 48 Conn. 32; *Tinkum v. O'Neale*, 5 Nev. 93, 97.

⁸ This is likely to occur when one or more of the joint obligors have been absent from the State and the statutory period has therefore not run against them though it has run against such obligors as remained within the State. See *infra*, § 2010.

⁹ *Spaulding v. Ludlow Woolen Mill*, 36 Vt. 150. See also *Towns v. Mead*, 16 C. B. 123, 129; *Robertson v. Stuhlmiller*, 93 Iowa, 326, 329, 61 N. W. 896;

Bruce v. Flagg, 25 N. J. L. 219; *Cutler v. Wright*, 22 N. Y. 472, 476.

¹⁰ *Cutts v. Gordon*, 13 Me. 474, 29 Am. Dec. 520; *Latrobe v. Dietrich*, 114 Md. 8, 78 Atl. 983; *Woodward v. Newhall*, 1 Pick. 500; *Cole v. Manners*, 76 Neb. 454, 107 N. W. 777; *Hartness v. Thompson*, 5 Johns. 160.

¹¹ *Chandler v. Parkes*, 3 Esp. 76; *Jaffray v. Frebain*, 5 Esp. 47; *Gibbs v. Merrill*, 3 Taunt. 307. See also *Burgess v. Merrill*, 4 Taunt. 468.

¹² *Viner's Abr. Action D. d. Pl. 8*; *Redington v. Farrar*, 5 Greenl. 379; *Cutts v. Gordon*, 13 Me. 474, 478, 29 Am. Dec. 530.

improperly joined ¹³ but it should be observed that in this case the defendant never was a joint obligor; it is not a case where a joint obligor may plead a separate defence.

At common law there was no adequate redress where a joint debtor was absent from England. "In that case, the plaintiff knows that he has a cause of action, and he would know upon inquiry that the defendant was not to be found in [England]. Still, however, he was not without remedy: he might issue his writ, and continue it by *alias* and *pluries*, and so forth, until the defendant's return, or he might proceed to outlawry against him." ¹⁴

In the United States without the aid of statute, it has generally been held that an action may be enforced against such of the joint debtors as are within the jurisdiction of the court, disregarding those who are not; ¹⁵ and by statute in some States the right to proceed to judgment against such joint defendants as have been served with process applies to cases where those not served are resident within the jurisdiction. ¹⁶

It is a natural consequence of the rule that judgments for breach of joint duties must be joint, that individual indebtedness due from one of several joint obligors cannot be set off by the defendant against the joint right in an action by the obligees; ¹⁷ nor can a joint indebtedness be set off against an individual right of one of the joint debtors. ¹⁸

¹³ See, e. g., *East v. McClung*, 49 Col. 502, 113 Pac. 517; *Fairchild v. Llewellyn Realty Co.*, 82 N. J. L. 423, 82 Atl. 924; *Alaska Banking, etc., Co. v. Van Wyck*, 130 N. Y. S. 563; *McKane v. Gordon*, 85 Vt. 253, 81 Atl. 637.

¹⁴ *Towns v. Mead*, 16 C. B. 123, 135. As to the process of outlawry, see 3 Bl. Comm. 283.

¹⁵ *Wiley v. Sledge*, 8 Ga. 532; *Merriman v. Barker*, 121 Ind. 74, 22 N. E. 992; *Cox v. Maddux*, 72 Ind. 206; *Rand v. Nutter*, 56 Me. 339; *Dennett v. Chick*, 2 Me. 191, 11 Am. Dec. 59; *Wiley v. Holmes*, 28 Mo. 286, 75 Am. Dec. 126; *McElroy v. Ford*, 81 Mo. App. 500; *Olcott v. Little*, 9 N. H. 259, 32 Am. Dec. 357; *Blessing v. McLinden*,

81 N. J. L. 379, 79 Atl. 347; *Brown v. Birdsall*, 29 Barb. 549.

¹⁶ *Ostrander v. Blandin*, 211 Fed. 733 (N. Y.); *Reeves v. Mercer*, 155 Ill. App. 57; *Connor v. Tailor*, 33 Okl. 733, 127 Pac. 1089.

¹⁷ *Bauer Cooperage Co. v. Ewell*, 149 Ky. 838, 149 S. W. 1137.

¹⁸ *Sutton v. Hurley*, 12 Ga. App. 312, 77 S. E. 218; *Mintz v. Tri-County Natural Gas Co.*, 259 Pa. 477, 103 Atl. 285. But where several defendants are sued jointly, they may set off a claim held by one of them individually against the plaintiff, since the defendants have the right to agree among themselves as to the adjustment of the proceeds of the set-off.

§ 330. Judgment against or in favor of one or more joint obligors discharges the others.

The obligation of joint obligors is single and indivisible. Therefore if for any reason going to the merits of the action, an obligor can no longer be sued, the others are in effect discharged. This principle is illustrated by a variety of cases. Thus, judgment is entered against one or more joint obligors because of their failure to plead in abatement the non-joinder of the others, a subsequent action cannot be brought against the others.¹⁹ Even though the joint debtors omitted from the first suit were dormant partners whose existence was unknown to the creditor when he obtained judgment, the principle is none the less applicable.²⁰

A judgment on the merits in favor of one joint obligor is a fatal to an action against the others as if the first action had terminated in favor of the plaintiff.²¹

Mintz v. Tri-County Natural Gas Co., 259 Pa. 477, 103 Atl. 285, 286. And one of two joint obligees with the consent of the other may use the obligation as an equitable defence in an action by the obligor against one of them alone. *Ibid.*

¹⁹ *King v. Hoare*, 13 M. & W. 494; *Kendall v. Hamilton*, 4 A. C. 504; *Mason v. Eldred*, 6 Wall. 231, 18 L. Ed. 783 (overruling *Sheehy v. Mandeville*, 6 Cranch, 253, 3 L. Ed. 391); *United States v. Ames*, 99 U. S. 35, 25 L. Ed. 295; *Trafton v. United States*, 3 Story, 646; *Brady v. Reynolds*, 13 Cal. 31; *Scarborough v. Yarborough*, 13 Ga. App. 792, 79 S. E. 1131; *Wann v. McNulty*, 2 Gilm. 355, 43 Am. Dec. 58; *Moore v. Rogers*, 19 Ill. 347; *Jansen v. Grimshaw*, 125 Ill. 468, 17 N. E. 850; *Travellers Ins. Co. v. Mayo*, 170 Ill. 498, 500, 48 N. E. 917; *Fleming v. Ross*, 225 Ill. 149, 80 N. E. 92; *Crosby v. Jeroloman*, 37 Ind. 264; *Lawrence v. Beecher*, 116 Ind. 312, 19 N. E. 143; *Moale v. Hollins*, 11 G. & J. 11, 33 Am. Dec. 684; *Ward v. Johnson*, 13 Mass. 148; *Cowley v. Patch*, 120 Mass. 137; *Davison v. Harmon*, 65 Minn. 402,

67 N. W. 1015; *Coles v. McKenna*, 81 N. J. L. 48, 76 Atl. 34; *Robertson v. Smith*, 18 Johns. 459, 9 Am. Dec. 227; *Candee v. Smith*, 93 N. Y. 349; *Ryckman v. Manerud*, 68 Or. 350, 136 Pac. 826; *Smith v. Black*, 9 Serg. & R. 142, 11 Am. Dec. 686; *McFarlane v. Kipp*, 206 Pa. 317, 55 Atl. 986; *Lauer v. Bandow*, 48 Wis. 638, 4 N. W. 774.

Also see *Hammond v. Schofield*, [1891] 1 Q. B. 453, holding that where judgment had been signed by consent against the defendant, it could not be set aside, even with his assent, in order that the writ might be amended by joining another defendant who had been discovered by the plaintiff to have contracted jointly with the defendant.

²⁰ *Kendall v. Hamilton*, 4 A. C. 504; *United States v. Ames*, 99 U. S. 35, 25 L. Ed. 295; *Moale v. Hollins*, 11 G. & J. 11, 33 Am. Dec. 684; *Smith v. Black*, 9 S. & R. 142, 11 Am. Dec. 688. See also *Ryckman v. Manerud*, 68 Or. 350, 136 Pac. 826, 831. But compare *Scott v. Colmesnil*, 7 J. J. Marsh. 416.

²¹ *Phillips v. Ward*, 2 H. & C. 717;

§ 331. Foreign judgments against one joint obligor do not discharge the others.

But a foreign judgment against one joint debtor, it has been held, being of no higher nature than the original obligation, does not merge the right against the other obligors;²² and generally in the United States where the defendant in the subsequent action was not at the time within the jurisdiction of the court in which the prior judgment was rendered, the subsequent action may be sustained. In such a case, for reasons of necessity and justice perhaps rather than of logic, the prior judgment is held to be no bar.²³

§ 332. Effect of merger, satisfaction or security upon rights against one joint or joint and several obligor.

If the debt for which a joint, joint and several or several obligor is bound is completely satisfied, the creditor can have no further right against anybody. Since there was but one debt though several persons were liable to pay it, after the debt has been paid by any of the debtors, it is necessarily extinguished as to all.²⁴

If instead of payment in full, the creditor has received an accord and satisfaction from a joint, joint and several or several debtor, two situations are conceivable. It is possible

Cowley v. Patch, 120 Mass. 137.
See *Pierce v. Kearney*, 5 Hill, 82.

²² *Dennett v. Chick*, 2 Greenl. 191, 11 Am. Dec. 59; *Stone v. Wainwright*, 147 Mass. 201, 17 N. E. 301; *Eastern Townships Bank v. Beebe*, 53 Vt. 177, 38 Am. Rep. 665. A judgment in one State, however, operates as a bar and a merger in another, as to all debtors of whom the first court had jurisdiction. *McGilvray v. Avery*, 30 Vt. 538.

²³ *Merriman v. Barker*, 121 Ind. 74, 22 N. E. 992; *Dennett v. Chick*, 2 Me. 191, 11 Am. Dec. 59; *Rand v. Nutter*, 56 Me. 339; *Odom v. Denny*, 16 Gray, 114 (statutory); *Wiley v. Holmes*, 28 Mo. 286, 75 Am. Dec. 126; *Olcott v. Little*, 8 N. H. 259, 32 Am. Dec. 357; *Burt v. Stevens*, 22 N. H. 229, 232;

Yoho v. McGovern, 42 Oh. St. 11; *Eastern Townships Bank v. Beebe & Co.*, 53 Vt. 177, 38 Am. Rep. 665; *Bradley Engineering Co. v. Heyburn*, 56 Wash. 628, 106 Pac. 170. But see *contra Fleming v. Ross*, 225 Ill. 149, 80 N. E. 92.

²⁴ Thus a payment by one tortfeasor as a complete satisfaction for a joint tort (for which the liability is joint and several), discharges all. *Cocke v. Jennor*, Hob. 66; *Matheson v. O'Kane*, 211 Mass. 91, 97 N. E. 638, 39 L. R. A. (N. S.) 475; *Brewer v. Casey*, 196 Mass. 384, 388, 82 N. E. 45; *Himmelberger-Harrison Lumber Co. v. Dallas*, 165 Mo. App. 49, 146 S. W. 95; *Kropidowski v. Pfister & Vogel Leather Co.*, 149 Wis. 421, 135 N. W. 839, 39 L. R. A. (N. S.) 509.

that the debtor's performance was received as a full satisfaction for the creditor's entire claim; in which event any right against the other debtors is also discharged.²⁵ Or it may be that the performance was not intended as a satisfaction of the debt itself, but merely of the creditor's right against the individual debtor. If such is the agreement, the cases of joint or joint and several debtors must be distinguished from that of several debtors. Where there is merely a several liability, the creditor's entire claim is not discharged, and he is entitled to recover any balance due him from the other debtors, provided they are not sureties.²⁶

The greatest difficulty in determining the effect of a dealing with one co-debtor on the right against others arises where negotiable instruments are given by one of several co-debtors. Under the rule generally prevailing, a negotiable instrument given by a debtor takes effect only as conditional payment; that is, unless the negotiable instrument is paid at maturity, the original obligation is not discharged or merged.²⁷ But it is universally agreed that the parties may agree that a negotiable instrument shall operate as absolute payment as soon as it is given.²⁸ Accordingly a negotiable instrument given by one co-debtor, though given for the debt of a number of joint debtors, will not operate as a discharge of the joint co-debtors on their original obligation unless the negotiable instrument was taken in absolute payment.²⁹ If, however, a negotiable instrument of one debtor is taken in absolute payment, even of the liability of one joint debtor all other joint obligors are discharged.³⁰ The mere merger of the creditor's claim against one joint and several debtor in an obligation of a higher nature does not destroy the creditor's several right against the other co-debtors. No more complete merger of a claim can be made than by judgment, and a creditor of joint and several debtors is entitled to obtain judgment separately against

²⁵ *Grubbe v. Pierce*, 156 Wis. 29, 145 N. W. 207, 51 L. R. A. (N. S.) 358; and see cases cited in preceding note.

²⁶ See cases cited *supra*, note, 24; also *infra*, § 339.

²⁷ See *infra*, §§ 1922, 1923.

²⁸ *Ibid.*

²⁹ *Prosser v. Evans*, [1895] 1 Q. B. 108.

³⁰ *Moale v. Hollins*, 11 Gil. & J. 11, 33 Am. Dec. 684. See also *Grubbe v. Pierce*, 156 Wis. 29, 145 N. W. 207, 51 L. R. A. (N. S.) 358.

each without thereby affecting his right of recovery against the others.³¹ A discharge by release or otherwise than by merger, of one joint and several debtor, however, illogically is held to discharge the others.³² But even a merger of the creditor's claim against one joint debtor where there is no several liability destroys the creditor's right against the others. The claim was against all and can have continued existence only as a claim against all. Accordingly, a judgment against one destroys the right against the others.³³ And if one or more of a number of joint debtors give an obligation intended as satisfaction simply of the liability of those who give it, and not of the entire joint debt, their original indebtedness is merged in the new sealed instrument;³⁴ and since the joint indebtedness is one and indivisible, the other joint debtors cannot be liable by themselves and, therefore, are discharged.³⁵ If, however, the obligation of one of the joint obligors is given merely as collateral security, there is no merger and all the joint obligors continue liable on the original joint obligation. Thus if the individual bond of a joint debtor expressly state that it is to satisfy the joint debt only when paid in full,³⁶ or if the new obligation is in terms merely a guaranty of the old,³⁷ the joint indebtedness is not discharged. But whatever merges the cause of action against one joint obligor, merges it as to all.³⁸

§ 333. Release of one joint obligor releases all.

For the same reason, that a joint duty is one and indivisible, it is also true that a release given to one or more joint obligors discharges the others.³⁹

³¹ See *infra*, § 334.

³² *Ibid.*

³³ See *supra*, § 330.

³⁴ See *infra*, § 1922.

³⁵ *Sydam v. Cannon*, 1 Houst. (Del.) 431; *Settle v. Davidson*, 7 Mo. 604; *Averill v. Loucks*, 6 Barb. 19; *Baxter v. Bell*, 19 Hun, 367 (reversed in 86 N. Y. 195); *Bennett v. Cadwell*, 70 Pa. 253, 260; *Jacobs v. McBee*, 2 McMull. (S. Car.) 348. See also *United States v. Ames*, 99 U. S. 35, 25 L. Ed. 295.

³⁶ *Wallace v. Fairman*, 4 Watts, 378.

³⁷ *Potter v. McCoy*, 26 Pa. 458.

³⁸ *Coles v. McKenna*, 80 N. J. L. 48, 76 Atl. 344.

³⁹ Co. Litt. Vol. II. 232 a; *Lacy v. Kinaston*, 1 Lord Ray. 688, s. c. 12 Mod. 548; *Clayton v. Kynaston*, 2 Salk. 573; *Lacy v. Kynaston*, 2 Salk. 575; *Dean v. Newhall*, 8 T. R. 168; *Ex parte Good*, 5 Ch. D. 46, 57; *Duck v. Mayeu*, [1892] 1 Q. B. 511, 513; *Johnson v. Collins*, 20 Ala. 435 (*cf.* *Carroll v. Corbitt*, 57 Ala. 579); *Ward v.*

But as a matter of pure common law in every case alike, a release of one of the debtors, whether principal, or surety, or partly principal and partly surety, discharges the others. Certainly the release of one joint co-surety is a legal discharge of the obligation of the other or others;⁴⁴ and an examination of the early cases discloses no inquiry or consideration of possible suretyship relations which the joint debtor released may have borne to his co-debtors.⁴⁵ Other applications of the common-law rule that all joint obligors must remain bound by the obligation, or the obligation as to all will be discharged, may be pointed out. Thus where a note made by several joint makers is assigned to one of them, the obligation of one being gone that of all of the others is likewise destroyed.⁴⁶ So if an obligee makes one of several joint obligors his executor, the obligation is legally discharged.⁴⁷ So if two were joint obligors in a bond to an unmarried woman, and she married one of them, and he died, even after his death she had no right of action, for the debt ceased to exist.⁴⁸ And so strict was the rule of the common law, that formerly if the seal of one joint obligor were torn off by accident, or eaten off by rats, this operated as a discharge of all.⁴⁹ At the present day, as such accidental injury to the obligation would not release the obligor whose seal was torn off,⁵⁰ the other obligors also would of course not be discharged. At common law, if the holder of negotiable paper fails duly to notify one or more of several joint indorsers

⁴⁴ *Nicholson v. Revill*, 4 A. & E. 675; *Evans v. Bremridge*, 2 Kay & J. 174, 183; *Kearsley v. Cole*, 16 M. & W. 128, 136; *Price v. Barker*, 4 E. & B. 760, 777; *Ward v. Nat. Bank*, 8 App. Cas. 755, 764; *Mercantile Bank v. Taylor*, [1893] A. C. 317; *People v. Buster*, 11 Cal. 215; *Spencer v. Houghton*, 68 Cal. 82, 8 Pac. 679; *Deering v. Moore*, 86 Me. 181, 29 Atl. 968; *Lower v. Buchanan Bank*, 78 Mo. 67, 69. But see *infra*, n. 83.

⁴⁵ See cases cited *supra*, n. 39.

⁴⁶ *Gordon v. Wansey*, 21 Cal. 77 (joint and several); *Snell v. Davis*, 149 Ill. App. 391 (joint and several); *Knee-*

land v. Miles (Tex.), 24 S. W. 1113. *Supra*, § 308.

⁴⁷ Y. B. 21 Edw. IV. 81 b; s. c. Bro. Ab. Executors, pl. 118; *Cheetham v. Ward*, 1 B. & P. 630. These were cases of joint and several liability, but their authority is not less strong on this account. The effect is the same where an obligee made his obligor one of several executors. *Freakley v. Fox*, 9 B. & C. 130.

⁴⁸ Y. B. 21 Hy. VII. 30.

⁴⁹ See *Bayly v. Garford*, March, 125; *Seaton v. Henson*, 2 Show. 28; *Nichols v. Haywood*, Dyer, 59 a; *Michælls v. Stockworth*, Owen, 8.

⁵⁰ See *infra*, § 1892.

of the dishonor of the paper by the party primarily liable, even those joint indorsers who were duly notified are discharged,⁵¹ unless the joint indorsers were partners, or one in fact was authorized to receive notice for the others, in which cases notice to one operated as notice to all.⁵² Under the Negotiable Instruments Law, however, it has been held in Kentucky that only those joint indorsers not duly notified are discharged.⁵³ But there seems to be nothing in the statute to require this result. The indorsers are indeed by the statute made to assume a joint and several liability, but the discharge of a joint and several obligor discharges his co-obligors, according to the prevailing view.⁵⁴

It has already been pointed out⁵⁵ as an exception that a discharge in bankruptcy of one joint obligor does not discharge the rest because the statute is regarded as giving a personal privilege to the bankrupt rather than totally destroying the debt. An express provision in the National Bankruptcy Law makes perfectly clear, however the ineffectiveness of such a discharge as far as co-debtors are concerned.⁵⁶ This section of the act also prevents the discharge of a co-debtor who is a surety because of the discharge of the principal debtor, whether the co-

⁵¹ *Bowie v. Hume*, 13 App. D. C. 286, 315; *State Bank v. Slaughter*, 7 Blackf. 133; *People's Bank v. Keech*, 26 Md. 521, 90 Am. Dec. 118; *Northrop v. Chambers*, 90 Mo. App. 61; *Hubbard v. Matthews*, 54 N. Y. 43, 50, 13 Am. Rep. 562. In *Jarnagin v. Stratton*, 95 Tenn. 619, 32 S. W. 625, 20 L. R. A. 495, the court reached a contrary result, relying on a statute making all joint obligations joint and several; but the discharge of a joint and several obligor discharges his co-obligors. See *infra*, § 334. In other cases it was sufficient to meet the issue presented for the court to hold that notice to one joint obligor who is not a partner does not charge the others. *Miser v. Trovinger's Exr's*, 7 Ohio St. 281; *Sayre v. Frick*, 7 Watts & S. 383, 62 Am. Dec. 249; *Bank of United States v. Beirne*; 1 Gratt. 234, 266, 42 Am. Dec. 551.

⁵² *People's Bank v. Keech*, 26 Md. 521, 90 Am. Dec. 118; *Dabney v. Stidger*, 12 Miss. 749; *Fourth National Bank v. Alheimer*, 91 Mo. 190, 3 S. W. 858; *Barber v. Van Horn*, 54 Kan. 33, 36 Pac. 1070; *Hays v. Citizens' Sav. Bank*, 101 Ky. 201, 40 S. W. 573.

⁵³ *Williams v. Paintsville Nat. Bank*, 143 Ky. 781, 137 S. W. 535; *Doherty v. First Nat. Bank*, 170 Ky. 810, 186 S. W. 937.

⁵⁴ See *infra*, § 334, and *supra*, n. 51.

⁵⁵ See *supra*, § 329.

⁵⁶ Sec. 16, "Co-Debtors of Bankrupts.—a. The liability of a person who is co-debtor with, or guarantor or in any manner a surety for, a bankrupt shall not be altered by the discharge of such bankrupt."

debtors were liable jointly, jointly and severally, or merely severally.⁵⁷

§ 333a. Discharge by other means than a technical release.

It is often said that nothing but a technical release under seal of a joint debtor discharges the obligation of the other joint debtors.⁵⁸ Such statements, however, necessarily involve the assumption that nothing but a release under seal can operate as a legal discharge of the original obligation. This assumption was true at common law if that obligation was itself a contract under seal for the payment of money, or was a contract under seal for the performance of any other act than the payment of money provided the time for performance had not yet come;⁵⁹ and it is in regard to such sealed instruments that the statement was originally applicable that nothing but a technical release under seal of a joint debtor would discharge the others.⁶⁰

At the present time when in most jurisdictions the effect of seals has been largely or wholly abolished by statute, and when even in other jurisdictions an accord and satisfaction may generally be pleaded at law as a bar to all kinds of sealed contracts,⁶¹ it may be doubted whether many courts could fairly save the liability of a joint debtor even on a sealed contract where his co-debtor had been discharged by parol on sufficient consideration, though the sealed contract was for the payment of money, or the parol discharge was made before breach of the contract, unless as part of the agreement an intention was manifested to reserve the creditor's rights against the co-debtor.

⁵⁷ See *Wolf v. Stix*, 99 U. S. 1, 25 L. Ed. 309; *Klipstein v. Allen Miles Co.*, 136 Fed. 385, 69 C. C. A. 229; *Carpenter v. Turrell*, 100 Mass. 450; *Commercial Bank v. Varnum*, 176 Mo. App. 78, 162 S. W. 1080; *Knapp v. Anderson*, 71 N. Y. 466.

⁵⁸ *Hartley v. Manton*, 5 Q. B. 247; *Ex parte Good*, 5 Ch. D. 46; *Browning v. Grady*, 10 Ala. 999; *Evans v. Carey*, 29 Ala. 99; *McAllester v. Sprague*, 34 Me. 296; *Shaw v. Pratt*, 22 Pick. 305, 308; *Gold Medal Sewing Mach. Co. v.*

Harris, 124 Mass. 206; *Berry v. Gillis*, 17 N. H. 9, 13, 43 Am. Dec. 584; *De-Zeng v. Bailey*, 9 Wend. 336; *Line v. Nelson*, 38 N. J. L. 353, 360; *Morgan v. Smith*, 70 N. Y. 537, 543; *Burke v. Nobel*, 48 Pa. 168; *Bloss v. Plymale*, 3 W. Va. 393, 405, 100 Am. Dec. 752.

⁵⁹ See *infra*, § 1849.

⁶⁰ See *Webb v. Hewitt*, 3 Kay & J. 438, 443; *Re E. W. A.*, [1901] 2 K. B. 642.

⁶¹ *Infra*, § 1849.

However this may be, if a joint contract is not of the sort just alluded to, any agreement for good consideration with one of the joint debtors will operate everywhere, if so intended, as an immediate cancellation at law of his liability,⁶² and therefore should have the same effect as a release under seal in discharging the other joint debtors. Undoubtedly a mere agreement to forbear or an unexecuted accord would not have this effect; but anything which legally destroys the claim against one joint debtor will operate as a bar against the others.⁶³ This has been so held in regard to an accord and satisfaction;⁶⁴ and similarly where a statute provided that proof by a creditor under a general assignment should bar him from any subsequent action against the assignor, a creditor who proved his claim against one joint debtor who had made such an assignment was held thereby to discharge the others.⁶⁵ There is, however, this important difference between a discharge by formal writing and by parol. In the former case the parol evidence rule precludes, proof of an unexpressed intent to reserve the creditor's rights against co-debtors, while in the latter case it does not.⁶⁶

§ 334. Release or discharge of one joint and several debtor releases all.

Not only are all joint debtors discharged by a release of one of them, but the same rule is applicable to joint and several debtors. The joint as well as the several liability of all the debtors is discharged. This was early decided.⁶⁷ It is less easy to find

⁶² *Infra*, § 1838.

⁶³ *Connecticut F. Ins. Co. v. Olen-dorff*, 73 Fed. 88, 19 C. C. A. 379; *Dwy v. Connecticut Co.*, 89 Conn. 74, 92 Atl. 883, L. R. A. 1915 E. 800; *Pierson v. Berry* (N. J. Eq.), 97 Atl. 275.

⁶⁴ *In re E. W. A.*, [1901] 2 K. B. 642; *Dwy v. Connecticut Co.*, 89 Conn. 74, 92 Atl. 883, L. R. A. 1915 E. 800; *Fox v. Hudson's Ex.*, 150 Ky. 115, 150 S. W. 49; *Matheson v. O'Kane*, 211 Mass. 91, 94, 97 N. E. 638, 39 L. R. A. (N. S.) 475. See also *Peterson v. Wiggins*, 230 Pa. 631, 79 Atl. 767 (tort).

⁶⁵ *Munyan v. French*, 60 N. J. L. 12, 36 Atl. 771.

⁶⁶ See *infra*, § 338.

⁶⁷ *Cocke v. Jennor*, Hob. 66, pl. 69 (1724); *Hammon v. Roll*, March, 202 (1642); *Windham's Case*, 5 Coke, 7 (1489). See also *Co. Litt.* 232a; *Clayton v. Kynaston*, 2 Salk. 573, 574 (1699).

The modern rule is the same. *In re E. W. A.*, [1901] 2 K. B. 642; *United States v. Thompson*, Gilp. (U. S.) 614; *Garnett v. Macon*, 2 Brock. (U. S.) 185, 220; *Pettigrew Machine Co. v. Harmon*, 45 Ark. 290; *Hoch-*

a technically satisfactory reason for the rule in case of joint and several debtors than in case of joint debtors where there is no several obligation. The reason given in the early cases is that a release is as complete a satisfaction in law as performance. This reason seems somewhat artificial, and if followed to its logical consequences would lead to the discharge of one several debtor, when another was released, even though no suretyship relation existed between the two. To the modern mind a release of one debtor is not necessarily a release or satisfaction of the debt itself. Perhaps the early conception of a release as a conveyance or grant of an indebtedness as if that were tangible property may explain why three or four centuries ago it might seem to have the effect of satisfaction.⁶⁸ It may be admitted that a release of a joint and several debtor is properly to be construed as a release not only of his several liability but also of his joint liability, but even so, except on the supposition that the debt itself has been granted away, it is not easy to see why the several liability of the debtors not released should be extinguished. The correctness of the early rule, however, does not seem to have been seriously questioned.⁶⁹ Where one joint and several obligor is discharged by operation of law, as by becoming executor of the obligee,⁷⁰ or holder of the obligation,⁷¹ the result is the same—the whole obligation is discharged. A statute making all joint obligations in legal effect joint and several, therefore, can have no effect on the rule.⁷² That the discharge

mark v. Richler, 16 Colo. 263, 26 Pac. 818; Dwy v. Connecticut Co., 89 Conn. 74, 92 Atl. 883, L. R. A. 1915 E. 800 (tort); Louisville &c. R. Co. v. Allen, 67 Fla. 257, 65 So. 8 (tort); Bonney v. Bonney, 29 Ia. 448; Bradford v. Prescott, 85 Me. 482, 486, 27 Atl. 461; American Bank v. Doolittle, 14 Pick. 123; Frink v. Green, 5 Barb. (N. Y.) 455; Crawford v. Roberts, 8 Or. 324. Blackmer v. McCabe, 86 Vt. 303, 85 Atl. 113 (tort).

⁶⁸ See Professor Ames in 9 Harv. L. Rev. 56; *infra*, §§ 1310, 1820.

⁶⁹ "It is too late now to question the law—that where the obligation is joint and several, the release of one of

two joint debtors has the effect of releasing the others." *In re E. W. A.*, [1901] 2 K. B. 642, 648. The opposite rule was suggested in *Gillespie v. Riggs*, 229 Fed. 760, in regard to the sureties on a probate bond. The case was reversed on another ground in *Riggs v. Gillespie*, 241 Fed. 311, 154 C. C. A. 191.

⁷⁰ *Y. B. 21 Edw. IV.* 81 b; s. c. *Bro. Abr. Executors*, pl. 118; *Dorchester v. Webb*, W. Jones, 345 (3d resolution); *Cheetham v. Ward*, 1 B. & P. 630.

⁷¹ *Gordon v. Wansey*, 21 Cal. 77; *Snell v. Davis*, 149 Ill. App. 391.

⁷² There is such a statute in Ark-

in bankruptcy of one obligor does not have this effect has been shown in a previous section.⁷³ Where the several covenants are not for the same performance as the joint covenant, it is obvious that the principle is inapplicable, and a release of one obligor from his obligations will not discharge the others from their liability on their several obligations.⁷⁴

§ 335. Equitable relief from discharge of one joint debtor by release of another.

As the rule discharging all joint debtors, whether also severally liable or not, if one of them is released, is a technical rule which undoubtedly more often than not violates the intention of the parties to the release, it might be thought that equity would give relief from the application of the rule where it worked injustice and violated the intention of the parties. In support of such a contention might be cited the practice of American courts of equity in giving relief in certain instances against the technical rule that a deceased joint debtor's estate is freed from liability to the creditor.⁷⁵ There can be no doubt that a just result would be reached if courts having equitable powers assumed that a release of a joint or of a joint and several debtor, was intended by the parties as a release merely of that debtor with a reservation of rights against the others. Even if such a construction were adopted the creditor's rights against the other co-debtors would not in every case be reserved for the question is affected not simply by the technical rule of the common law, but also by the rule which courts of equity have established for the protection of sureties that any discharge or binding agreement to forbear proceedings against a principal debtor discharges a surety since otherwise the burden which he had assumed might be increased or varied.⁷⁶ But unless the release is voidable for fraud⁷⁷ or other cause, it is clear that English courts of equity, at least, do not now give, and never have given, relief from the effect of a release of one joint

ansas; yet the release of one joint obligor was held to discharge all in *Tancred v. First Nat. Bank*, 124 Ark. 154, 160, 187 S. W. 160.

⁷³ *Supra*, § 329.

⁷⁴ *Krbel v. Krbel*, 84 Neb. 160, 120 N. W. 935.

⁷⁵ See *infra*, § 344.

⁷⁶ See *infra*, § 339.

⁷⁷ *Riggs v. Gillespie*, 241 Fed. 311, 154 C. C. A. 191.

or joint and several debtor. Lord Hardwicke said: "There is no doubt but a release to one joint obligor is a release in equity to both as well as at law";⁷⁸ and more recently it has been held that an accord and satisfaction with one joint and several debtor precludes proof of the claim in bankruptcy against another,⁷⁹ though equitable rights have always been recognized in bankruptcy proceedings, and though the English Judicature Act adopts for all cases the rule of equity where that differs from the rule at law. This failure of equity to relieve from the effect of a release finds analogy in the failure of equity to relieve from the legal effect of a judgment against one or more joint debtors in merging the debt and thereby precluding any action against other debtors.⁸⁰

In the case of joint debtors, or of joint and several debtors, there is always some relation of principal and surety between the parties. One or more of the obligors may have entered into the obligation merely to accommodate one or more of the others. In such a case there is an uncomplicated relation of principal and surety. But even where all the debtors are interested in the debt, each is to some extent a principal debtor, but also each is acting as surety for the others to the extent that the equitable duty to pay belongs to them.⁸¹ Accordingly a court of equity could not properly wholly relieve against the rule that a release of one joint or joint several debtor discharges the others, except where the debtor released was merely a surety. In such a case a few decisions hold the principal still liable.⁸² Where the joint debtors as between one another are liable equally or in other proportions for the debt, equity should not allow a release of one to relieve the others from liability except to the extent of the share of the debtor released. As to this share the other debtors were merely sureties. This result has been reached in several cases where the

⁷⁸ *Bower v. Swadlin*, 1 Atk. 294.

⁷⁹ *In re E. W. A.*, [1901] 2 K. B. 642.

⁸⁰ *Kendall v. Hamilton*, 4 App. Cas. 489.

⁸¹ In the case of partnership obligations, if the partnership is regarded as an entity, the direct obligation would be that of the firm and the obligation

of the individual partners would be as sureties for the firm.

⁸² *Carroll v. Corbitt*, 57 Ala. 579; *Bridges v. Phillips*, 17 Tex. 128; *McIlhenny v. Blum*, 68 Tex. 197, 4 S. W. 367. See also *Burke v. Noble*, 48 Pa. St. 168.

joint debtors were co-sureties.⁸³ No reason for a different rule is apparent where the joint debtors are principals, for such co-debtors like co-sureties are, as between one another, principals as to a portion of the debt and sureties as to the rest.⁸⁴ No decisions have been found, however, which apply the principle suggested upon this point, but it has been adopted by statute in some States.⁸⁵

§ 336. Statutory changes.

In most of the United States statutes have somewhat changed the common law in regard to joint obligations. These statutes are, however, not uniform in character. They are aimed chiefly against the rule requiring the joinder of all joint debtors, that declaring a joint obligation discharged by either a judgment or release of a joint debtor, and that providing that on the death of a joint obligor his estate is freed from liability to the creditor. Less often is any change made in the rights of joint obligees, and it will be noticed that a common provision in these statutes that the liability of joint debtors shall be joint and several does not affect the rule that the release of one discharges all.⁸⁶ A brief summary of the more important statutory enactments on the subject follows:^{86a}

In ALABAMA ⁸⁷ one or more joint debtors may be sued in equity without joining others. Joint contractors are bound jointly and severally.

In ARIZONA ⁸⁸ joint contractors are bound jointly and severally, and judgment against one is no bar to suit against the others. Release of one is also no bar; but the court may order a plaintiff to bring in as defendants all that are jointly interested.

⁸³ *Gordon v. Moore*, 44 Ark. 349, 51 Am. Rep. 606; *Smith v. State*, 46 Md. 617; *State v. Matson*, 44 Mo. 305; *Schock v. Miller*, 10 Pa. St. 401; *Massey v. Brown*, 4 S. C. 85. See also *Morgan v. Smith*, 70 N. Y. 537. But see *Draper v. Weld*, 13 Gray, 580, and cases cited *supra*, n. 44.

⁸⁴ See *infra*, § 340.

⁸⁵ See in the next section statutes of Col., Minn., Miss., Mont., Nev., Utah, Vt., Va. and Wis.

⁸⁶ See *supra*, § 334.

^{86a} See also Secs. 17(7), 68, 78 of the Uniform Neg. Inst. Law, *infra*, §§ 1143, 1163, 1167.

⁸⁷ Code (1907), §§ 3089, 5384.

⁸⁸ Civ. Code (1913), par. 551.

In ARKANSAS⁸⁹ joint obligations are made joint and several, and survivorship is abolished.

In CALIFORNIA,⁹⁰ where all promisors receive some benefit, their promise is presumed to be joint and several, and so it is where the promise is in the singular but is signed by more than one. Except in the above cases the promise is presumed to be joint. Contribution is provided for and full performance by one joint obligor discharges the obligation as does performance to one joint obligee. A release of a joint obligor does not discharge others unless they are mere guarantors. It will be noticed that the presumption of joint and several liability from the receipt of separate benefits by the promisors is contrary to the common-law rule.

In COLORADO,⁹¹ joint obligations are made joint and several. A release of one joint debtor does not discharge others except to the extent of the full proportionate share of the one released.

In the DISTRICT OF COLUMBIA,⁹² all contracts entered into by two or more are joint and several. Survivorship is abolished and judgment is no merger as to those who are not parties to the suit.

In DELAWARE⁹³ obligations of two or more are made joint and several unless otherwise expressed.

In FLORIDA⁹⁴ a promise in the singular signed by several is joint and several.

In ILLINOIS,⁹⁵ all joint obligations are made joint and several.

By the statutes of INDIAN TERRITORY,⁹⁶ survivorship is abolished and joint obligations are made joint and several.

In INDIANA⁹⁷ a joint obligee who refuses to join as plaintiff may be joined as defendant. Judgment against one joint debtor is no bar against others who are not summoned and did not appear. On the death of a joint obligor, the obligation is treated as joint and several.

In IOWA,⁹⁸ action may be brought against any joint debtors,

⁸⁹ Kirby and Castle's Dig. (1916), §§ 5147-5149.

⁹⁰ Civ. Code, §§ 1430, 1432, 1474, 1475, 1543, 1659, 1660.

⁹¹ Mills' Annot. Stat. (1912), §§ 4155-4157.

⁹² Code (1911), §§ 1205-1207.

⁹³ Rev. Code (1915), § 2628.

⁹⁴ Comp. Laws (1914), §§ 2951-7.

⁹⁵ Rev. Stat. (1917), c. 76, § 3.

⁹⁶ Stat. (1899), §§ 2578, 2580.

⁹⁷ Burns Annot. Stats., §§ 270, 325, 2830.

⁹⁸ Code (1897), § 3465.

or all joint debtors. If any die the action may be brought against any or all the survivors, together with any or all the personal representatives of the deceased. Judgment against one joint debtor is no bar to actions against others.

In KANSAS,⁹⁹ a joint debtor may compromise his liability and others will not be discharged.

In LOUISIANA ¹ joint obligations and several obligations, and obligations in solido are defined, but these terms have no common-law meanings.

In MARYLAND ² representatives of persons jointly bound are bound severally. Judgment against one or more joint debtors does not discharge others who are not bound by the judgment.

In MASSACHUSETTS ³ representatives of a joint debtor who dies are bound severally. If an action is not prosecuted against all joint defendants because of the absence of some from the Commonwealth, or for any other sufficient cause, judgment against some is no bar to judgment against others.

In MICHIGAN ⁴ the statute is like that of Kansas.

In MINNESOTA ⁵ joint obligations are made joint and several. The discharge of one joint debtor operates as payment of his share of the debt according to the number of the debtors aside from sureties.

In MISSISSIPPI ⁶ discharge of one joint debtor does not discharge others, but if the debtor discharged has paid more than his ratable share, the whole payment will be credited on the debt. If he has paid less than his ratable share, then that whole share shall be credited. A creditor may sue one or more joint debtors and judgment against one does not discharge the other.

In MISSOURI ⁷ joint obligations are made joint and several. A joint debt survives against representatives of a deceased debtor as well as against the survivors, and a joint debt may be enforced by action against any one or more of the debtors.

In MONTANA ⁸ a release of one joint debtor does not extin-

⁹⁹ Gen. Stat. (1915), §§ 6786-6790.

⁵ Gen. Stat. (1913), §§ 7916, 7917.

¹ Code §§ 2077 *et seq.*

⁶ Code (1917), §§ 2169, 2170.

² Code (1911), Art. L, §§ 1, 10.

⁷ Rev. Stat. (1909), §§ 2769, 2772.

³ Rev. Laws (1902), c. 141, § 8, c. 170, § 14.

⁸ Rev. Codes (1907), §§ 4964, 5048, 5049, 7135, 7136.

⁴ Comp. Laws (1916), § 14585, etc.

guish the obligation of any of the others; but a discharge of one amounts to payment of the proportionate interest of the debtor discharged. Where all the promisors receive some benefit their promise is presumed to be joint and several. This provision is identical with that in California Civil Code, § 1659 and is commented on it in that connection. A promise in the singular signed by several creates a joint and several obligation.

In NEBRASKA ⁹ on the death of one joint debtor his estate is severally liable.

In NEVADA ¹⁰ a release of one joint debtor discharges only the released debtor's portion of the debt estimated upon the number of such debtors.

In NEW JERSEY ¹¹ joint debtors are liable severally and on the death of one joint debtor his representatives are bound.

In NEW YORK ¹² a creditor may compromise in writing with one joint debtor, and that debtor only will be discharged; but other joint debtors will have the same defences they would have had if one had not been discharged, and the right of contribution is not impaired. When one or more partners have not been joined in an action against other partners against whom judgment is rendered those not joined may be sued if the judgment is not satisfied.

In NORTH DAKOTA ¹³ a similar provision is made in regard to partners not joined in an action, and it is also more broadly provided that if judgment goes against one or more joint debtors, others not joined may be summoned into court to show cause why they should not be bound by the judgment.

In OHIO ¹⁴ there is the same provision as in Kansas, and it is also provided that the estate of a deceased joint debtor shall be liable.

In PENNSYLVANIA ¹⁵ judgment against one or more joint debtors is no bar to an action against others.

In RHODE ISLAND, ¹⁶ judgment without complete satisfaction

⁹ Rev. Stat. (1913), § 1424.

¹⁰ Rev. Laws (1912), § 5846.

¹¹ Comp. Stat. (1911), p. 3777.

¹² Debtor and Creditor Law, §§ 230-233, Code Civ. Proc., § 1946.

¹³ Comp. Laws (1913), §§ 7435, 7850.

¹⁴ Page and Adams Code (1912), §§ 8079-8084, 10733.

¹⁵ Purdon's Dig. (13th ed.), pp. 2039, 2040.

¹⁶ Gen. Laws, (1909), c. 283, § 18.

against part of the defendants in an action is no bar to future action against such defendants against whom the writ in the original action was not served. It will be noticed that this provision does not cover a case where some joint debtors were omitted altogether as defendants in the first suit. The estate of a deceased joint contractor is liable as if the contract had been several.

In SOUTH CAROLINA,¹⁷ as in New York, a compromise in writing with one joint debtor may be made, and he only will be discharged. Others may be sued, but will have the same defences they would have had had not one been discharged, and their right of contribution is not impaired.

In SOUTH DAKOTA¹⁸ obligations and rights are presumed to be joint. This presumption in case of a right can be overcome only by express words. Where all who unite in a promise receive a benefit, their obligations are presumed to be joint and several. It will be observed that these provisions directly reverse the rule of the common law which makes interest important in case of a joint right, but immaterial in case of a joint duty. It is also provided that a promise in the singular signed by several persons is joint and several.

In TENNESSEE¹⁹ all or any number of persons jointly liable may be sued. Joint obligations are made joint and several, and debt survives against deceased obligors. Dismissal of a suit or failure to recover against one, does not prevent recovery against other defendants who may be liable.

In UTAH²⁰ release of a joint debtor does not discharge others beyond the just proportion of the debt for which the released debtor was liable or which he has paid. If judgment is rendered against one or more joint debtors others not joined may be brought into court without summons to show cause why they should not be joined by the judgment.

In VERMONT²¹ representatives of a deceased joint obligor are liable. The discharge of one joint contractor may be made without impairing the creditor's right to the residue of the

¹⁷ Code (1912), §§ 3944-3946.

¹⁸ Civ. Code, §§ 1118, 1268, 1269.

¹⁹ Shannon's Annot. Code (1917), §§ 4484-4487.

²⁰ Comp. Laws (1907), §§ 2037, 3201.

²¹ Pub. St. (1906), §§ 1527-1530, 2828.

debt, but such a discharge shall have the effect of payment of the party discharged of his equal part of the debt, according to the number of debtors aside from sureties. Recovery of an unsatisfied judgment is no bar to suit against other joint debtors.

In VIRGINIA ²² the creditor may make a compromise with one joint debtor, or release him without discharging others. In such a case credit shall be given for the full share of the party released unless he is a surety, in which case credit shall be given for the sum actually paid.

In WASHINGTON ²³ a joint debtor who is made defendant on a suit, but not originally served with process may be summoned to show cause why he should not be bound by a judgment given against others.

In WISCONSIN ²⁴ there is a provision similar to that in Washington, and it is also provided that an action begun against joint debtors shall not abate by the death of one of them. The estate of a deceased joint debtor is severally liable and may recover contribution. The release of one discharges others only as to the amount which in equity the party discharged ought to pay as between himself and the other joint contractors, provided that if he pays more than his share, or, if being a surety he pays anything, the amount paid shall be credited, and a principal debtor cannot be released without discharging sureties.

In WEST VIRGINIA ²⁵ representatives of a deceased joint debtor are liable as if the debt were joint and several.

§ 337. Effect of judgments against joint and several obligors.

The Supreme Court of the United States has said of joint and several liabilities of a number of promisors: "If the plaintiff obtains a joint judgment, he cannot afterwards sue them separately, for the reason that the contract or bond is merged in the judgment; nor can he maintain a joint action after he has recovered judgment against one of the parties in a separate action, as the prior judgment is a waiver of his right to

²² Code (1904), §§ 2856, 2857.

²⁴ Stat. (1915), §§ 2795-2799, 2805,

²³ Remington's Codes (1915), § 436. 3848, 4204, 4205.

²⁵ Code (1914), § 4372.

pursue a joint remedy." ²⁶ And this expresses the law as generally understood, though the final words of the quotation "is a waiver of his right to pursue a joint remedy" might better be "is a merger of his claim against that party, and is, therefore, inconsistent with the continuance of a joint right against all." ²⁷ It is true that a single Justice of the English Supreme Court of Judicature, ²⁸ has said: "Is the separate cause of action merged in the joint judgment? Take the illustration of a joint and several note against A, B, and C, which is usually comprised in one document. The result is the same as if three separate notes were given as well as the joint note. If A is sued to judgment on his separate note, is the joint note of A, B, and C, merged in the judgment? On principle, why should it be? The object of taking a joint and several note is to have the separate liability of each promisor as well as the joint liability of all, and why should the fact that the separate liability of one promisor has merged in a separate judgment against him prove a bar to an action on the joint note?" And there are a few early federal decisions to the same effect. ²⁹ The quotation above from the decision of the United States Supreme Court seems the better statement. The question involved is—can two judgments be given against the same debtor for the same debt? and it seems that the answer should be in the negative even though the debtor is bound by separate contracts for the debt. It has even been held that the beginning of a joint action or a several action could be pleaded in abatement to a subsequent action for the same cause in which a party defendant in the earlier action was again made a party defendant, whether jointly with others or not. ³⁰ But the mere beginning of an action does not merge the cause of action, and

²⁶ *Sessions v. Johnson*, 95 U. S. 347, 348, 24 L. Ed. 596, quoted in *United States v. Ames*, 99 U. S. 35, 25 L. Ed. 295.

²⁷ *United States v. Price*, 9 How. 83, 13 L. Ed. 56; *Stearns v. Aguirre*, 6 Cal. 176; *Bangor Bank v. Treat*, 6 Greenl. 207; *Stoner v. Stroman*, 9 Watts & S. 85; *Clinton Bank v. Hart*, 5 Ohio St. 33; *Greer v. Miller*, 2 Overt. 187. See also per Bayley, B., *Lechmere v. Flet-*

cher, 1 C. & M. 623, 634; *Taylor v. Sartorius*, 130 Mo. App. 23, 108 S. W. 1089.

²⁸ Cave, J. in, *Re Davison*, 13 Q. B. D. 50, 53, 54.

²⁹ *United States v. Cushman*, 2 Sumn. 426; *Trafton v. United States*, 3 Story, 646; *Sheehy v. Mandeville*, 6 Cranch, 253, 3 L. Ed. 391.

³⁰ *Ex parte Rowlandson*, 3 P. Wms' 408; *Stearns v. Aguirre*, 6 Cal. 176, 181.

their obligations could not continue to exist without all being bound.³⁷ In order to give effect to the manifest intention of the parties as nearly as possible, the courts have therefore held that a release with such a reservation is in legal effect no release at all, but merely a covenant not to sue.³⁸ So in the case of joint and several liabilities, if the creditor while discharging the several liability expressly reserves the joint right, it is not discharged.³⁹ Likewise, the joint liability may be released with a reservation of the several right.⁴⁰ A right against other debtors is held to be reserved in any case where it appears from the terms of the release that it was not intended or expected that all the debtors should be released.⁴¹ Parol evidence, however, to show an intent to reserve rights against other joint obligors has been held inadmissible;⁴² though if all the parties assent, and the rule locally in force in regard to varying a sealed instrument by matter *in pais* does not prevent,⁴³ a new agreement, in effect a novation, may be made, by which one obligor in consideration of a payment by him, is discharged and the others remain liable.⁴⁴ If an agreement not to sue is not under seal, or if the effect of seals at common law has been abolished⁴⁵ questions may arise as to the sufficiency of the consideration for any promise to release or to forbear perpetually to sue a debtor either because the promise was made in consideration of the payment of part of a debt, for the whole of which he was liable, or for other reasons, but these questions have been considered under the subject of consideration.

§ 338a. Release of joint tortfeasors.

The liability of two or more persons jointly concerned in

³⁷ See *Nicholson v. Revill*, 4 Ad. & El. 675; *Kearsley v. Cole*, 16 M. & W. 128; *Webb v. Hewitt*, 3 K. & J. 438; *Green v. Wynn*, L. R. 4 Ch. 204.

³⁸ See cases in the preceding two notes and *Bradford v. Prescott*, 85 Me. 482, 27 Atl. 461.

³⁹ *Thompson v. Lack*, 3 C. B. 540, 549.

⁴⁰ *North v. Wakefield*, 13 Q. B. 536; *Stevens v. Stevens*, 5 Exch. 306.

⁴¹ *Ex parte Good*, 5 Ch. D. 46, 55; *Carroll v. Corbitt*, 57 Ala. 579; *Parry Mfg. Co. v. Crull* (Ind. App.), 101

N. E. 756; *Bradford v. Prescott*, 85 Me. 482, 27 Atl. 461; *Hale v. Spaulding*, 145 Mass. 482, 14 N. E. 534, 1 Am. St. Rep. 475; *Burke v. Noble*, 48 Pa. 168.

⁴² See, however, *infra*, § 647, *ad fin.*

⁴³ See § 218.

⁴⁴ See *infra*, §§ 1834-1836.

⁴⁵ See *Drake v. Reed*, 4 Stew. & P. (Ala.) 192; *Miller v. Lloyd*, 181 Ill. App. 230; *Marks v. Deposit Bank*, 21 Ky. L. Rep. 117, 50 S. W. 1103.

⁴⁶ See § 218.

committing a tort is joint and several;⁴⁵ and, for the same reason, as in the case of parties jointly and severally liable in contract, a release of one discharges all.⁴⁶ There seems also no reason of technical principle to distinguish the effect of a covenant not to sue or a release of one of several obligors under a joint and several liability in tort with a reservation of rights against the others from the effect of a similar release given to a joint and several contractor,⁴⁷ and many decisions, accepting the analogy, permit an action to be maintained subsequently against the other tortfeasors, where one jointly and severally liable with them for the tort has been given a covenant not to sue him or a qualified release.⁴⁸ There is, however, a practical difference between a liquidated claim on the one hand and a claim which, like many claims in tort, is not only unliquidated but without a definite standard by which it can be liquidated. No one can be allowed to recover more than one payment in full for the same claim, by any device. If A and B jointly owe

⁴⁵ Cooley on Torts (3d ed.), 224.

⁴⁶ *Patridge v. Emson*, Noy, 62; *Cocke v. Jennor*, Hob. 66; *Kiffin v. Willis*, 4 Mod. 380; *Urton v. Price*, 57 Cal. 270; *Stone v. Dickinson*, 7 Allen, 26; *Aldrich v. Parnell*, 147 Mass. 409, 18 N. E. 170; *O'Neil v. National Oil Co.*, 231 Mass. 20, 120 N. E. 107; *Arnett v. Missouri Pac. R.*, 64 Mo. App. 368; *Rogers v. Cox*, 66 N. J. L. 432, 50 Atl. 143; *Brogan v. Hanan*, 55 N. Y. App. D. 92, 66 N. Y. S. 1066; *Smithwick v. Ward*, 7 Jones (N. C.), 64, 75 Am. Dec. 453; *Brown v. Marsh*, 7 Vt. 320.

⁴⁷ *Matheson v. O'Kane*, 211 Mass. 91, 95, 97 N. E. 638, 39 L. R. A. (N. S.) 475.

⁴⁸ *Matheson v. O'Kane*, 211 Mass. 91, 94, 97 N. E. 638, 39 L. R. A. (N. S.) 475, citing, *Texarkana Telephone Co. v. Pemberton*, 86 Ark. 329, 111 S. W. 257; *Chicago v. Babcock*, 143 Ill. 358, 32 N. E. 271; *Chicago & Alton Ry. v. Averill*, 224 Ill. 516, 79 N. E. 654; *Drinkwater v. Jordan*, 46 Me. 432; *Musolf v. Duluth Edison Electric*

Co., 108 Minn. 369, 122 N. W. 499, 24 L. R. A. (N. S.) 451; *Arnett v. Missouri Pacific Ry.*, 64 Mo. App. 368; *Snow v. Chandler*, 10 N. H. 92, 34 Am. Dec. 140; *Line & Nelson v. Nelson & Smalley*, 9 Vroom, 358; *Irvine v. Milbank*, 56 N. Y. 635, 15 Abb. Pr. (N. S.) 378; *Robertson v. Trammell*, 98 Tex. 364, 83 S. W. 1098; *Bloss v. Plymale*, 3 W. Va. 393, 100 Am. Dec. 752; *Ellis v. Esson*, 50 Wis. 138, 6 N. W. 518, 36 Am. Rep. 830. See also *Carey v. Bilby*, 129 Fed. 203, 63 C. C. A. 361; *Berry v. Pullman Co.*, 249 Fed. 816, 162 C. C. A. 50; *Dardanelle & Co. R. Co. v. Brigham*, 98 Ark. 169, 135 S. W. 869; *Parry Mfg. Co. v. Crull*, 56 Ind. App. 77, 101 N. E. 756; *Judd v. Walker*, 158 Mo. App. 156, 138 S. W. 655; *Gilbert v. Finch*, 173 N. Y. 455, 66 N. E. 133, 61 L. R. A. 807, 93 Am. St. Rep. 623; *Smith v. Dixie Park & Co.*, 128 Tenn. 112, 157 S. W. 900; *Nashville Interurban Ry. v. Gregory*, 137 Tenn. 422, 193 S. W. 1053; *Sloan v. Herrick*, 49 Vt. 327.

C \$100 and A pays that sum on account of the indebtedness, a release to him with reservation of rights against B will not enable C to get a further payment from B; and the debt being for a fixed sum an attempt so to do cannot be camouflaged. Where the claim is in tort, however, deception is possible; and some courts fear that a creditor who receives a payment from one tortfeasor and reserves rights against others is in fact endeavoring to get double payment for the same wrong, and therefore are disposed to disregard the reservation.⁴⁹ How far such cases rest upon the sound principle that if the plaintiff in a particular case has been fully paid by any one for the wrong done him he can recover nothing from any one else, and how far they go on the unsound technical reason that a release with a reservation of rights is not the equivalent of a covenant not to sue⁵⁰ is not always easy to determine.⁵¹ Where two or more

⁴⁹ *Ducey v. Patterson*, 37 Colo. 216, 86 Pac. 109, 9 L. R. A. (N. S.) 1066, 119 Am. St. 284, 11 Ann. Cas. 393; *Gunther v. Lee*, 45 Md. 60, 24 Am. Rep. 504; *McBride v. Scott*, 132 Mich. 176, 93 N. W. 243, 61 L. R. A. 445, 102 Am. St. 416; *Musolf v. Duluth Elec. Co.*, 108 Minn. 369, 122 N. W. 499, 24 L. R. A. (N. S.) 451; *Mitchell v. Allen*, 25 Hun, 542; *Delong v. Curtis*, 35 Hun, 94; *Ellis v. Bitzer*, 2 Ohio, 89, 15 Am. Dec. 534; *Seither v. Philadelphia Traction Co.*, 125 Pa. 397, 17 Atl. 338, 4 L. R. A. 54, 11 Am. St. 905; *Abb v. Northern Pac. R.*, 28 Wash. 428, 68 Pac. 954, 58 L. R. A. 293, 92 Am. St. 864. See also *Smith v. Dixie Park &c. Co.*, 128 Tenn. 112, 157 S. W. 900.

⁵⁰ See *supra*, § 338. And also the following cases of liability in tort, holding that such a qualified release is in effect a covenant not to sue. *Carey v. Bilby*, 129 Fed. 203, 63 C. C. A. 361; *Chicago &c. R. Co. v. Averill*, 224 Ill. 516, 79 N. E. 654; *Louisville &c. Co. v. Barnes' Adm'r*, 117 Ky. 860, 79 S. W. 261, 64 L. R. A. 574, 111 Am. St. 273; *Gilbert v. Finch*, 173 N. Y. 455, 66 N. E. 133, 61 L. R. A. 807, 93 Am. St. 623; *Walsh v. Hanan*, 93

N. Y. App. D. 580, 87 N. Y. S. 930; *Hirschfield v. Alsberg*, 47 N. Y. Misc. 141, 93 N. Y. S. 617; *Bloss v. Plymale*, 3 W. Va. 393, 100 Am. Dec. 752; *Ellis v. Esson*, 50 Wis. 138, 6 N. W. 518, 36 Am. Rep. 830.

⁵¹ In *Matheson v. O'Kane*, 211 Mass. 91, 95, 97 N. E. 638, 39 L. R. A. (N. S.) 475, the court said: "The confusion and apparent conflict of authorities has not arisen in cases like that at bar, where the agreement given to one of the joint wrongdoers is clearly an agreement not to sue and nothing more. The distinction between the legal effect of a release and of a covenant not to sue is generally recognized. The controversy concerns rather the construction of a particular writing as a release or as a covenant not to sue, and the means whereby the two are to be distinguished. Where it is apparent from the paper that the intention was to discharge the liability of one of the joint wrongdoers, the courts quite generally hold that the original joint and indivisible liability is thereby extinguished, and that any clause by which parties seek to reserve a right of action against the other wrongdoers is repug-

persons are liable for the same injury though their tort was not joint the only question when a release has been given to one, should be, has the plaintiff obtained full satisfaction, or what he agreed to accept as such, for his injury;⁵² but here too the difficulty of determining whether a sum received by the plaintiff was received by him as full satisfaction of a claim for undetermined damages has led some courts to lay down an absolute rule that a discharge of one of the tort feors discharges the others though they were severally and not jointly liable.⁵³

§ 338b. Release of one not in fact liable.

Even though one is not liable for a tort, if he is given a release as a party jointly liable for it, it has been held that this will preclude the releasor from afterwards suing another for the injury to which the release related.⁵⁴

Such a result can be defended only on the theory that a release is a conclusive admission of the receipt of full satisfaction, and that full satisfaction even from a stranger is a bar to any further claim. The latter proposition may be admitted,⁵⁵ but

nant to the release and void. *Ducey v. Patterson*, 11 Ann. Cas. 393, note; *Gunther v. Lee*, 45 Md. 60, 24 Am. Rep. 504; *McBride v. Scott*, 132 Mich. 176, 93 N. W. 243, 61 L. R. A. 445, 102 Am. St. Rep. 416; *Seither v. Philadelphia Traction Co.*, 125 Penn. St. 397, 17 Atl. 338, 4 L. R. A. 54, 11 Am. St. Rep. 905; *Abb v. Northern Pacific Ry.*, 28 Wash. 428, 68 Pac. 954, 58 L. R. A. 293, 92 Am. St. Rep. 864. But where it is evident that the consideration paid to the plaintiff was not intended to be full compensation for his injuries, and the agreement signed by him although in form a release was clearly intended to preserve the liability of those who were not parties to it, many of the courts have sought to give effect to that intention by construing the agreement as in legal effect a covenant not to sue and not a technical release."

⁵² *Wheat v. Carter* (N. H.), 106 Atl. 602.

⁵³ See *State v. Maryland Elec. Rys. Co.*, 126 Md. 300, 95 Atl. 43, L. R. A. 1917 A. 273, and cases collected in note to the latter report.

⁵⁴ *Tompkins v. Clay St. R. R. Co.*, 66 Cal. 163, 4 Pac. 1165; *Miller v. Beck*, 108 Ia. 575, 79 N. W. 344; *Leddy v. Barney*, 139 Mass. 394, 2 N. E. 107; *Hartigan v. Dickson*, 81 Minn. 284, 83 N. W. 1091; *Hubbard v. St. Louis & Co. R.*, 173 Mo. 249, 72 S. W. 1073; *Casey v. Auburn Telephone Co.*, 155 N. Y. App. D. 66, 139 N. Y. S. 579; *Seither v. Philadelphia Traction Co.*, 125 Pa. 397, 17 Atl. 338, 4 L. R. A. 54, 11 Am. St. 905.

⁵⁵ In *Lovejoy v. Murray*, 3 Wall. 1, 18 L. Ed. 129, Miller, J., said: "When plaintiff has accepted satisfaction in full for the injury done him, from whatever source it may come, he is so far

Instruments Law is in force.⁵⁸ It has been held under this law that one who signs negotiable paper jointly with another, although a surety and known by the holder of the instrument to be such, is not discharged by an extension of time to the principal debtor.⁵⁹ Though such a conclusion may be technically justified by construction of the statute, it seems an undesirable result since it is opposed to principles generally governing the law of suretyship. Why there should be different rules applicable to joint makers of a bond, and joint makers of a note is not easy to see. The principle which discharges the surety is, however, an equitable one and is subject to equitable modifications. If a surety consents to a discharge or change of liability of the principal debtor, he cannot claim exemption from liability.⁶⁰ It has also been established that the surety cannot claim exemption if the agreement with the principal debtor reserves in effect to the surety all rights of indemnification to which he is entitled, and this is the legal effect of an agreement which reserves to the creditor a right against the surety, as well as of an agreement which in terms reserves the surety's rights against the principal debtor.⁶¹ The rule which permits a creditor to make a covenant not to sue or to release a principal debtor known to be such and nevertheless by a reservation of the creditor's rights against co-debtors, still hold them bound, though they are sureties and known to be such, is in reality inconsistent in principle with the rule that an agreement with the principal debtor to forbear or to give time discharges the surety. This latter rule must rest on the injustice of holding a surety bound when the creditor has either varied the terms of the obligation, or has impaired the right of subrogation to which the surety would be entitled on paying the debt. The injustice is no less because the creditor when he

⁵⁸ Secs. 119, 120 of the Act of those operative in this respect. See *infra*, §§ 1189, 1190, 1260.

⁵⁹ *Vandeford v. Farmers' &c. Bank*, 105 Md. 164, 66 Atl. 47, 10 L. R. A. (N. S.) 129; *Lane v. Hyder*, 163 Mo. App. 688, 147 S. W. 514, 515; *Richards v. Market Exchange Bank Co.*, 81 Oh. St. 348, 90 N. E. 1000, 26 L. R. A.

(N. S.) 99; *Wolstenholme v. Smith*, 34 Utah, 300, 97 Pac. 329; *Bradley Engineering Co. v. Heyburn*, 56 Wash. 628, 106 Pac. 170, 134 Am. St. Rep. 1127. See also *Fritts v. Kirchdorfer*, 136 Ky. 643, 124 S. W. 882, and *infra*, § 1260.

⁶⁰ *Infra*, § 1223.

⁶¹ *Infra*, § 1230.

varies the obligation agrees with the principal debtor but without the consent of the surety that the surety shall not be discharged. If it be urged that where the right against the surety is reserved, his right of indemnity against the principal is also reserved, and that therefore the surety is not injured, the reply is obvious that the surety's right of indemnity can never be taken away from him in any case without his consent, and that therefore, if the continued existence of the right of indemnity justifies the creditor in changing the terms of his contract with the principal, no agreement to give time to the principal should discharge the surety. And certainly if the creditor has precluded himself from successfully suing the principal debtor, the surety will not have anything to which the word subrogation is properly applicable. The fact, therefore, will always remain that after a covenant with the principal debtor whether or not there is an express reservation of rights against the surety, not only the surety's right of subrogation if he chooses or is compelled to pay the debt is injuriously affected, but also the chance which he is called upon to face is different after the covenant has been made from what it was before.

Though it is not possible to reconcile the general rule forbidding the giving of time with the special rule permitting it without the surety's consent if the creditor's right against the surety is expressly reserved, at least it is possible to show how the inconsistency arose. The general rule forbidding the giving of time is a modern one in equity.⁶² Its recognition at law is still more modern.⁶³ About a century before such a doctrine was heard of even in equity, it had been laid down that a covenant not to sue one joint debtor did not discharge the others.⁶⁴ Before the adoption by courts of law of the rule protecting sureties from agreements between creditor and principal debtor for forbearance a case had presented the question of the effect of a release of one joint debtor with a reservation of

⁶² See *infra*, § 1222.

⁶³ In *Dean v. Newhall*, 8 T. R. 168, and *Hutton v. Eyre*, 6 Taunt. 289, covenants to discharge a joint debtor known to be the principal debtor were held not to bar the creditor from proceeding against the other joint debtors,

though they were sureties, and the covenants contained no reservation of rights against the latter.

⁶⁴ *Lacy v. Kinnaston*, Holt 178; s. c. 1 Ld. Raym. 688; s. c. 12 Mod. 548; s. c. 2 Salk. 575; s. c. 3 Salk. 298; *Fitzgerald v. Trant*, 11 Mod. 254.

rights against another.⁶⁵ The court purported merely to construe a release in terms contradictory and held it to amount in effect to a covenant not to sue one joint debtor, and, therefore, under well-recognized law to have no effect on the liability of his co-debtor. The doctrine of this case persisted and was even applied to cases where the joint debtor against whom rights were reserved was a surety, while side by side with this doctrine there flourished the newly arisen doctrine discharging sureties if time was given to the principal debtor. Lord Eldon was thought to recognize the right of the creditor in equity to reserve his rights against the surety.⁶⁶ Baron Parke added the weight of his authority,⁶⁷ and the matter must now be considered settled,⁶⁸ however unsatisfactory may be the attempts to reconcile two conflicting doctrines.

As a creditor may release one joint debtor and expressly reserve rights against the other, so in the case of joint and several obligations, a creditor may release the several liability of one or more of the debtors with a reservation of the joint right.⁶⁹ And the joint liability may be released with a reservation of the several right.⁷⁰

§ 340. Importance of the creditor's knowledge of a suretyship relation between joint debtors.

Another principle also besides the form of the covenant or release qualifies its effect as a discharge of a joint debtor who in fact is a surety. A creditor who has received the joint obligation of several persons, unless he has actual knowledge of their relation to one another, cannot be justly required to regard the obligation as anything less or different from what it appears to be. On the face of a joint obligation the apparent liability of each obligor is for an *aliquot* part of the whole debt as a principal debtor, and as a surety of the remaining co-obligors for the rest of the debt. As there can be no question of the discharge of one joint debtor by a covenant not to sue another

⁶⁵ *Solly v. Forbes*, 2 B. & B. 38.

⁶⁶ *Ex parte Gifford*, 6 Ves. 805;
Boulton v. Stubbs, 18 Ves. 20.

⁶⁷ *Kearsley v. Cole*, 16 M. & W.
128.

⁶⁸ See *infra*, § 1230.

⁶⁹ *Thompson v. Lack*, 3 C. B. 540,
549.

⁷⁰ *North v. Wakefield*, 13 Q. B. 536;
Stevens v. Stevens, 5 Exch. 306.

except in so far as the former is a surety, it follows that a creditor of several joint obligors who is ignorant of any special relation of principal and surety between them may reasonably assume that their liability to each other is to pay the debt in equal shares; and an agreement by him to give time, or never to sue, made with one of the joint debtors could not have the effect of discharging the others to a greater extent than from all liability for the payment of the proportionate share of the one debtor with whom the agreement was made. But in fact the law seems to be that a covenant not to sue one of several joint principal debtors does not effect a discharge of the others even to this extent. Though it is sufficiently obvious upon principle that joint debtors who are under equal obligations as between one another to pay the debt are principals for a ratable share, and sureties as to the remainder, and though such joint debtors are recognized to be sureties for one another as to a ratable proportion of the debt in any litigation between them for contribution,⁷¹ the rule forbidding the creditor to give time to a principal debtor is held inapplicable in such cases. Thus it is said "where two or more execute a note for a joint liability they are in some respects sureties for each other, but the principle upon which a surety in the proper sense of the term is exonerated from liability by a contract with the principal, giving date of payment without the assent of the surety, has never been applied in such a case."⁷² The same point is involved also in decisions which lay down broadly that a covenant not to sue a joint debtor who in fact is in part a principal does not discharge the others, though their liability beyond their ratable shares is that of sureties, and though there is no express reservation of the creditor's rights against them.⁷³

⁷¹ See *Clark v. Dane*, 128 Ala. 122, 28 So. 960.

⁷² *Neel v. Harding*, 2 Met. (Ky.) 247, 250, quoted and followed in *Mulledore v. Wertz*, 75 Ind. 431, 39 Am. Rep. 155. To the same effect is *Parsons v. Harrold*, 46 W. Va. 122, 124, 32 S. E. 1002. See also *Draper v. Weld*, 13 Gray 580.

⁷³ The other obligors were held still bound, though the question of surety-

ship was not discussed, in *Roberts v. Strang*, 38 Ala. 566, 82 Am. Dec. 729; *Kendrick v. O'Neil*, 48 Ga. 631; *Mason v. Jouett's Admr.*, 2 Dana (Ky.), 107; *McLellan v. Cumberland Bank*, 24 Me. 566; *Bradford v. Prescott*, 85 Me. 482, 487; *Shed v. Pierce*, 17 Mass. 623, 628; *Durell v. Wendell*, 8 N. H. 369. See also *Collins v. Prosser*, 1 B. & C. 682; *First Nat. Bank v. Cheney*, 114 Ala. 536, 21 So. 1002. Cf. Statutes re-

But a joint debtor who is merely a surety and known by the creditor to be a surety is discharged by such a contract with the principal. Though in early cases the parol evidence rule was thought to prevent the proof of such a relation between the parties unless stated in the instrument creating the obligation, at first in equity and now generally at law, if the creditor at the time when he received the obligation knew that one of the joint debtors was as between himself and his co-obligors primarily liable for the whole debt, the creditor will lose his rights against all the joint obligors if he makes any agreement or commits any action with reference to the debtor primarily liable which would impair the rights or increase the risk of those who were sureties.⁷⁴

The question is more difficult where the creditor did not know when he received the joint obligation that the obligors

ferred to *supra*, § 335, n. 85. In *Dean v. Newhall*, 8 T. R. 168; *Hutton v. Eyre*, 6 Taunt. 289, and *Ward v. Johnson*, 6 Munf. (Va.) 6, 8 Am. Dec. 729, the joint creditor who received a covenant that he should not be sued was a principal debtor, and there also it was held that the other joint obligors were not discharged. The question of suretyship was referred to only in the case last cited, in which it was suggested that in equity the surety might be entitled to discharge. Such would now be the surety's recognized right both at law and in equity.

⁷⁴ *Scott v. Scruggs*, 60 Fed. 721, 23 U. S. App. 280, 9 C. C. A. 246; *Branch Bank, etc., v. James*, 9 Ala. 949; *Lehnert v. Lewey*, 142 Ala. 149, 37 So. 921; *Vestal v. Knight*, 54 Ark. 97, 15 S. W. 17; *Drescher v. Fulham*, 11 Colo. App. 62, 52 Pac. 685; *Stewart v. Parker*, 55 Ga. 656; *Trustees of Schools v. Southard*, 31 Ill. App. 359; *Sample v. Cochran*, 84 Ind. 594; *Lambert v. Shitler*, 62 Ia. 72, 17 N. W. 187; s. c. 71 Ia. 463, 32 N. W. 424; *Robertson v. Blevins*, 57 Kan. 50, 45 Pac. 63; *Neel v. Harding*, 2 Met. (Ky.) 247; *Jones v. Fleming*, 15 La. Ann. 522; *Cummings*

v. Little, 45 Me. 183; *Guild v. Butler*, 122 Mass. 498, 23 Am. Rep. 378; *Baron v. Cady*, 40 Mich. 259; *Smith v. Clopton*, 48 Miss. 66; *O'Howell v. Kirk*, 41 Mo. App. 523; *Lee v. Bruggmann*, 37 Neb. 232, 55 N. W. 1053; *Rochester Savings Bank v. Chick*, 64 N. H. 410, 13 Atl. 872; *Hubbard v. Gurney*, 64 N. Y. 457; *Welfare v. Thompson*, 83 N. C. 276; *McComb v. Kittridge*, 14 Oh. 348; *Diffenbacher's Estate*, 31 Pa. Super. Ct. 35; *Turrill v. Boynton*, 23 Vt. 142; *Glenn v. Morgan*, 23 W. Va. 467; *Moulton v. Posten*, 52 Wis. 169, 8 N. W. 621. But the law of California is otherwise. The creditor may treat a joint obligor as a principal debtor though knowing him to be a surety. *California, etc., Bank v. Ginty*, 108 Cal. 148, 41 Pac. 38. And see *Moriarty v. Bagnetto*, 110 La. 598, 34 So. 701. In *Yates v. Donaldson*, 5 Md. 389, 61 Am. Dec. 283, and in *Anthony v. Fritts*, 45 N. J. L. 1, the defence was held inadmissible at law, although it was suggested that equity would give relief. See *Brandt, Suretyship*, § 38. See further Professor Crawford D. Hening, in 59 Univ. Pa. L. Rev. 532.

bore the relation of principal and surety to each other, and, subsequently, but before covenanting with the principal debtor, received this information. In some decisions it has been held an infringement of the rights for which the creditor bargained to compel him to recognize the relation between the debtors; and under these decisions he still may treat each debtor as if he were liable as a principal for an *aliquot* part of the whole debt.⁷⁵ But by the great weight of authority, even in the situation supposed, the creditor is required to recognize the equitable rights of the surety and therefore loses his own right against the surety if after learning of the relation of the obligors to each other he makes such an agreement or so acts with reference to a joint debtor who is, in fact, the principal obligor, as to impair the rights of a co-debtor who is a surety.⁷⁶

The principles of suretyship under consideration depend solely on the existence of the relation of principal debtor and surety between persons liable for the same debt. Whether they are liable jointly, jointly or severally, or merely severally, is not material. It is, therefore, pertinent to consider in this connection authorities relating to principal and surety bound severally; and it may be added, therefore, that in the situation supposed the English courts and the Supreme Court of the United States have held that knowledge acquired by the creditor at any time prior to the indulgence given to the principal, excuses the surety.⁷⁷

⁷⁵ *Drescher v. Fulham*, 11 Colo. App. 62, 52 Pac. 685; *Gano v. Heath*, 36 Mich. 441; *Heath v. Derry Bank*, 44 N. H. 174; *Diffenbacher's Estate*, 31 Pa. Super. Ct. 35. See also *Hoge v. Lansing*, 35 N. Y. 136 (1866); *Delaware County Trust Co. v. Haser*, 199 Pa. St. 17, 48 Atl. 694, 85 Am. St. Rep. 763; *Farmers, etc., Bank v. Rathbone*, 26 Vt. 19, 58 Am. Dec. 200.

⁷⁶ *Oriental Financial Corp. v. Overend*, L. R. 7 Ch. 142; *Scott v. Scruggs*, 60 Fed. 721, 23 U. S. App. 280, 9 C. C. A. 246; *Branch Bank v. James*, 9 Ala. 949; *Stewart v. Parker*, 55 Ga. 656; *Lauman v. Nichols*, 15 Ia. 161; *Neel v. Harding*, 2 Met. (Ky.) 247; *Fuller v.*

Quesnel, 63 Minn. 302, 65 N. W. 634; *Smith v. Clopton*, 48 Miss. 66; *O'Howell v. Kirk*, 41 Mo. App. 523; *Parsons v. Harrold*, 46 W. Va. 122, 32 S. E. 1002. See also *Edwin v. Lancaster*, 6 B. & S. 571; *Wheat v. Kendall*, 6 N. H. 504; *Westervelt v. Frech*, 33 N. J. Eq. 451; *Shelton v. Hurd*, 7 R. I. 403; *Zapalac v. Zapp*, 22 Tex. Civ. App. 375, 54 S. W. 938.

⁷⁷ *Union Mutual Life Ins. Co. v. Hanford*, 143 U. S. 187, 191, 12 S. Ct. 437, 36 L. Ed. 118; Mr. Justice Gray said: "The rule applies whenever the creditor gives time to the principal, knowing of the relation of principal and surety, although he did not know of that rela-

It seems probable, however, that the Uniform Negotiable Instruments Act, which now has been passed in most of the United States, reverses, so far as negotiable instruments are concerned, the rule of suretyship generally established, and permits a creditor to covenant not to sue or to forbear proceeding against one of several persons jointly liable on the instrument, though the covenantee is the principal debtor and known to be such, and the creditor's rights against the surety are not in terms reserved.⁷⁸

§ 341. Whether consideration received from one co-debtor must be credited in proceedings against another.

If it be assumed that an agreement made by a creditor with a joint, or a joint and several debtor, does not discharge the remaining debtors, either on the technical principles of the common law governing joint debtors, or on the principles of suretyship, it may still be asked are these remaining debtors entitled to credit for the consideration paid by the debtor who received a covenant or qualified release, or are they liable for the whole debt without deduction? The answer to this question seems to depend on the terms of the agreement made by the creditor. If A. and B. are jointly liable to C. for \$100, C. may covenant not to sue A. in consideration of the payment of \$25 on the debt, or in consideration of the payment of a separate and additional sum of \$25; just as a creditor may agree to forbear suing an individual debtor in consideration of the payment of part of the debt or in consideration of an additional sum.⁷⁹ But in the absence of clear evidence of a contrary intention, where a creditor covenants not simply for temporary forbearance, but permanently never to sue one of several debtors, it should be presumed that the payment made by that debtor

tion at the time of the original contract; *Ewin v. Lancaster*, 6 B. & S. 571; *Oriental Financial Corporation v. Overend*, L. R. 7 Ch. 142, and L. R. 7 H. L. 348; *Wheat v. Kendall*, 6 N. H. 504; *Guild v. Butler*, 127 Mass. 386; or even if that relation has been created since that time. *Oakeley v. Pasheller*, 4 Cl. & Fin. 207, 233; s. c. 10 Bligh (N. S.)

548, 590; *Colgrove v. Tallman*, 67 N. Y. 95, 23 Am. Rep. 90; *Smith v. Sheldon*, 35 Mich. 42, 24 Am. Rep. 529." Quoted with approval in *Scott v. Scruggs*, 60 Fed. 721, 725, 23 U. S. App. 280, 9 C. C. A. 246.

⁷⁸ See *supra*, § 339, and *infra*, § 1260.

⁷⁹ See *supra*, § 136; *Langdell, Summary of Contracts*, § 54, p. 70.

in consideration for the covenant is a payment on account of the debt, and therefore to that extent the debt is discharged as to all the debtors.⁸⁰

§ 342. Rights of a co-debtor who has received a covenant that he shall not be sued, or a qualified release.

The effect of a covenant not to sue one of several co-debtors or of a release of one with a reservation of rights against the others has been considered from the aspect of the creditor. The same question may be considered from the aspect of the debtor who has received the covenant or release; and it may be premised that if the undischarged co-debtors are forced by any means without their consent to pay more than their share of the debt, they can in turn enforce a claim for contribution against the debtor or debtors who received the covenant or qualified release.⁸¹ What then are the rights of a debtor dis-

⁸⁰ See *Carroll v. Corbitt*, 57 Ala. 579; *New York Bank Note Co. v. Kidder Press Mfg. Co.*, 192 Mass. 391, 408, 78 N. E. 463, and the following cases where the original liability was in tort: *Chicago &c. R. Co. v. Hines*, 82 Ill. App. 488; *O'Neil v. National Oil Co.*, 231 Mass. 20, 120 N. E. 107; *Knapp v. Roche*, 94 N. Y. 334; *Smith v. Dixie Parke &c. Co.*, 128 Tenn. 112, 119, 157 S. W. 900; *Pogel v. Meilke*, 60 Wis. 248, 18 N. W. 927. In *Dwy v. Connecticut Co.*, 89 Conn. 74, 95, 92 Atl. 883, L. R. A. 1915 E. 800, the court said: "Full satisfaction is in itself a bar to further recovery. *Ayer v. Ashmead*, 31 Conn. 447, 452, 83 Am. Dec. 154. When the right of action is once satisfied it ceases to exist. If part satisfaction has already been obtained, further recovery can only be had of a sufficient sum to accomplish satisfaction. Anything received on account of the injury inures to the benefit of all, and operates as payment *pro tanto*. This is the familiar rule where consideration has been received in return for covenants not to sue or in part payment, and it is the logical and reasonable one. *Snow v.*

Chandler, 10 N. H. 92, 95, 34 Am. Dec. 140; *Chamberlin v. Murphy*, 41 Vt. 110, 119; *Bloss v. Plymale*, 3 W. Va. 393, 409, 100 Am. Dec. 752; *Ellis v. Esson*, 50 Wis. 138, 154, 6 N. W. 518, 36 Am. Rep. 830; *Musolf v. Duluth Edison Electric Co.*, 108 Minn. 369, 122 N. W. 499, 24 L. R. A. (N. S.) 451. In *Nashville Interurban R. v. Gregory*, 137 Tenn. 422, 193 S. W. 1053, the court, however, refused to require a credit by the plaintiff in favor of the defendant of a sum received from another joint tortfeasor in exchange for a covenant not to sue. The court somewhat confused the two distinct questions as to whether a covenant not to sue extinguished the cause of action, and whether a payment received for such a covenant should be regarded as part payment on account of the joint liability of the tortfeasors. It is expressly provided in some of the statutes referred to *supra*, § 336, that credit shall be given for payments by a joint debtor.

⁸¹ *Hutton v. Eyre*, 6 Taunt. 289; *Price v. Barker*, 4 E. & B. 760, 780.

charged by the creditor, but thus forced to contribute by a co-debtor? The answer would seem to depend upon the construction of the covenant or release which he has received from his creditor. It seems possible for a creditor to covenant with a debtor that not only shall the covenantee be free from direct liability to the creditor, but also that he shall not be made indirectly liable by being forced to contribute on account of payments made by his co-debtors. If such is the true meaning of a creditor's covenant, the covenantee when forced to contribute by the other debtors would have an action at law against the covenantor to recover the amount of his contribution, and in order to avoid circuitry of action the covenantee would be entitled to relief in equity as well as at law for the substantial enforcement of the covenant:

"The intention of the parties is carried out by allowing the creditor to take payment [judgment?] at law, leaving the party who holds the covenant to his remedy in equity for a specific performance, by which he is fully protected, not only from paying more directly, but if there be sureties, by restraining the creditor from collecting any amount out of them, because that would subject him [the covenantee] to their action, and thus indirectly violate the covenant, or if there be other principal obligors, by restraining the collection of any more than an *aliquot* part of the debt, or any amount that would subject the party [covenantee] to an action for contribution." ⁸²

But this is not the necessary construction of a covenant not to sue. It is questionable whether such a covenant can be extended by implication to mean that the covenantee shall not be sued by anyone on account of the debt.⁸³ Certainly, if the

⁸² Russell v. Adderton, 64 N. C. 417. Quoted with approval in Craven v. Freeman, 82 N. C. 361, 365. See also Kirby v. Taylor, 6 Johns. Ch. 242, 253, where Chancellor Kent construed a covenant not to sue one joint obligor as amounting in effect to an agreement to discharge that obligor and also to discharge a surety from liability for his debt.

⁸³ The implication was held not permissible in Mallet v. Thompson, 5 Esp. 178 (1804); and this conclusion seems necessarily involved in any unqualified statement that a covenant not to sue one joint debtor does not discharge the others, for if such a covenant were construed as meaning that the covenantee should be sued by no one, to avoid circuitry of action the cov-

creditor by his covenant or release expressly reserves his right against the other co-debtors, the agreement must then necessarily be construed as binding the creditor to refrain only from direct proceedings against the debtor who receives the covenant or release, but not to hold that debtor harmless from such liability as may come to him indirectly after the debt has been enforced against his co-debtors. As has been seen, even though the debtor receiving the covenant or release is known to be the principal debtor, a right may be reserved against the co-debtors though known to be merely sureties.⁸⁴ And the enforcement by the sureties of their right to indemnification against their principal will give the latter no right against the creditor, "for, when the right is reserved, the principal debtor cannot say it is inconsistent with giving him time that the creditor should be at liberty to proceed against the sureties, and that they should turn round upon the principal debtor, notwithstanding the time so given him; for, he was a party to the agreement by which that right was reserved to the creditor and the question whether or not the surety is informed of the arrangement is wholly immaterial."⁸⁵

But even where the creditor expressly reserves a right against other co-debtors than the one released, and therefore may in a circuitous manner compel the one released to pay a portion of the debt, by rendering him liable to a suit for contribution, or indemnity, it seems the creditor would be liable for breach of covenant if he himself should levy execution directly on the debtor to whom he had given a release.⁸⁶

enantor in some cases at least ought not to be allowed to sue the others. See *supra*, § 338.

⁸⁴ *Bateson v. Gosling*, L. R. 7 C. P. 9. And see cases cited *infra*, § 1230.

⁸⁵ *Bateson v. Gosling*, L. R. 7 C. P. 9, 15 (1871). To the same effect are *Nevill's Case*, L. R. 6 Ch. 43, 47; *Parmelee v. Lawrence*, 44 Ill. 405, 411.

⁸⁶ In *Solly v. Forbes*, 2 B. & B. 38, the action was brought against joint debtors Forbes and Ellerman; the latter had been given by the creditors a release with a proviso reserving all

rights against Forbes. The counsel for the defendant urged that this release discharged the claim altogether, but the counsel for the plaintiff argued (at page 45): "The present suit is quite consistent with the provisoes, for Ellerman is sued jointly with Forbes on a joint debt; Ellerman is only joined for conformity, and if he or his property be taken in execution, he has his remedy by an action for damages on this deed, taking it as a covenant not to sue." To this part of the argument the court in its opinion said: "It is

§ 343. Discharge of a joint right by one obligee destroys the right of all.

Since each of several joint obligees is interested in the entire claim, he has power to discharge the entire claim either by release⁸⁷ or by an accord and satisfaction;⁸⁸ and so a payment of the whole debt to one obligee discharges it;⁸⁹ and a tender to one is legally a tender to all.⁹⁰ Where money is lent by several persons to another, the general rule in equity, however, is that they will be regarded *prima facie* as tenants in common, both of the claim and of any securities for it.⁹¹ "Though they take a joint security, each means to lend his own money and take back his own."⁹² But in speaking of this doctrine of equity, the English Court of Appeals has said: "It is obvious that this proposition cannot be put higher than a presumption capable of being rebutted. If the money, supposing it to have been lent, were trust money, the presumption of a tenancy in common on the part of the two trustees could not, as it seems to us, arise. Survivorship is essential for the purposes of trusts and so there may be a variety of circumstances which may settle the question either one way or the other. In the present case we do not even know whether the bond was for money lent, or what was the groundwork of the obligation, and it is clear that if the presumption is that the interest in this obligation belonged in equal portions in severalty to the two plaintiffs, the plaintiff who was settled with by the accord and satisfaction has been paid his half, at all events, and it cannot be recovered again in this action."⁹³ The court therefore held that a de-

not necessary now to say anything as to any ulterior remedy the defendant may have or suppose himself to have:— In this respect he will act as he may be advised, and as circumstances may seem to require."

⁸⁷ *Rawstorne v. Gandell*, 15 W. & M. 304; *Myrick v. Dame*, 9 Cush. 248; *Napier v. McLeod*, 9 Wend. 120.

⁸⁸ *Wallace v. Kelsall*, 7 M. & W. 264; *Husband v. Davis*, 10 C. B. 645; *United States v. Bacon*, 14 Blatch. 279; *Osborn v. Martha's Vineyard R. R. Co.*, 140 Mass. 549, 5 N. E. 486.

⁸⁹ *Bowes v. Seeger*, 8 W. & S. 222;

Allen v. South Penn Oil Co., 72 W. Va. 155, 77 S. E. 905.

⁹⁰ *Hoover v. Wolfe*, 167 Cal. 337, 139 Pac. 794; *Flanigan v. Seelye*, 53 Minn. 23, 55 N. W. 115; *Carman v. Pultz*, 21 N. Y. 547.

⁹¹ *Petty v. Styward*, Eq. Cas. Abr. 290; *Rigden v. Vallier*, 2 Ves. Sr. 252, 258; *Morely v. Bird*, 3 Ves. 628, 631; *Steeds v. Steeds*, 22 Q. B. D. 537; *Powell v. Brodhurst*, [1901] 2 Ch. 160.

⁹² *Morely v. Bird*, 3 Ves. 628, 631 (Lord Alvanley).

⁹³ *Steeds v. Steeds*, 22 Q. B. D. 537, 541.

fence of accord and satisfaction with one joint obligee could not be stricken out by equity but must be amended by such a statement of the material facts as would enable the court to judge whether the right should be treated as joint and therefore wholly discharged, or as several, in which case half only would have been discharged. But even though a release of a joint right by one obligee is made in the exercise of clear legal power, it would seem that if the release were intended and known to be intended as a fraud on the rights of other obligees, the obligor could not be allowed to set up his legal defence as a bar to an action by the defrauded obligee.⁹⁴ Just as a legal discharge of a debt is invalid where the creditor knows that the claim against him has been assigned⁹⁵ so here, a legal discharge by one obligee should be equally unavailable. It may be, also, that a joint obligation of two or more trustees with reference to the trust property cannot be discharged by payment to one of them even though the payment is made in good faith.⁹⁶

§ 344. Survivorship of joint rights and duties.

If one of several joint obligors dies, the law, following the analogy of survivorship in joint estates in land, has held from an early day and still holds that the whole duty devolves upon the surviving obligors.⁹⁷ If all the joint obligors die the obli-

⁹⁴ Griffith on Joint Rights and Liabilities, page 34; *W. D. Reeves Lumber Co. v. Davis*, 124 Ark. 143, 187 S. W. 171.

⁹⁵ See *infra*, § 433.

⁹⁶ In *Lee v. Sankey*, L. R. 15 Eq. 204, the defendants, a firm of solicitors, had been entrusted, with a sum of money to hold pending final instructions from two trustees. No investment was made but the defendants at various times repaid the money to one of the trustees supposing him authorized to act on behalf of both. He was not so authorized, and the defendants were held liable, *Bacon, V. C.*, saying (at p. 210): "the money having been placed in the Defendants' hands by the two trustees, they can only be discharged of such moneys by the

joint receipt or by the joint authority of the two persons who had so entrusted the Defendants." The court distinguishes the case of *Charlton v. Durham*, 4 Ch. App. 433, on the ground that there the persons jointly entitled were executors, and the receipt of one executor was sufficient. It is not intimated that the situation in *Lee v. Sankey* would have been otherwise if the money due from the defendants had been a debt instead of a trust, but it cannot be admitted that payment of a debt in good faith to one trustee is not a discharge of the right of two or more joint trustees. *Bowes v. Seeger*, 8 W. & S. 222.

⁹⁷ *Osborne v. Crosbern*, 1 Sid. 238; *Calder v. Rutherford*, 3 B. & B. 302; *Richards v. Heather*, 1 B. & Ald. 29;

gation rests upon the executor or administrator of the last survivor.⁸⁸ To this, however, an exception must be stated if a contract is personal in its character and requires for its performance the action of all the obligors. The death of one will discharge all from liability.⁸⁹

Survivorship also applies to joint obligees. If one of them die, the entire right vests in the survivors;¹ and if all the obligors die, the right vests in the personal representatives of the last survivor.² In the case of obligees also a contract may be so personal in its character as to preclude survivorship. Thus the contract of a theatrical agent to employ three persons for a performance, in which they were all to take part, could not be enforced by the survivors, if one should die. The rule of survivorship especially, as applied to joint obligors, frequently works injustice. Although the rule did not preclude a surviving obligor, or the estate of a surviving obligor, which had been compelled to pay the whole of the obligation, from obtaining contribution or indemnification from the estates of the deceased co-obligors,³ the creditor might be deprived of all redress if all obligors died who were pecuniarily responsible. In the United States, equity relieves this hardship by allowing the creditor a remedy against the estate of the deceased joint obligor.⁴ To this doctrine of equity is due the state-

Moore v. Rogers, 19 Ill. 347; Stevens v. Catlin, 152 Ill. 56, 37 N. E. 1023; Babcock v. Farwell, 245 Ill. 14, 44, 91 N. E. 683, 137 Am. St. Rep. 284; McIntosh v. Zaring, 150 Ind. 301, 49 N. E. 164; Foster v. Hooper, 2 Mass. 572; Lee v. Blodget, 214 Mass. 374; 102 N. E. 67; Yorks v. Peck, 14 Barb. 644; Chamberlain v. Dunlop, 126 N. Y. 45, 26 N. E. 966, 22 Am. St. Rep. 807; McLaughlin v. Head, 86 Oreg. 361, 168 Pac. 614; Hogan v. Sullivan, 79 Vt. 36, 64 Atl. 234.

⁸⁸ Bulkley v. Wright, 2 Root, 10.

⁸⁹ Thus a death of one member of the firm discharges a contract by the firm to employ a servant. See *supra*, § 316; *infra*, § 1941.

¹ *Jell v. Douglas*, 4 B. & Ald. 374; *Vandenhauvel v. Storrs*, 3 Conn. 203;

Supreme Lodge, K. & L. of Honor v. Portingall, 167 Ill. 291, 47 N. E. 203, 59 Am. St. Rep. 296; *Babcock v. Farwell*, 245 Ill. 14, 44, 91 N. E. 683; *Semper v. Coates*, 93 Minn. 76, 100 N. W. 662; *Amarillo Nat. Bank v. Harrell* (Tex. Civ. App.), 159 S. W. 858.

² *Rolls v. Yate*, Yelv. 177; *Anderson v. Martindale*, 1 East, 497; *Park v. Parker*, 216 Mass. 405, 406, 103 N. E. 936; *Stowells v. Drake*, 3 Zab. (N. J. Eq.) 310. See *Babcock v. Farwell*, 245 Ill. 14, 44, 91 N. E. 683, 137 Am. St. Rep. 284.

³ See *infra*, § 345.

⁴ See the following notes. The same result is sometimes attained by statute. *McClaskey v. Barr*, 79 Fed. 408 (Ohio); *White v. Connecticut General Life*

ment often made, that joint obligations are treated in equity as joint and several. But this statement is inaccurate, for equity never charged the estate of the deceased joint obligor unless either because of fraud, ignorance, or mistake, the parties failed to create a joint and several liability when such was their intention;⁵ or where the deceased joint obligor shared in the consideration or benefit for which the obligation was given.⁶ Where the deceased obligor is merely a surety, his death destroys all remedy of the obligee against his estate in equity as well as at law.⁷ And even where the deceased joint obligor shared in the consideration his estate cannot be held until it is shown that the creditor has no effective redress against the surviving obligor.⁸ In England unless the joint obligation is that of a partnership the creditor has no relief against the estate of a deceased joint obligor even though he was not a surety, and the claim cannot be collected from the survivor.⁹ By modern statutes it is sometimes broadly provided that all contracts which by the common law are joint shall be construed as joint and several.¹⁰

§ 345. Contribution.

Though a creditor may exact full payment of the whole

Ins. Co., 34 App. D. C. 460; *Hogan v. Sullivan*, 79 Vt. 36, 64 Atl. 234; *Brownfield v. Holland*, 63 Wash. 86, 114 Pac. 890. But such a statute does not prevent the surviving obligors also from being jointly liable for the whole debt. *Lee v. Blodget*, 214 Mass. 374, 102 N. E. 67.

⁵ *Pickersgill v. Lahens*, 15 Wall. 140, 144, 21 L. Ed. 119.

⁶ *Ibid.* See also *Cox v. Maddux*, 72 Ind. 206; *Waters v. Riley*, 2 H. & G. 305; *Barnes v. Brown*, 130 N. Y. 372; *Hengst's App.*, 24 Pa. 413.

⁷ *Towers v. Moor*, 2 Vern. 98; *Simpson v. Vaughan*, 2 Atk. 31; *Pickersgill v. Lahens*, 15 Wall. 140, 21 L. Ed. 119; *Olmsted v. Olmsted*, 38 Conn. 309; *Davis v. Van Buren*, 72 N. Y. 587; *Richardson v. Draper*, 87 N. Y. 337; *Douglass v. Ferris*, 138 N. Y. 192, 207, 33 N. E. 1041, 34 Am. St. Rep. 435.

⁸ *In re Burdick*, 79 N. Y. Misc. 167, 140 N. Y. S. 582.

⁹ *Sumner v. Powell*, 2 Mer. 30; *Clarke v. Bickers*, 14 Sim. 639; *Wilmer v. Currey*, 2 De G. & Sm. 347; *Jones v. Beach*, 2 De G. M. & G. 886, 889; *Other v. Iveson*, 3 Drew. 177, 182; *Beresford v. Browning*, L. R. 20 Eq. 564, 569. See also *Richardson v. Horton*, 6 Beav. 185.

¹⁰ *Bank of Topeka v. Eaton*, 95 Fed. 355 (Mass. decision on Kansas Statute); *Gummer v. Mairs*, 140 Cal. 535, 74 Pac. 26 (if all the obligors receive some benefit from the consideration); *Powell v. Kettelle*, 6 Ill. 491; *Hudelson v. Armstrong*, 70 Ind. 99; *Rose v. Williams*, 5 Kans. 483; *Mays v. Cockrum*, 57 Tex. 352; *Bergstroem v. State*, 58 Tex. 92; *Donnerberg v. Oppenheimer*, 15 Wash. 290, 46 Pac. 254.

debt, by levy of execution or otherwise, from one only of those severally or jointly, or jointly and severally, liable to him, and cannot be compelled to confine his resort to each to that amount which as between one another each debtor ought to pay, an obligor who is compelled by the creditor to pay in excess of the share, proper as between himself and his co-debtors, is entitled to contribution or indemnification from the other obligors according to his contract or relation with them. The obligors before entering into the obligation may have made a special contract with one another as to the shares in which the liability should ultimately be borne by them.¹¹ If they made no such contract it will be inferred that their shares are in proportion to their interest in the matter. Accordingly if the transaction was wholly for the benefit of one of the obligors and the others were sureties, the former should discharge the whole debt, and if any of the latter have been forced to pay anything upon the obligation it can be recovered by him from the principal debtor. As between obligors who are equally interested or equally without interest the duty to bear the burden is equal, and contribution will be enforced in favor of one who has paid more than his proportion against others who have paid less.¹² But in the case of a partner who has paid personally a partnership liability, contribution will not be enforced against his co-partners, since on settlement of the whole partnership the balance might be against the partner who has made the payment.¹³ If a debtor jointly liable with

¹¹ See for instances of such contracts, *Williams v. Riehl*, 127 Cal. 365, 59 Pac. 762, 78 Am. St. Rep. 60; *Crane v. Bayley*, 126 Mich. 323, 85 N. W. 874; *Armitage v. Pulver*, 37 N. Y. 494.

¹² *Marsack v. Webber*, 6 H. & N. 1; *Lowe v. Dixon*, 16 Q. B. D. 455; *Comstock v. Potter*, 191 Mich. 629, 158 N. W. 102; *Allen v. Garner*, 45 Utah, 39, 143 Pac. 228; *In re Koch's Estate*, 148 Wis. 548, 134 N. W. 663. See also cases cited in this section, *passim*, and *infra*, §§ 1277 *et seq.* As to right of subrogation see *infra*, 1271.

¹³ *Brown v. Tapscott*, 6 M. & W. 119; *Sedgwick v. Daniell*, 2 H. & N. 319; *Pollard v. Stanton*, 5 Ala. 451; *DeJarnette v. McQueen*, 31 Ala. 230, 68 Am. Dec. 164; *Ross v. Cornell*, 45 Cal. 133; *Price v. Drew*, 18 Fla. 670; *Crossley v. Taylor*, 83 Ind. 337; *Lawrence v. Clark*, 9 Dana, 257, 35 Am. Dec. 133; *Phillips v. Blatchford*, 137 Mass. 510; *Glynn v. Phetteplace*, 26 Mich. 383; *Cockrell v. Thompson*, 85 Mo. 510; *Younglove v. Liebhardt*, 13 Neb. 557, 14 N. W. 526; *Harris v. Harris*, 39 N. H. 45; *Booth v. Farmers' &c. Bank*, 74 N. Y. 228; *Fulton's Appeal*, 95 Pa. St. 323; *Merriwether v. Hardeman*,

others dies, his estate remains liable to contribute what is equitably due to his co-debtors who discharge the obligation, in view of the original agreement of the debtors with one another, or of their respective interests.¹⁴

It has been frequently laid down that no right to contribution in favor of a joint debtor exists until actual payment by him of more than the share of the whole debt which, as between himself and those from whom he seeks contribution, he ought to pay;¹⁵ but where judgment has been rendered against a co-debtor for more than his share it seems that he may by an equitable proceeding in which the creditor is made a party have the other co-debtors compelled to pay their proper shares of the judgment.¹⁶

The right of two or more joint debtors to recover for an excessive amount paid by them is a joint right which they can enforce against a co-debtor in an action in which those who paid are all joined as plaintiffs, provided payment was made by them jointly;¹⁷ but for payments made severally by joint debtors, they must sue severally for contribution.¹⁸ The obligation of each joint debtor who has not paid his share to contribute to those who have paid more than their share is a several obligation;¹⁹ but resort may be had to a court of equity where the parties are numerous or the facts are complicated, and all persons from whom or to whom contribution is due

51 Tex. 436; Kendrick v. Tarbell, 27 Vt. 512; Tomlinson v. Nelson, 49 Wis. 679, 6 N. W. 366.

¹⁴ Prior v. Hembrow, 8 M. & W. 873; Ashby v. Ashby, 7 B. & C. 444, 449, 451; Batard v. Hawes, 2 E. & B. 287, 298.

¹⁵ *Ex parte* Snowden, 17 Ch. D. 44; Gardner v. Brooke, [1897] 2 Ir. Rep. 6; Washington v. Norwood, 128 Ala. 383, 30 So. 405; Cornett v. Holcomb, 23 Ky. Law Rep. 34, 62 So. 477; Backus v. Coyne, 45 Mich. 584, 8 N. W. 694; Yore v. Yore, 240 Mo. 451, 144 S. W. 847; Gourdin v. Trenholm, 25 S. C. 362. But giving negotiable paper by one debtor if accepted by the creditor as absolute payment gives a right to contribution. Bayne v. Greiner's Est.,

118 Minn. 350, 136 N. W. 1041, and see *infra*, §§ 1277 *et seq.*

¹⁶ Wolmershausen v. Gullick, [1893] 2 Ch. 514. See *infra*, § 1275.

¹⁷ Dussol v. Bruguere, 50 Cal. 456; Clapp v. Rice, 15 Gray, 557, 77 Am. Dec. 387; Weeks v. Parsons, 176 Mass. 570, 58 N. E. 157; Fletcher v. Jackson, 23 Vt. 581, 56 Am. Dec. 98.

¹⁸ Kelby v. Steel, 5 Esp. 194; Graham v. Robertson, 2 T. R. 282; Birkley v. Presgrave, 1 East, 220, 226; Lombard v. Cobb, 14 Me. 222; Fletcher v. Grover, 11 N. H. 368, 35 Am. Dec. 497; Prescott v. Newell, 39 Vt. 82.

¹⁹ Cowell v. Edwards, 2 B. & P. 268; Powell v. Matthias, 4 Ired. L. 83, 40 Am. Dec. 427; Fletcher v. Jackson, 23 Vt. 581, 56 Am. Dec. 98.

may be joined as defendants.²⁰ A joint debtor who has paid more than his share is not generally held entitled at law to enlarge the liability of some of the remaining joint debtors because others are insolvent;²¹ but in equity the insolvent debtors may be disregarded in making the calculation.²² So parties bound to contribute who are not within the jurisdiction will not be regarded by a court of equity in the calculation;²³ and in some jurisdictions the equitable rule has been applied at law.²⁴ The subject of contribution between co-sureties is further considered in a later chapter.²⁵ It may be added finally to avoid misapprehension, that no right of contribution exists between joint tortfeasors who are in *pari delicto*.²⁶

§ 346. Effect of a new promise or part payment by a joint or joint and several debtor on the statute of limitations.

Lord Mansfield held in an early case that a "payment by one joint debtor is payment for all, the one acting, virtually, as agent for the rest; and, in the same manner, an admission by one is an admission by all; and the law raises the promise to pay when the debt is admitted to be due."²⁷

²⁰ *New England Trust Co. v. New York Belting Co.*, 166 Mass. 42, 43 N. E. 928; *Cuyler v. Ensworth*, 6 Paige, 32.

²¹ *Browne v. Lee*, 6 B. & C. 689; *Cowell v. Edwards*, 2 B. & P. 268; *Batard v. Hawes*, 2 E. & B. 287; *Moore v. Bruner*, 31 Ill. App. 400; *Chaffee v. Jones*, 19 Pick. 260, 265; *Powell v. Matthis*, 4 Ired. L. 83, 40 Am. Dec. 427; *Gross v. Davis*, 87 Tenn. 226, 230, 11 S. W. 92.

²² *Cowell v. Edwards*, 2 B. & P. 268; *Hitchman v. Stewart*, 3 Drew, 271; *Ramskill v. Edwards*, 31 Ch. D. 100; *Burroughs v. Lott*, 19 Cal. 125; *Security Ins. Co. v. St. Paul & Co. Ins. Co.*, 50 Conn. 233; *Young v. Lyons*, 8 Gill, 162, 166; *Gross v. Davis*, 87 Tenn. 226, 11 S. W. 92, 10 Am. St. Rep. 635; *Twitchell v. Askew* (Tex. Civ. App.), 141 S. W. 1072; *Preston v. Preston*, 4 Gratt. 88, 47 Am. Dec. 717; *Cummings*

v. May, 91 Ala. 233, 8 So. 790. See also *Young v. Clark*, 2 Ala. 264.

²³ *Security Ins. Co. v. St. Paul & Co. Ins. Co.*, 50 Conn. 233; *Whitman v. Porter*, 107 Mass. 522; *Boardman v. Paige*, 11 N. H. 431; *McKenna v. George*, 2 Rich. Eq. 15.

²⁴ *Michael v. Allbright*, 126 Ind. 172, 25 N. E. 902; *Boardman v. Paige*, 11 N. H. 431; *Mills v. Hyde*, 19 Vt. 59, 46 Am. Dec. 177; *Liddell v. Wisnell*, 59 Vt. 365, 8 Atl. 680. In England since the Judicature Act, 36 & 37 Vict., c. 66, s. 25, the equity rule prevails in all cases. *Lowe v. Dixon*, 16 Q. B. D. 455. And in States in this country where procedure at law and that in equity are assimilated, the same result may be expected.

²⁵ See *infra*, §§ 1277 *et seq.*

²⁶ See *infra*, §§ 1026, 1631.

²⁷ *Whitcomb v. Whiting*, 2 Doug.

There is nothing in the inherent nature of joint indebtedness which should warrant the conclusion that one joint debtor may by a new promise bind his co-obligors. The question should, on principle, depend upon the authority in fact of the promisor to act as agent for his co-obligors. In deciding such a question of fact it may be a highly material circumstance that the joint obligors are partners, and other circumstances from which an inference of actual or apparent authority may be drawn will be similarly important. If, however, Lord Mansfield's ruling is adopted to its full extent, all these questions become immaterial. In every case the payment or new promise of one joint, or joint and several obligor will have the same effect as if jointly made by all. This was the law in England²⁸ until changed by statute,²⁹ by virtue of which the right of one joint debtor to bind another by a new promise or part payment is dependent upon authority in fact.³⁰

In America the tendency has been strongly away from the early law laid down by Lord Mansfield. In a very few jurisdictions the old rule may perhaps prevail.³¹ Generally, however, after a debt is already completely barred by the statute,

662. This ruling of Lord Mansfield was contrary to that in an early case. *Bland v. Haselrig*, 2 Vent. 151.

²⁸ *Wood v. Braddick*, 1 Taunt. 104 (an acknowledgment by one partner after dissolution); *Burleigh v. Stott*, 8 B. & C. 36; *Pease v. Hirst*, 10 B. & C. 122; *Dowling v. Ford*, 11 M. & W. 329; *Fordham v. Wallis*, 10 Hare, 217.

²⁹ The Statute of Frauds Amendment Act (1828), § 1, provided that no written acknowledgment or promise by one joint debtor should bind the others, and the Mercantile Law Amendment Act (1856), § 14 provided that no payment of principal or interest by one co-debtor should bind another.

³⁰ *Watson v. Woodman*, L. R. 20 Eq. 721; *In re Tucker*, [1894] 3 Ch. 429.

³¹ *Bound v. Lathrop*, 4 Conn. 336, 10 Am. Dec. 147 (*cf.* later Connecticut decisions cited in subsequent notes);

Austin v. Bostwick, 9 Conn. 496, 25 Am. Dec. 42; *Casebolt v. Ackerman*, 46 N. J. L. 169; *Turner v. Ross*, 1 R. I. 88. In the three decisions last cited the debt was not barred at the time of the new promise, but the court does not seem to rely on this distinction. (*Cf.* with the last decision *Woonsocket Inst. v. Ballou*, 16 R. I. 351, 16 Atl. 144.) Lord Mansfield's rule formerly prevailed in Maine and Massachusetts, North Carolina and Vermont, *White v. Hale*, 3 Pick. 291, 15 Am. Dec. 209; *Colburn v. Averill*, 30 Me. 310; *Wellman v. Southard*, 30 Me. 425; *Cady v. Shepherd*, 11 Pick. 400, 22 Am. Dec. 379; *Vinal v. Burrill*, 16 Pick. 401; *Ilseley v. Jewett*, 2 Metc. 168; *McIntire v. Oliver*, 2 Hawks, 209, 11 Am. Dec. 760; *Wheelock v. Doolittle*, 18 Vt. 440, 46 Am. Dec. 163; *Noyes v. Cushman*, 25 Vt. 390, but in these States has been changed by statute.

one joint, or joint and several debtor without authority from his co-debtors cannot revive the obligation. Thus after dissolution of a partnership, one partner cannot bind others by new promise or part payment.³² And there seems no reason, on principle or authority, to give any greater force to the acts of a joint debtor, who is not a partner, in the absence of evidence showing actual authority.³³ There seems, on principle, little reason to distinguish a case where the new promise or part payment is made before the statute has run. During the continuance of a partnership there can be no doubt of the implied authority of one partner thus to prolong the statutory period;³⁴ but there seems no reason to infer such authority in the case of a joint debtor who is not in partnership with his co-debtors,³⁵ or in case of a partner after dissolution. It is true that a joint debtor, even in these cases, may properly make full payment or promise of it, and if he pays exact contribution from his co-debtor because the debtor who paid was bound to pay the joint obligation. But it is the inference

³² *Bell v. Morrison*, 1 Pet. 351, 373-4, 7 L. Ed. 174; *Wilson v. Torbert*, 3 Stew. 296, 21 Am. Dec. 632; *Espy v. Comer*, 76 Ala. 501; *Burr v. Williams*, 20 Ark. 171; *Bissell v. Adams*, 35 Conn. 299, 302; *Conkey v. Barbour*, 22 Ind. 196; *Merritt v. Pollys*, 16 B. Mon. 355, 357; *Walsh v. Cane*, 4 La. Ann. 533; *Ellicott v. Nichols*, 7 Gill, 85, 48 Am. Dec. 546; *Newman v. McComas*, 43 Md. 70; *Wilmer v. Gaither*, 68 Md. 342, 345, 12 Atl. 253; *Whitney v. Reese*, 11 Minn. 138; *Van Kueren v. Parmelee*, 2 N. Y. 523, 51 Am. Dec. 322 (overruling *Smith v. Ludlow*, 6 Johns. 267); *Bloodgood v. Bruen*, 8 N. Y. 362; *Repert v. Colvin*, 48 Pa. 248 (unless the promisor is liquidating partner of a solvent firm); *Fisher v. Tucker*, 1 McCord Ch. 169; *Steele v. Jennings*, 1 McMull. 297; *Belot's Ex. v. Wayne*, 7 Yerg. 534; *Cocke v. Hoffman*, 5 Lea, 105, 111, 40 Am. Rep. 23, and cases *infra*, n. 36, holding that even before the statute has completely run, one debtor has no power to bind others.

³³ *Lowther v. Chappell*, 8 Ala. 353, 42 Am. Dec. 643; *Myatts v. Bell*, 41 Ala. 222; *State Loan &c. Co. v. Cochran*, 130 Cal. 245, 255, 62 Pac. 466; *Rogers v. Burr*, 105 Ga. 432, 447, 31 S. E. 438, 70 Am. St. Rep. 50; *Kallenbach v. Dickinson*, 100 Ill. 427, 39 Am. Rep. 47; *Dickerson v. Turner*, 12 Ind. 223, 230; *Bottles v. Miller*, 112 Ind. 584, 14 N. E. 728; *Hayman v. Lambden*, 97 Md. 33, 54 Atl. 962; *Briscoe v. Anketell*, 28 Miss. 361, 61 Am. Dec. 553; *Mayberry v. Willoughby*, 5 Neb. 368, 25 Am. Rep. 491; *Omaha Sav. Bank v. Simeral*, 61 Neb. 741, 86 N. W. 470; *Exeter Bank v. Sullivan*, 6 N. H. 124; *Bush v. Stowell*, 71 Pa. 208, 10 Am. Rep. 694; *Muse v. Donelson*, 2 Humph. 166, 36 Am. Dec. 309.

³⁴ *Tate v. Clements*, 16 Fla. 339, 354, 26 Am. Rep. 709; *Mann v. Locke*, 11 N. H. 246, 250; *Tappan v. Kimball*, 30 N. H. 136, 141.

³⁵ *Hayman v. Lambden*, 97 Md. 33, 54 Atl. 962.

of a new promise by the other debtor which is here in question and while a new promise on the part of the one who pays is properly be inferred from a part payment, or may be made expressly by one joint debtor, no reason can be found why this promise should bind any one but the debtor who made it. This view prevails in many States,³⁶ but other States hold the new promise or payment effectual to prolong the debt against all,³⁷ though if the debt were barred when the new

³⁶ *Myatts v. Bell*, 41 Ala. 222; *Curry v. White*, 51 Cal. 530; *Terry v. Platt*, 1 Pennewill, 185, 40 Atl. 243; *Tate v. Clements*, 16 Fla. 339, 28 Am. Rep. 709; *Rogers v. Burr*, 105 Ga. 432, 447, 31 S. E. 438, 70 Am. St. Rep. 50; *McLin v. Harvey*, 8 Ga. App. 360, 69 S. E. 123; *Boynton v. Spafford*, 162 Ill. 113, 44 N. E. 379, 53 Am. St. Rep. 274; *McDonald v. Weidmer*, 103 Ill. App. 390; *Yandes v. Lefavour*, 2 Blackf. 371; *Bottles v. Miller*, 112 Ind. 584, 14 N. E. 728; *Mozingo v. Ross*, 150 Ind. 688, 50 N. E. 867, 41 L. R. A. 612, 65 Am. St. Rep. 387; *Theis v. Wood*, 238 Mo. 642, 142 S. W. 431 (a decision under the law of Kansas); *Terrell v. Rowland*, 86 Ky. 67, 81, 4 S. W. 825; *Gates v. Fisk*, 45 Mich. 522, 8 N. W. 558; *Willoughby v. Irish*, 35 Minn. 63, 27 N. W. 379, 59 Am. Rep. 297; *Pfenninger v. Kokesch*, 68 Minn. 81, 70 N. W. 867; *Monidah Trust v. Kemper*, 44 Mont. 1, 118 Pac. 811; *Mayberry v. Willoughby*, 5 Neb. 368, 25 Am. Rep. 491; *Tappan v. Kimball*, 30 N. H. 136, 141; *Shoemaker v. Benedict*, 11 N. Y. 176, 52 Am. Dec. 95; *Hoover v. Hubbard*, 202 N. Y. 289, 95 N. E. 702; *Cohen v. Diamond*, 132 N. Y. S. 355, 74 Misc. 444; *Hance v. Hair*, 25 Ohio St. 349; *Kerper v. Wood*, 48 Ohio St. 613, 29 N. E. 501, 15 L. R. A. 656; *Wilson v. Waugh*, 101 Pa. 233 (unless the promisor is a liquidating partner); *Meggett v. Finney*, 4 Strobb. L. 220; *Fortune v. Hayes*, 5 Rich. Eq. 112; *Goudy v. Gillam*, 6 Rich. Law, 28; *Muse v. Donelson*, 2 Humph. 166, 36

Am. Dec. 309; *Haddock v. Crocherc*, 32 Tex. 276, 5 Am. Rep. 244; *Carit v. Ludlow Woolen Mills*, 27 Vt. 4 (statutory); *Stubblefield v. McAuli*, 20 Wash. 442, 55 Pac. 637 (cf. *Gehr v. Orlowski*, 36 Wash. 156, 78 Pac. 792; *Conrad v. Buck*, 21 W. Va. 396, 40; *Cowhick v. Shingle*, 5 Wyo. 87, 37 Pac. 689, 25 L. R. A. 608, 63 Am. St. Rep. 17. See also *State Loan Co. v. Cochran*, 130 Cal. 245, 255, 62 Pac. 466, and as to the application of State law by the Federal Courts, *Cronkhite v. Herrin*, 15 Fed. 888; *Bergman v. Bly*, 66 Fed. 40, 27 U. S. App. 650, 13 C. C. A. 319.

³⁷ *Burr v. Williams*, 20 Ark. 171; *Bissell v. Adams*, 35 Conn. 299; *Beardsley v. Hall*, 36 Conn. 270, 4 Am. Rep. 74; *White v. Connecticut Insurance Co.*, 34 App. D. C. 460; *Brewster v. Hardeman*, *Dudley (Ga.)*, 138; *Cox v. Bailey*, 9 Ga. 467, 54 Am. Dec. 358; but see *First Nat. Bank v. Ellis*, 68 Ga. 192; *Rogers v. Burr*, 105 Ga. 432, 447; *McLin v. Harvey*, 8 Ga. App. 360, 69 S. E. 123; *Van Staden v. Kline*, 64 Iowa, 180, 20 N. W. 3; *Wilmer v. Gaither*, 68 Md. 342, 345, 12 Atl. 8, 253; *Hayman v. Lambden*, 97 Md. 33, 54 Atl. 962; *Clinton County v. Smith*, 238 Mo. 118, 141 S. W. 1091, 37 L. R. A. (N. S.) 272; *Merritt v. Day*, 38 N. J. L. 32, 20 Am. Rep. 362; *Casebolt v. Ackerman*, 46 N. J. L. 169; *Wood v. Barber*, 90 N. C. 76; *Turner v. Ross*, 1 R. I. 88; *Fisher v. Tucker*, 1 McCord Ch. 169; *Veale v. Hassan*, 3 McCord L. 278; *Woonsocket Inst. v. Ballou*, 16 R. I. 351, 16 Atl. 144, 1 L. R. A. 555;

promise was made, one debtor would have no power to revive it.

In every jurisdiction if one co-debtor has actual authority to pay or promise on behalf of all, all will be bound. Therefore payment by one joint debtor at the request or by direction of another revives the statute as to the latter;³⁸ and not only actual authority from his co-debtors at the time the new promise is made by one will bind all, but a semblance of authority for which the co-debtors are responsible is certainly sufficient if the new promise is made before the debt is barred. Therefore a partial payment made upon a partnership debt after the dissolution of the firm will suspend the operation of the statute as to other partners in favor of the creditor receiving such payment if he has had dealings with the partnership during its continuance and has had no notice of its dissolution.³⁹ If, however, the new promise is not made until after the debt is barred, no forbearance injurious to the creditor can have been caused by relying on the supposed revival of the debt, and no element of estoppel can prevent those who made no promise from showing that no authority in fact existed, as by proving a dissolution of a partnership, even without proper notice to creditors. Ratification of a payment or new promise made by a co-debtor is as effectual as authority originally given to bind the party ratifying;⁴⁰ but mere contemporary knowledge of payments being made by a co-debtor is not of itself sufficient.⁴¹ Nor will a subsequent verbal

Wheelock v. Doolittle, 18 Vt. 440, 46 Am. Dec. 163; *Mix v. Shattuck*, 50 Vt. 421, 28 Amer. Rep. 511; *In re Smith's Estate*, 43 Oregon, 595, 75 Pac. 133. See also *Emmons v. Overton*, 18 B. Mon. 643.

³⁸ *Pitt v. Hunt*, 6 Lans. 146; *Coleman v. Ward*, 85 Wis. 328, 55 N. W. 695.

³⁹ *Austin v. Bostwick*, 9 Conn. 496, 25 Am. Dec. 42; *Beardsley v. Hall*, 36 Conn. 270, 4 Am. Rep. 74; *Sage v. Ensign*, 2 Allen, 245; *Buxton v. Edwards*, 134 Mass. 567; *Robertson Lumber Co. v. Anderson*, 96 Minn. 527, 105 N. W. 972; *Tappan v. Kimball*, 30

N. H. 136; *Graves v. Merry*, 6 Cow. 701, 16 Am. Dec. 471; *Clement v. Clement*, 69 Wis. 599, 35 N. W. 17, 2 Am. St. Rep. 760. But see *Green v. Baird*, 53 Ill. App. 211; *Tate v. Clements*, 16 Fla. 339, 26 Am. Rep. 709.

⁴⁰ *Granville v. Young*, 85 Ill. App. 167; *McDonald v. Weidmer*, 103 Ill. App. 390; *Pfenninger v. Kokesch*, 68 Minn. 81, 70 N. W. 867; *Whipple v. Stevens*, 22 N. H. 219; *First Nat. Bank of Utica v. Ballou*, 49 N. Y. 155.

⁴¹ *Pfenninger v. Kokesch*, 68 Minn. 81, 70 N. W. 867; *McMullen v. Rafferty*, 89 N. Y. 456; *Littlefield v. Littlefield*, 91 N. Y. 203, 43 Am. Rep.

promise to pay the balance amount to a ratification of a prior payment by a co-debtor, or bind the promisor in a jurisdiction where new promises must be in writing in order to be binding.⁴²

In a number of jurisdictions the whole matter is settled by statutes, which, in effect, generally provide that an admission or a new promise is ineffectual against any one but the party making it, in the absence of actual authority. Some States, however, follow the first English statute on the subject;⁴³ and do not limit the effect of a part payment but only deprive a co-debtor of the power without actual authority to make a promise which will bind others.⁴⁴

663; *Perkins v. Jennings*, 27 Wash. 145, 67 Pac. 590. But see *Granville v. Young*, 85 Ill. App. 167; *McDonald v. Weidmer*, 103 Ill. App. 390.

⁴³ *Pfenninger v. Kokesch*, 68 Minn. 81, 70 N. W. 867.

⁴² See *supra*, n. 29.

⁴⁴ *Vernon County v. Stewart*, 64 Mo. 408, 410, 27 Am. Rep. 250; *Clinton County v. Smith*, 238 Mo. 118, 141 S. W. 1091, 37 L. R. A. (N. S.) 172.

CHAPTER XIII

CONTRACTS FOR THE BENEFIT OF THIRD PERSONS

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§ 347. Nature of contracts for the benefit of a third person.

(A contract in which the promisor engages to the promisee to render some performance to a third person) is generally called a contract for the benefit of a third person with little regard to whether the purpose of the promisee in entering into the contract was his own benefit or the benefit of the person to whom performance was to be rendered. The inherent difficulty of correctly determining the legal rights under such contracts is shown both by the varying attempts at theoretical analysis and the contradictory results reached by the decisions. The intrinsic difficulty of the problem is also shown by the fact that in the Roman Law and the Modern Civil Law, as well as in English and American Law, the questions involved have been a source of trouble and confusion.¹ Any attempt to clear up the confusion must be based in the first place on an understanding and differentiation of several varying types of cases in which third persons may be interested in agreements made between contracting parties.

§ 348. Property rights distinguished from contract rights.

Rights of property may arise simultaneously with the making of a contract, and may be enforced by the owner though

¹ For some examination of the Civil Law on the subject, see 16 Harv. L. Rev.

he was not a party to the contract. His right of action is not based on the law of contracts, but on the law of property. Such a right may be legal or equitable. When a seller ships goods in fulfilment of an order, for instance, the legal title to the goods ordinarily passes to the consignee at the time of shipment, which is the time when the carrier contracts with the consignor to deliver the goods to the consignee. If the carrier loses or misdelivers the goods the consignee can sue the carrier or indeed anyone else who may have dealt with the goods wrongfully, not by virtue of the contract which the carrier has made, but because of his right of property which arose when that contract was made. If, indeed, the liability of the carrier depends wholly on a promise in the bill of lading, then the question must arise, who can sue on contract contained in the bill of lading.² The case of the carrier is typical. Whenever property other than money or negotiable paper payable to bearer is delivered, in accordance with a contract of sale, to a third person for the purchaser, the title will ordinarily pass to the purchaser at that time, and he will acquire a right of action though not a party to the contract made between the seller and bailee.³ The right of property transferred in many cases, however, is equitable. Whenever property is delivered to one person under such circumstances that the legal title passes to him, but he undertakes to deliver that specific property or its proceeds to a third person or use the property for his benefit, the relation of trustee and *cestui que trust* arises.⁴ When money or negotiable paper payable to bearer or indorsed in blank is delivered to another the legal title will generally if not necessarily pass, and the right of the person for whose benefit the delivery is made will be equitable, though in the case of money the appropriate remedy of the *cestui que trust* is ordinarily money had and received.⁵ The fact that the remedy in such

² See Elliott on Railroads, § 1692; Williston on Sales, § 426.

³ See Thomas v. Atkinson, 94 S. Car. 125, 77 S. E. 722.

⁴ Forbes v. Thorpe, 209 Mass. 570, 95 N. E. 955.

⁵ "Whenever one person has in possession money which he cannot con-

scientiously retain from another, the latter may recover it in this form of action, subject to the restriction that the mode of trial and the relief which can be given in a legal action are adapted to the exigencies of the particular case, and that the transaction is capable of adjustment by that proce-

cases is in assumpsit has often blinded courts to the fact that the right of action is not based on principles of contract.⁶ Such rights of property are not generally hard to distinguish from contract rights, though in many cases courts have confused the two. The inquiry whether a specific fund or *res* is to be transferred to the beneficiary furnishes a ready test.⁷ In the early English law prior to the introduction of assumpsit a beneficiary was allowed to enforce a claim through the actions of debt and account as if he had a property right under circumstances where according to modern law he would have neither legal nor equitable title, and it has been ingeniously argued that as *indebitatus assumpsit* was allowed after its introduction wherever a debt existed, the beneficiary should still be permitted to recover in such cases.⁸ But the modern division between contract and property is not based merely on rules of procedure in assumpsit and other actions; but because as matter of substantive law that division is accurate. The equitable rules defining a trust have superseded the old distinctions in debt

dure without prejudice to the interests of third persons. No privity of contract between the parties is required, except that which results from the circumstances." *Roberts v. Ely*, 113 N. Y. 128, 131, 20 N. E. 606. To similar effect see *McKee v. Lamon*, 159 U. S. 317, 322, 40 L. Ed. 165, 16 Sup. Ct. 11; *Nebraska Bank v. Nebraska Hydraulic Co.*, 14 Fed. 763; *Bither v. Packard*, 115 Me. 306, 312, 98 Atl. 929, 932; *Nash v. Commonwealth*, 174 Mass. 335, 337, 54 N. E. 865; *Edwards v. Thoman*, 187 Mich. 361, 153 N. W. 806; *Devries' Estate v. Hawkins*, 70 Neb. 656, 97 N. W. 792; *Commercial Travelers' Home Assoc. v. McNamara*, 42 N. Y. Misc. 258, 86 N. Y. S. 608.

⁶ The mistakes are twofold. Cases of trust are treated as involving merely questions of contract. *Allen v. Thomas*, 3 Met. (Ky.) 198, 77 Am. Dec. 169; *Bank of Laddonia v. Bright-Coy Comm. Co.*, 139 Mo. App. 110, 120 S. W. 648; *Price v. Trusdell*, 28 N. J. Eq. 200, 202; *Bennett v. Merchant-*

ville Building Assoc., 44 N. J. Eq. 116; *Delaware & Hudson Canal Co. v. Westchester Bank*, 4 Denio, 97. Cases of mere contract rights are called trusts. *Follansbee v. Johnson*, 28 Minn. 311, 9 N. W. 882; *Rogers v. Gosnell*, 51 Mo. 466, 469. The true distinction is well presented by the facts and is explained in the opinions in *Fay v. Sanderson*, 48 Mich. 259, 12 N. W. 161; *Hidden v. Chappel*, 48 Mich. 527, 12 N. W. 687. See also *Miller v. Farr*, 178 Ind. 36, 98 N. E. 805; *Staley v. Weston*, 92 Kan. 317, 140 Pac. 878; *Beattie Mfg. Co. v. Gerardi*, 166 Mo. 142, 65 S. W. 1035; *Belknap v. Bender*, 75 N. Y. 446, 31 Am. Rep. 476; *Roberts v. Ely*, 113 N. Y. 128, 20 N. E. 606.

⁷ *Thomas v. Atkinson*, 94 S. Car. 125, 77 S. E. 722 (*cf. O'Connell v. Mercantile Trust Co.*, 165 Mo. App. 398, 147 S. W. 841).

⁸ 43 Am. L. Reg. (N. S.) 764, 44 *id.* 112; 47 *id.* 73, by Professor Crawford D. Henning.

and account because they are intrinsically sounder, and though in contracts for the benefit of third persons or in which third persons are interested if the old analogies of debt and account were followed a better, because a more liberal, doctrine might be reached than that which the modern English courts have attained, that doctrine would nevertheless itself be narrow and wholly unsatisfactory, with limits indefensible on any grounds but those of ancient history in the main repudiated or forgotten by the courts centuries ago.⁹ This ancient history, however, certainly makes even more striking the attitude of the modern English courts in wholly denying relief to third persons interested in contracts, since that attitude is to be contrasted not only with the law of Continental Europe and of the United States, but also with the early law of England itself.

§ 349. Property rights distinguished from revocable agencies.

More difficult than the distinction between contract rights and property rights is the distinction between cases involving such rights and cases of revocable agency. Unquestionably a man can create a trust for the benefit of another so absolute that the settlor cannot regain the property forming the subject of the trust. On the other hand, one may give money or property to an agent with instructions to give it to a third person, and before the mandate is executed it may be revoked.¹⁰ Where is the line which divides the first from the second case? No other test can be found than that furnished by the intention of the settlor or principal as indicated by his words and conduct, when he enters into the transaction. If his expressed intention read in connection with all the circumstances of the case indicates that the delivery was to be a finality, that the

⁹ In Pennsylvania, the boundaries limiting the right of a third person to sue are perhaps based on the early distinction. If assets are put in the hands of the promisor as a consideration for his promise to pay a third person, the latter may sue, though the promisor was under no duty to apply the specific assets he had received to the payment. *In re Edmundson's Estate*, 259 Pa. 429, 103 Atl. 277. But a similar

promise based on other consideration is unenforceable. *Sweeney v. Houston*, 243 Pa. 542, 90 Atl. 349, L. R. A. 1915 A. 779.

¹⁰ See, e. g., *Shackleford v. Kiser Co.*, 131 Ala. 224, 31 So. 77; *Halliburton v. Nance*, 40 Ark. 161; *Brockmeyer v. Washington Nat. Bank*, 40 Kan. 744, 21 Pac. 300; *Bosea v. Lent*, 44 N. Y. Misc. 437, 90 N. Y. Supp. 41; *Bears v. Spooner*, 9 Leigh, 153.

money or property was to be from that moment dedicated to the third person, the law will give effect to the intention and give the latter a property right from that time. It is true that this cannot be done against his will, but if there is no duty or obligation required from him in return for the property he is to receive, no expression of assent is required.¹¹ Assent may be implied or it may be said perhaps more accurately that the property right vests without assent subject to the possibility of rejection. On the other hand, if the use of the money or property was intended to be subject to the directions of the person delivering it, if the holding was for his benefit and under his orders, the relation is that of principal and agent and the third person can acquire no rights until the agency has been executed either by actual transfer to the third person or by some express or implied attornment to him by the agent. Mere notice to the third person that an agency has been created cannot make it irrevocable, nor can even acceptance or change of position by the third person, unless either the principal or the agent with authority from the principal has made an offer that the holding shall be for the benefit of the third party if he so elects. Not only are property rights thus to be distinguished from revocable agencies, but contract rights must similarly be distinguished. A man may by contract with another be bound to pay the latter's debt, or he may simply be authorized to do so.¹²

§ 350. Application of foregoing principles.

The statement of these principles is easier than the application of them to concrete facts. One of the commonest cases involving the distinction is that of a general assignment by a debtor for the benefit of his creditors. The English courts hold that the delivery of such an assignment vests no rights in the creditors.¹³ Yet it gives rise to something more than a mere agency, for when the creditors assent, the assignment cannot be revoked.¹⁴ It is in effect, therefore, under the English view, an offer to the creditors of a trust for their benefit.

¹¹ Ames, *Cas. Trusts*, 2d ed., 232, note; Perry on Trusts, 5th ed., § 105.

¹² See *infra*, § 389.

¹³ *Garrard v. Lauderdale*, 3 Sim. 1. *Smith v. Keating*, 6 C. B. 136.

¹⁴ *Ibid.*

Until the offer is accepted, but no longer, the assignee is agent or trustee for the assignor. In the United States such assignments are held, with better reason, to create irrevocable trusts from the moment the deed is executed.¹⁵

§ 351. Further illustrations.

Another illustration is furnished by the facts of a New York case.¹⁶ Money was deposited in a bank by a corporation which owed coupon bonds to meet a series of coupons about to fall due. The bank agreed to apply the money to the payment of the coupons. Before the coupons had actually been paid a creditor of the corporation sued it, and garnished the bank. It was held that the bank had become a trustee for the coupon holders, and that the corporation had no right which could be attached. But where goods were put into A's hands, to sell as the owner should direct and distribute the proceeds among certain creditors, it was held that only a revocable agency was created.¹⁷ So where an agent who received money from his principal to pay over to a creditor subsequently used the money otherwise for his principal's benefit, and the principal assented, it was held that the creditor had acquired no rights.¹⁸ But where an insurance company gave to the insured at his request checks for a commission payable to an insurance agent, the insured was held liable for refusing to deliver the checks to the agent and returning them to the insurance company.¹⁹

§ 352. Agency and contracts for the benefit of a third person.

In another respect the law of agency touches the borderland of contracts for the benefit of a third person. It is familiar law that if a contracting party either is or assumes to be the agent of another, the latter may sue upon the contract. The right of a third person benefited by a contract to sue upon it has sometimes been defended on the ground that the promisee

¹⁵ Burrill on Assignments, 6th ed., §§ 257 seq.

¹⁶ *Rogers Locomotive Works v. Kelley*, 88 N. Y. 234. Cf. *Mayer v. Chattahoochee Bank*, 51 Ga. 325. See also *supra*, § 348, *ad fin.*

¹⁷ *Comley v. Dazian*, 114 N. Y. 161,

21 N. E. 135. See also *Kelly v. Pitman*, 40 Mo. App. 596; *Babcock*, 49 N. Y. 318.

¹⁸ *Dixon v. Pace*, 63 N. C. 3603. See also *Center v. McQuesten*, 18 Kan. 476.

¹⁹ *Thomas v. Atkinson*, 9 S. Car. 125, 77 S. E. 722.

was the agent of the third person. But the existence of an agency is a question of fact. It cannot be assumed as a convenient piece of machinery when in fact there was no agency.

§ 353. Novations.

Novations and offers of novation must also be distinguished from the other legal relations with which this chapter deals. The aim of the novation is to substitute for an existing obligation another right. To work a novation, it is not enough that a promise has been made to the original debtor to pay the debt; nor does the assent of the creditor help the matter unless an offer was made to him. The theory of novation is that the new debtor contracts with the old debtor that he will pay the debt, and also to the same effect with the creditor, while the latter agrees to accept the new debtor for the old. A novation is not made out by showing that the substituted debtor agreed to pay the debt. It must appear that he agreed with the creditor to do so. Moreover, this agreement must be based on the consideration of the creditor's agreement to look to the new debtor instead of the old. The creditor's assent to hold the new debtor liable is therefore immaterial unless there is assent to give up the original debtor.²⁰

§ 354. Promises to one who did not furnish the consideration.

Promises for the benefit of a third party must also be distinguished from promises to one who has not given the consideration for the promise. It is sometimes laid down in the books that consideration must move from the promisee, and it is occasionally supposed that infringement of this rule is the basis of the objection to allowing an action by a third person upon a promise made for his benefit. This is not the case. In such promises the consideration does move from the promisee, but the beneficiary who seeks to maintain an action on the promise is not the promisee. Consideration, therefore, does not move from the plaintiff, and this fact has been thought a fundamental objection;²¹ but the rule that consideration

²⁰ See *infra*, §§ 1865 *et seq.*, also an article on Novation by Professor Ames, 6 Harv. L. Rev. 184.

²¹ See, *e. g.*, Hare on Contracts, 146.

must move either from the plaintiff or from the promisee, so far as it exists, is purely technical, and in a developed system of contract law there seems no good reason why A should not be able for a consideration received from B to make an effective promise to C. Unquestionably he may in the form of a promissory note,²² and the same result has been generally reached in the United States in the case of an ordinary simple contract.²³

§ 355. When cestui que trust can sue on contract for his benefit.

One more preliminary distinction must be made. A trustee can make a contract for the benefit of his *cestui que trust*, and if the contract is not performed may sue and recover full damages. A contract by which A engages to pay B money as trustee for C is unquestionably valid.²⁴ And if B refuses to enforce the contract, C may bring a bill in equity against A and B, the primary equity of which is to compel the trustee to do his duty, but to avoid multiplicity of actions a court of equity will decree that A pay the money.²⁵ It is only in case the trustee, who is the promisee, refuses to act, that the beneficiary has a right to sue in this way.²⁶

§ 356. Two types of case involving benefit of third persons.

There are two quite distinct types of cases which pass current under the name of promises for the benefit of a third

²² See *supra*, § 114.

²³ *Ibid.*

²⁴ Such contracts are illustrated in *Cope v. Parry*, 2 J. & W. 538; *Treat v. Stanton*, 14 Conn. 445; *Massachusetts Mut. L. I. Co. v. Robinson*, 98 Ill. 324.

²⁵ *Gandy v. Gandy*, 30 Ch. D. 57. In this case a promise by a husband to pay trustees money for the support of the promisor's wife and for the education of their children was held enforceable by the wife when the trustees refused to sue. It was said that the trustees merely intervened because husband and wife could not contract. The reasoning and distinctions in this case are not clear. The promise was

to pay the trustees, who were contracting parties, but the court did not clearly distinguish the case from that of a promise to pay a beneficiary directly. Cotton, L. J., suggested as an exception to the general rule forbidding one not a party to a contract to sue that "if the contract though in form it is with A is intended to secure a benefit to B so that B is entitled to say he has a beneficial right as *cestui que trust* under that contract, then B would, in a court of equity, be allowed to insist upon and enforce the contract." In the same case it was held that the children could not sue.

²⁶ *Flynn v. Massachusetts Ben. Assoc.*, 152 Mass. 288, 25 N. E. 716.

person. To the first class belong promises where the promisee has no pecuniary interest in the performance of the contract, his object in entering into it being the benefit of a third person. To the second class belong promises where the promisee seeks indirectly to discharge an obligation of his own to a third person by securing from the promisor a promise to pay this creditor. These two classes are frequently treated as if their correct solution depended upon the same principles, but there are important distinctions.

§ 357. Contracts for the sole benefit of a third person should be enforceable.

The first class is properly called a promise for the benefit of a third person, and the phrase "sole beneficiary" should be reserved for this class. There may conceivably be several promises in a contract and only one or a part of them for a sole beneficiary. As the promisee has no pecuniary interest in the performance of such a promise, he can have, generally speaking, no other intention than to benefit the third person, to give him a right. For this reason he may be called a donee beneficiary.²⁷ A typical illustration is a contract of life insurance payable to some one other than the insured. Whatever may be the apparent technical difficulties, it is obvious that justice requires some remedy to be given the beneficiary. The original bargain was convenient and proper, and the law should find a means to enforce it according to its terms. The technical difficulty is twofold. The beneficiary is not a party to the contract, and apart from some special principal governing this class of cases cannot maintain an action. The promisee, though entitled to sue on the promise on ordinary principles of contract, having suffered no pecuniary damage by the failure of the promisor to perform his agreement, it would seem, cannot recover substantial damages;²⁸ and even if it be granted that

²⁷ See 21 Yale. L. J. 1008 (Corbin).

²⁸ *West v. Houghton*, 4 C. P. D. 197 (but see *Lloyds v. Harper*, 16 Ch. D. 290; *R. Flavell*, 25 Ch. D. 89, 97); *Peel v. Peel*, 17 W. R. 586, *per James*, V. C.; *Burbank v. Gould*, 15 Me. 118 (overruled in *Baldwin v. Emery*, 89

Me. 496, 499, 36 Atl. 994); *Watson v. Randall*, 20 Wend. 201; *Adams v. Union R. R. Co.*, 21 R. I. 134, 137, 42 Atl. 515, 44 L. R. A. 273. See also *Board of Commerce v. Security Trust Co.*, 225 Fed. 454, 463, 140 C. C. A. 486; *Axtel v. Chase*, 77 Ind. 74. Therefore

the wrong of the defendant, not the injury to the plaintiff, furnishes the measure of damages, the beneficiary gains nothing thereby; for it is no easier to find a principle requiring the promisee to hold what he recovers as a trustee for the beneficiary than to find a principle allowing a direct recovery by the beneficiary against the promisor.²⁹

§ 358. A court of equity is the appropriate forum.

There is no satisfactory solution of these difficulties in the procedure of a court administering legal remedies only. But one of the functions of equity is to provide a remedy where the common-law procedure is not sufficiently elastic, and no opportunity can be found for the exercise of this function more appropriate than the sort of case under consideration. Much of the difficulty of the situation arises from the fact that three parties are interested in the contract. Common-law procedure contemplates but two sides to a case, and cannot well deal with more. Equity can deal successfully with any number of conflicting interests in one case, since defendants in equity need have no community of interest, and under the procedure of the so-called code States, the same thing is possible though separate courts of equity are abolished.

§ 359. Grounds for equitable jurisdiction.

In the case under consideration the only satisfactory relief is something in the nature of specific performance. The basis for equity jurisdiction is the same as in other cases of specific performance. There is a valid contract, and the remedy at law for its enforcement is inadequate. As the promisee and the beneficiary have both an interest in the performance of the promise, either should be allowed to bring suit joining the other as co-defendant with the promisor. In this way all parties have a chance to be heard. There may always be a possible question as to the respective rights of the promisee and the beneficiary, and also whether the promisor has a valid

a charterer of a ship who does not own the cargo can recover no damages for the owner's breach of warranty in regard to the vessel. *The Ask*, 156

Fed. 678; *The Habil*, 100 Fed. 120.

²⁹ *Cleaver v. Mut. Reserve Fund Life Assoc.*, [1892] 1 Q. B. 147, 152.

defence against the promisee³⁰ and these questions should not be determined in any litigation in which all three interested parties are not joined.³¹ Any procedure which not only permits but requires this meets the necessities of the case.

§ 360. English law.

The right of the beneficiary in such a contract to maintain an action was suggested in a number of early English cases, but judicial opinion was almost invariably against it.³² The well-known case of *Dutton v. Poole*,³³ it is true, allowed an action by a child on a promise made to her father, but this decision seems to have been exceptional, and indeed professes not to deny that only a party to a contract could sue upon it. The court held that the child might be so far identified with the parent on account of the nearness of relationship as to be regarded as a party to the contract. This fictitious identification of child with parent may have been more convincing formerly than it is to-day. The same kind of reasoning is to be found in cases on marriage settlements where it is said that the children of a marriage are "within the consideration of the marriage" and may sue upon the covenants for their benefit.³⁴ *Dutton v. Poole* has been overruled and the marriage settlement cases are generally brought within the principle of trusts. Whatever disadvantages the English law on the question may have, it has at least the merit of definiteness. A beneficiary has no legal rights;³⁵ and though the cases in equity

³⁰ See *infra*, § 394.

³¹ In *Peel v. Peel*, 17 W. R. 586, V. C. James decreed specific performance at the suit of a beneficiary, on the ground that the party who had the legal right had suffered no damage.

³² See *Viner's Abr.* I, 333-337.

³³ 1 Vent. 318, 332; s. c. T. Jones, 102, 103; 2 Lev. 210.

³⁴ See *Peachey on Marriage Settlements*, 56 *et seq.*

³⁵ *Tweddle v. Atkinson*, 1 B. & S. 393; *Cleaver v. Mutual Reserve Fund Life Assoc.*, [1892] 1 Q. B. 147. In the latter case, Lord Esher said that apart from statute a policy of insurance on

A's life payable to his wife gave her no rights. It would be payable to A's executors, and they would not hold as trustees. See also *Dunlop Pneumatic Tyre Co. v. Selfridge*, [1915] A. C. 847.

So in Ireland, *McCoubrey v. Thomson*, 2 Ir. Rep. C. L. 226; *Clitheroe v. Simpson*, L. R. 4 Ir. 59; and Canada, *Faulkner v. Faulkner*, 23 Ont. 252; *Abbinett v. Northwestern L. Ins. Co.*, 21 N. Brunswick, 216.

In Scotland, however, a beneficiary may be entitled to sue. *Dunlop Pneumatic Tyre Co. v. Selfridge*, [1915] A. C. 847, 853; *Stair's Inst.* (1832) I,

are not all of them easy to reconcile, it seems probable that he has no equitable rights, either against the promisor or the promisee. Lindley, L. J., has said:—"An agreement between A and B that B shall pay C gives C no right of action against B. I cannot see that there is in such a case any difference between equity and Common Law. It is a mere question of contract."³⁶

The denial of relief to a beneficiary is so obviously unsatisfactory in the case of life insurance policies that by the Married Women's Property Act in England a wife or husband or child, named as beneficiary in a policy, is entitled to the proceeds of the policy though not to sue for them directly.³⁷ But the same reasons which demand that relief shall be given in the case of an insurance policy apply to other contracts where the intention of the promisee was to stipulate for a benefit to a third person. Such bargains are unquestionably valid contracts and the law should have sufficient adaptability to enforce them according to their terms. The case of *Tweddle v. Atkinson*,³⁸ for instance, is open to as serious criticism as the life insurance case. There the father and father-in-law of the plaintiff agreed that each should pay the plaintiff a sum of money and that he should have power to sue for it. It was held he could not recover on the promise. If the plaintiff could not recover against one who promised to

105. A possible exception to the general rule in England arises where a devise is made subject to the condition that the devisee shall pay a sum of money to another. The acceptance of the devise was held by Lord Holt to create a personal liability to the beneficiary. *Ewer v. Jones*, 2 Ld. Ray. 934, 2 Salk. 415, 6 Mod. 25. This was followed in *Webb v. Jiggs*, 4 M. & S. 113, and not denied in *Braithwaite v. Skinner*, 5 M. & W. 313, but it was suggested that the value of the devise limited the liability of the devisee. See also the English cases stated in *Gilpatrick v. Glidden*, 81 Me. 137, 16 Atl. 464. For American cases holding the devisee liable see *infra*, § 370.

³⁶ *Re Rotherham Alum & Chemical Co.*, 25 Ch. D. 103, 111. See also *Eley v. Positive, etc.*, Life Assurance Co., 1 Ex. D. 20, 88; *Melhado v. Porto Alegre Ry. Co.*, L. R. 9 C. P. 503; *Re Empress Engineering Co.*, 16 Ch. D. 125; *Gandy v. Gandy*, 30 Ch. D. 57. The remarks in *Touche v. Metropolitan Ry. Warehousing Co.*, L. R. 6 Ch. 671, must be regarded as overruled.

The Irish case of *Drimmie v. Davies*, [1899] 1 I. R. 176, however, was a clear case of a promise for the benefit of a third person, and the promise was enforced.

³⁷ 45 & 46 Vict., c. 75, § 11.

³⁸ 1 B. & S. 393.

pay him the money, it seems clear that he could have no more rights against the promisee if the latter collected the money from the promisor by way of damages for breach of contract.

Were it not for strained decisions on the law of trusts, the English courts would be obliged to make more unfortunate decisions than they do. In *Moore v. Darton*,³⁹ money was lent to Moore for which he gave this receipt: "Received the 22d of October, 1843, of Miss Darton, for the use of Ann Dye £100, to be paid to her at Miss Darton's decease, but the interest at 4 per cent to be paid to Miss Darton." The court held that a trust for Ann Dye had been created; but the provision as to interest is clear evidence that the transaction was a loan, which Moore promised to repay to a beneficiary instead of to the lender.

§ 361. Contract to discharge a debt of the promisee.

The second type of case which reference has been made—a contract to discharge an obligation of the promisee—has been held in England enforceable only by the promisee;⁴⁰ and the law of Canada is the same.⁴¹ This rule does not operate as unjustly as the rule in the other type of cases, for here both the promisee and the third party have an adequate remedy. The object of such a contract must always be primarily and generally solely to secure an advantage to the promisee. He wishes to be relieved from liability, and he exacts a promise to pay the third person only because that is a way of relieving himself. If the promisor breaks his promise the promisee suffers material damage, namely, the amount of the liability which should have been discharged and which in fact still exists, and

³⁹ 4 De G. & S. 517; Ames, *Cas. Trusts*, 2d ed., 39. See also *M'Fadden v. Jenkyns*, 1 Phillips, 153; Ames, *Cas. Trusts*, 47. In *Walford v. Les Affreteurs Réunis Société Anonyme*, [1918] 2 K. B. 498, a clause in a charter party provided that a commission should be paid by the owners to the brokers in the transaction. The charterers were held entitled to sue upon this promise as trustees for the brokers.

⁴⁰ *Crow v. Rogers*, 1 Strange, 592;

Price v. Easton, 4 B. & Ad. 433; *Re Empress Engineering Co.*, 16 Ch. D. 125, 129; *Bonner v. Tottenham Society*, [1899] 1 Q. B. 161. But see *Gregory v. Williams*, 3 Mer. 582.

⁴¹ *Henderson v. Killey*, 17 Ont. App. 456; s. c. *sub nom. Osborne v. Henderson*, 18 Can. S. C. 698; *Robertson v. Lonsdale*, 21 Ont. 600; *Canadian Moline Plow Co. v. Troa*, 39 D. L. R. 581; *Cochrane v. Caie*, 3 Pugsley (N. Brunswick), 224.

according to ordinary rules of contract the promisor is liable for this damage.⁴² The third person, moreover, can sue his original debtor. This was the right for which he bargained. If he is given also a direct right against the promisor, the latter is subjected to a double right of action on a single promise, and the creditor is allowed to take advantage of a promise for which he did not furnish the consideration and in which the contracting parties had their own advantage, not his, in mind.

§ 362. Creditor's interest in such a promise.

Yet the creditor is not wholly without interest in the promise to pay his claim. That promise is a valuable right belonging to his debtor. If a solvent promisor has agreed to discharge a debt of the promisee to the amount of a thousand dollars, it is as real an increase of the assets of the promisee as a promise to pay the latter directly that sum, or indeed as the actual payment thereof. It should make no difference what form a debtor's assets take. The law should be able to reach them in whatever shape they may be, and compel their application to the payment of debts. Obviously a promise to pay a debt due from the promisee to a third person cannot be taken on an execution against the promisee, nor be the subject of garnishment. It cannot, at least before breach, be attached by creditors other than the one whose claim the promisor undertook to pay, for the promisor, if he is willing to perform his promise, cannot be compelled to do anything else.⁴³ Nor can the very creditor whom the promisor undertook to pay generally garnishee the promisor under existing statutes, which usually provide for the attachment only of debts due the debtor, and here the promise is to pay not the debtor but the creditor. The aid of equity is, therefore, necessary in order to compel the application of such property even to this creditor's claim, and

⁴² *Infra*, § 1408.

⁴³ *Coleman v. Hatcher*, 77 Ala. 217; *Clinton Bank v. Studemann*, 74 Ia. 104, 37 N. W. 112; *Rickman v. Miller*, 39 Kan. 362, 18 Pac. 304; *Edgell v. Tucker*, 40 Mo. 523; *Baker v. Eglin*, 11 Oreg. 333, 8 Pac. 280; *Vincent v. Watson*, 18 Pa. 96; *Putney v. Farn-*

ham, 27 Wis. 187, 9 Am. Rep. 459.

See also *Pounds v. Chatham*, 96 Ind. 342. But one who has merely a revocable agency to pay a debt of his principal may be garnished by the latter's creditors. *Mayer v. Chattahoochee Bank*, 51 Ga. 325; *Center v. McQuesten*, 18 Kan. 476.

acting as it does by personal decree, equity can readily give the required relief. In a bill against the indebted promisee and the promisor, the court can order the promisor to perform his promise by paying the plaintiff. As the promisee is a party to the litigation, his rights will be concluded by such a decree, and the promisor will not be subjected to the hardship of the possibility of two actions against him by virtue of a single promise. As in the case of garnishment, the payment to the plaintiff will discharge the obligation to the promisee. Indeed the statutes permitting garnishment might readily be extended so as to cover this kind of transaction.⁴⁴

§ 363. Right not available for every creditor.

It is, then, a peculiarity in regard to the application of such a promise to the debt of the promisee, that the promise is an asset of which not every creditor can take advantage. As to most property, the creditor who first attaches or files a bill acquires whatever rights his debtor has; but as stated in the previous section certainly so long as a promise to pay A's debt to B is not broken, it cannot be made available by any creditor except B, since the promisor cannot be required to do anything other than what he promised. On the other hand, it seems clear that if B should sue A and collect his claim out of A's general assets, the liability which would arise on the part of the promisor to A because of the promisor's failure to pay the debt could be made available by any creditor. It may also be urged that after breach of his contract by the promisor even though B has not been paid, a right of action for damages arises in favor of the promisee of which he could avail himself for his own advantage;⁴⁵ and, of which therefore, any creditor should be able to avail himself.⁴⁶

⁴⁴ In Vermont garnishment by the creditor specified in the promise is allowed. *Corey v. Powers*, 18 Vt. 587; *Chapman v. Mears*, 56 Vt. 386. See also *Henry v. Murphy*, 54 Ala. 246.

⁴⁵ See *infra*, §§ 390, 392.

⁴⁶ Compare *In re Richardson*, [1911] 2 K. B. 705, in which on the bankruptcy of a trustee, the question arose

whether the trustee's right to be indemnified from liability on a contract made by him in pursuance of the trust was to be treated as assets for the general creditors or could only be applied for the benefit of the particular creditor with whom the trustee's contract had been made. The court took the latter view, but distinguished the equi-

§ 364. Creditor's right derivative.

If the analysis in the preceding sections is sound the claim of the creditor is a derivative one. His only interest in the promise is the interest which he has in any property belonging to his debtor. This view has considerable support in the decisions in many jurisdictions in regard to promises to assume mortgages.⁴⁷ A promise to assume and pay a mortgage for which the promisee is liable can hardly differ in principle from a promise to pay any other debt of the promisee, but the mortgage cases are frequently treated as a class by themselves. A few cases also of promises to pay unsecured debts are based on substantially this theory.⁴⁸

§ 365. Statutes.

The law in the United States has not been much affected by statute. Such statutes as exist are generally of limited application. Many States make a policy of life insurance for the benefit of a wife or a wife and children good against creditors,⁴⁹ but these statutes are silent as to the respective rights of the beneficiary and promisee. In Massachusetts, however, the beneficiary of a life insurance policy is given a right of action.⁵⁰ California,⁵¹ North Dakota,⁵² and South Dakota,⁵³ Montana⁵⁴ and Idaho,⁵⁵ have the same provision that "a contract made

table right of a trustee from a mere contractual right.

⁴⁷ See *infra*, § 384.

⁴⁸ *Jesup v. Illinois Central R. Co.* 43 Fed. 483, 493; *Mercantile Trust Co. v. Baltimore, etc., R. Co.*, 94 Fed. 722; *Goff v. Ladd*, 161 Calif. 257, 118 Pac. 792; *Sheppard v. Bridges*, 137 Ga. 615, 74 S. E. 245; *Congregational Soc. v. Flagg*, 72 Vt. 248, 47 Atl. 782; *Vanmeters' Ex. v. Vanmeters*, 3 Gratt. 148. In *Forbes v. Thorpe*, 209 Mass. 570, 95 N. E. 955, the court sustained a suit in equity, saying: "The contract being made by the firm for the benefit of their creditors, the latter may in equity enforce the rights of the co-partners to compel the corporation to perform its agreement in this regard. This is a property right not subject to

attachment which can be reached in equity and made available for the benefit of the creditor." Consider also the rights of a creditor of a trustee to reach the trust estate or *cestui que trust*. See *supra*, § 313.

⁴⁹ 3 Am. & Eng. Cyc., 2d ed., 981.

⁵⁰ Rev. L. c. 118, § 73.

⁵¹ Civ. Code, § 1559.

⁵² Comp. L. (1913), Civ. Code, § 5841.

⁵³ Comp. L. (1913), Civ. Code, § 1193.

⁵⁴ Rev. Codes (1907), Civ. Code, § 4970. But this seems to be very narrowly construed. *McDonald v. American Nat. Bank*, 25 Mont. 456, 65 Pac. 896.

⁵⁵ Rev. Stat., § 3221.

expressly for the benefit of a third person may be enforced by him at any time before the parties thereto rescind it." The Louisiana Code ⁵⁶ allows suit by the beneficiary of a contract, and Virginia ⁵⁷ and West Virginia ⁵⁸ have the same provision that "if a covenant or promise be made for the sole benefit of a person with whom it is not made, or with whom it is made jointly with others, such person may maintain in his own name any action thereon which he might maintain in case it had been made with him only, and the consideration had moved from him to the party making such covenant or promise." The Georgia Code provides ⁵⁹ that "if there be a valid consideration for the promise, it matters not from whom it is moved, the promisee may sustain his action though a stranger to the consideration."

§ 366. Code provisions as to real party in interest.

The common provision in the so-called code States, ⁶⁰ that actions shall be brought in the name of the real party in interest, though sometimes referred to as controlling the question, ⁶¹ seems properly to have little bearing upon it. The difficult question is whether the third person is the real party in interest. It is a question of substantive law as to the existence of rights rather than of the procedure appropriate for their enforcement. If, as matter of common law, the third person is held entitled to sue in the name of the promisee or to treat the promisee as a trustee for him, the provision would enable the third person to sue directly in his own name. The English common law, certainly, does not admit the indirect right any more than the direct. The provision has served in some States to add another element of confusion.

⁵⁶ Art. 1890; Code of Practice, Art. 35.

⁵⁷ Code, § 2415.

⁵⁸ Code, § 3740.

⁵⁹ Code, (1914) § 4249.

⁶⁰ These statutes are collected in Hepburn, *Cases on Code Pleading*, 188.

⁶¹ *Paducah Lumber Co. v. Paducah Water Supply Co.*, 89 Ky. 340, 12 S. W. 554, 13 S. W. 249, 7 L. R. A. 77, 25 Am. St. Rep. 536; *Smith v. Smith*, 5 Bush, 625, 632; *Ellis v. Harrison*, 104 Mo. 270, 277, 16 S. W. 198. See also *Preston v. Preston* (Mich.), 172 N. W. 371.

§ 367. Massachusetts law.

In no jurisdiction in the United States is the law as strict in denying relief to a stranger to the contract as it is in England. But there is no uniformity in the law of the several States. That of Massachusetts, until recently at least, most nearly approached the English rigor. Early decisions which followed what was then supposed to be the English law, and gave a direct right to the sole beneficiary of a contract and to a creditor against one who had promised to pay his debt, have been overruled.⁶² But by statute, if not otherwise, the beneficiary of a life insurance policy is entitled to the proceeds of the policy as against the personal representatives of the insured,⁶³ and by a later statute⁶⁴ may sue the insurance company in his own name. Further, the Massachusetts court has held that a policy of fire insurance insuring the premises of a mortgagor and taken out and paid for by him, if made payable to the mortgagee, may be sued upon by the latter in his own name.⁶⁵ The mortgagee's interest in such a policy is essentially

⁶² *Terry v. Brightman*, 132 Mass. 318; *Marston v. Bigelow*, 150 Mass. 45, 22 N. E. 71, 5 L. R. A. 43; *Nims v. Ford*, 159 Mass. 575, 35 N. E. 100; *Wright v. Vermont Life Ins. Co.*, 164 Mass. 302, 41 N. E. 303; *Clare v. Hotch*, 180 Mass. 194, 62 N. E. 250; overruling *Felton v. Dickinson*, 10 Mass. 287; *Felch v. Taylor*, 13 Pick. 133; *Bacon v. Woodward*, 12 Gray, 376, 382. Cf. *Nash v. Commonwealth*, 174 Mass. 335, 54 N. E. 865.

⁶³ Stat. 1887, c. 214, sec. 73. This statute and that referred to in the following note are incorporated in Rev. L. (1902), 118, c. § 73. See also as to fraternal beneficiary associations Stat. 1888, c. 429, §§ 8, 9; Rev. L., c. 119, under which a beneficiary was allowed to sue in his own name in *Dean v. American Legion of Honor*, 156 Mass. 435, 31 N. E. 1; *Timberlake v. Supreme Commandery*, 208 Mass. 411, 94 N. E. 685.

⁶⁴ By statute of 1894, c. 225, a beneficiary may sue in his own name upon

all policies of life insurance issued since that date. A decision in regard to this statute is *Wright v. Vermont Life Ins. Co.*, 164 Mass. 302, 41 N. E. 303.

⁶⁵ *Palmer Savings Bank v. Insurance Co.*, 166 Mass. 189, 44 N. E. 211, 32 L. R. A. 615, 55 Am. St. Rep. 387, following previous practice, which had not before been disputed. The Massachusetts court relies on the fact that most courts in the country allow the mortgagee to sue. This is true. See 11 Am. Encyc. of Pl. and Pr. 394. But most American courts also allow any creditor to sue on a promise to pay him made to another, so that such holding by them as to the mortgagee's right is in accordance with their other decisions.

In Michigan, where as in Massachusetts a creditor cannot sue upon a promise to pay his debt, a mortgagee cannot sue upon insurance of the mortgagor made payable to the mortgagee. *Hartford Fire Ins. Co. v. Davenport*,

the same as any creditor's interest in a promise made to his debtor to pay the debt. It is true the promise of the insurance company is conditional and is not to pay the debt as such, but any payment made by the insurer operates as payment of the debt *pro tanto*, and, if all the parties are solvent it is the mortgagor not the mortgagee who derives benefit from the payment. The only distinction that seems possible to except this case from the general rule in regard to promises to pay a debt to a third person is to regard a policy of insurance as a mercantile instrument, the effect of which is largely determined by business custom⁶⁶ and which may be sued on like negotiable paper by the party to whom it is made payable without regard to who furnished the consideration or negotiated the contract. This distinction seems sound. There are also decisions in Massachusetts, not overruled, which hold a devisee who has accepted a devise made conditional on payment to another personally liable to the beneficiary.⁶⁷ Finally, it has recently been held that a promise to a parent to give the latter's child a sum of money may be enforced by the child.⁶⁸ The reasons given for distinguishing the case from earlier decisions⁶⁹ seem inadequate, but it may induce the Massachusetts court to recognize in the future more fully than in the past that a sole beneficiary should be entitled, under some form of procedure, to enforce a promise made for his benefit.

37 Mich. 609; *Minnock v. Eureka F. & M. Ins. Co.*, 90 Mich. 236, 51 N. W. 367; *conf. Hopkins Mfg. Co. v. Aurora F. & M. Ins. Co.*, 48 Mich. 148, 11 N. W. 846. In *Collinsville Savings Society v. Boston Ins. Co.*, 77 Conn. 676, 60 Atl. 647, 69 L. R. A. 924, it was also held that making the loss payable to the mortgagee gave the latter no contract rights and that he was therefore bound by an arbitration to fix the loss under the policy, though not made party to the arbitration.

⁶⁶ See Langdell, *Summary Contracts*, §§ 49, 51.

⁶⁷ *Felch v. Taylor*, 13 Pick. 133; *Adams v. Adams*, 14 Allen, 65. In *Prentice v. Brimhall*, 123 Mass. 291, 293, Gray, C. J., explained these decisions by the lack of equity powers in the court when the first decision was made. As no equitable charge on the property could have been enforced, the defendant would have escaped altogether if not held personally liable.

⁶⁸ *Gardner v. Denison*, 217 Mass. 492, 105 N. E. 359, 51 L. R. A. (N. S.) 1108.

⁶⁹ *Ibid.*, at p. 494;

§ 368. Law of other states.

A large majority of the States allow the sole beneficiary to sue at law;⁷⁰ but besides Massachusetts, the Federal

"The consideration moves in part from the child, although he is not in a position personally to yield an assent to the promise at the time it is made. . . . The circumstances of the parties respecting the naming of a child are so peculiar, the nearness of the relation so great, and the obligation resting on the father and mother so important and the consequences to the child so vital that the inference may be drawn that the father is acting in the interests of and as agent for the son in making any contract as to giving him a name."

⁷⁰ Insurance cases are not included in this note.

ARKANSAS. *Rogers v. Galloway Female College*, 64 Ark. 627, 44 S. W. 454, 39 L. R. A. 636. But see *Georgia State Sav. Assoc. v. Dearing*, 128 Ark. 149, 193 S. W. 512; *Priest v. Murphy*, 103 Ark. 464, 144 S. W. 921.

ILLINOIS. *Lawrence v. Oglesby*, 178 Ill. 122, 52 N. E. 945; *Riepe v. Schmidt*, 199 Ill. App. 129.

INDIANA. *Allen v. Davison*, 16 Ind. 416; *Beals v. Beals*, 20 Ind. 163; *Marlett v. Wilson*, 30 Ind. 240; *Miller v. Billingsly*, 41 Ind. 489; *Henderson v. McDonald*, 84 Ind. 149; *Waterman v. Morgan*, 114 Ind. 237, 16 N. E. 590; *Stevens v. Flannagan*, 131 Ind. 122, 30 N. E. 898; *Ferris v. American Brewing Co.*, 155 Ind. 539, 58 N. E. 701, 52 L. R. A. 305. See also *Reed v. Adams & Co. Works*, 57 Ind. App. 259, 264, 106 N. E. 882. Except for the Code the plaintiff would have to sue in equity.

IOWA. *Smead v. Stearns*, 173 Ia. 174, 155 N. W. 307; *Meyer v. Stortenbecker (Ia.)*, 165 N. W. 456.

KANSAS. *Strong v. Marcy*, 33 Kan. 109, 5 Pac. 366.

KENTUCKY. *Clarke v. McFarland's Exec.*, 5 Dana, 45; *Smith v. Smith*, 5

Bush, 625; *Benge v. Hiatt's Adm.*, 82 Ky. 666, 56 Am. Rep. 912; *Paducah Lumber Co. v. Paducah Water Supply Co.*, 89 Ky. 340, 12 S. W. 554, 13 S. W. 249, 7 L. R. A. 77, 25 Am. St. Rep. 536. See also *McGuire v. McGuire*, 11 Bush, 142; *Mercer v. Mercer's Adm.*, 87 Ky. 30, 7 S. W. 401. Except for the Code plaintiff would have to sue in equity.

LOUISIANA. Civil Code, Arts. 1884, 1896.

MARYLAND. *Owings v. Owings*, 1 H. & G. 484, 491.

MASSACHUSETTS. *Felton v. Dickinson*, 10 Mass. 287 (overruled by *Terry v. Brightman*, 132 Mass. 318; *Marston v. Bigelow*, 150 Mass. 45, 22 N. E. 71, 5 L. R. A. 43). See also *Felch v. Taylor*, 13 Pick. 133; *Bacon v. Woodward*, 12 Gray, 376, 382; *Prentice v. Brimhall*, 123 Mass. 291, and other cases cited *supra*, § 367. In *Gardner v. Denison*, 217 Mass. 492, 105 N. E. 359, 51 L. R. A. (N. S.) 1108, under the guise of a fictitious agency the Massachusetts court showed a tendency to revert to its early doctrine.

MISSISSIPPI. *Canada v. Yasoo & Co.*, 101 Miss. 274, 57 So. 913.

MISSOURI. *St. Louis v. Von Phul*, 133 Mo. 561, 34 S. W. 843, 54 Am. St. Rep. 695; *Devers v. Howard*, 144 Mo. 671, 46 S. W. 625; *Crone v. Stinde*, 156 Mo. 262, 55 S. W. 863, 56 S. W. 907; *Weinreich v. Weinreich*, 18 Mo. App. 364; *Markel v. W. U. Tel. Co.*, 19 Mo. App. 80; *Glencoe Lime Co. v. Wind*, 86 Mo. App. 163. But see *Phoenix Ins. Co. v. Trenton Water Co.*, 42 Mo. App. 118; *Howsmon v. Trenton Water Co.*, 119 Mo. 304, 24 S. W. 784, 23 L. R. A. 146, 41 Am. St. Rep. 654.

MONTANA. Civil Code, § 2103 (but see *McDonald v. American Bank*, 25 Mont. 456, 65 Pac. 896; *Tatem v.*

Eglanol Mining Co., 45 Mont. 367, 123 Pac. 28).

NEBRASKA. *Hale v. Ripp*, 32 Neb. 259, 49 N. W. 218; *Sample v. Hale*, 34 Neb. 220, 51 N. W. 837; *Lyman v. City of Lincoln*, 38 Neb. 794, 57 N. W. 531; *Doll v. Crume*, 41 Neb. 655, 59 N. W. 806; *Korsmeyer Co. v. McClay*, 43 Neb. 649, 62 N. W. 50; *Chicago, etc., R. R. Co. v. Bell*, 44 Neb. 44, 62 N. W. 314; *Kaufmann v. Cooper*, 46 Neb. 644, 65 N. W. 796; *Hickman v. Layne*, 47 Neb. 177, 180, 66 N. W. 298; *Fitzgerald v. McClay*, 47 Neb. 816, 66 N. W. 828; *King v. Murphy*, 49 Neb. 670, 68 N. W. 1029; *Rohman v. Gaiser*, 53 Neb. 474, 73 N. W. 923; *Pickle Marble Co. v. McClay*, 54 Neb. 661, 74 N. W. 1062. But see *Eaton v. Fairbury Water Works Co.*, 37 Neb. 546, 56 N. W. 201, 21 L. R. A. 653, 40 Am. Rep. 510.

NEVADA. See *Ferris v. Carson Water Co.*, 16 Nev. 44, 40 Am. Rep. 485.

NEW JERSEY. *Rue v. Meirs*, 43 N. J. Eq. 377, 384; *Whitehead v. Burgess*, 61 N. J. L. 75, 38 Atl. 802; *Deseumeur v. Rondel*, 76 N. J. Eq. 394, 74 Atl. 703.

NEW YORK. *Schemerhorn v. Vanderheyden*, 1 Johns. 139, 140; *Glen v. Hope Mutual L. I. Co.*, 56 N. Y. 379; *Little v. Banks*, 85 N. Y. 258; *Todd v. Weber*, 95 N. Y. 181, 47 Am. Rep. 20; *Rector v. Teed*, 44 Hun, 349, 120 N. Y. 583, 24 N. E. 1014; *Buchanan v. Tilden*, 158 N. Y. 109, 52 N. E. 724, 70 Am. St. Rep. 454; *Roberts v. Cobb*, 31 Hun, 150; *Knowles v. Erwin*, 43 Hun, 150; *affd.* 124 N. Y. 633, 26 N. E. 759; *Whitcomb v. Whitcomb*, 92 Hun, 443, 36 N. Y. Supp. 607; *Babcock v. Chase*, 92 Hun, 264, 36 N. Y. S. 879; *Luce v. Gray*, 92 Hun, 599, 36 N. Y. S. 1065. But see *contra* *Lorillard v. Clyde*, 122 N. Y. 498, 25 N. E. 917, 10 L. R. A. 113; *Townsend v. Rackham*, 143 N. Y. 516, 38 N. E. 731; *Sullivan v. Sullivan*, 161 N. Y. 554, 56 N. E. 116; *Wainwright v.*

Queen's County Water Co., 78 Hun, 146, 28 N. Y. S. 987; *Coleman v. Hiler*, 85 Hun, 547, 33 N. Y. S. 357; *Buffalo Cement Co. v. NeNaughton*, 90 Hun, 74, 35 N. Y. S. 453, *affd.* 156 N. Y. 702, 51 N. E. 1089, re-argument denied, 157 N. Y. 703, 52 N. E. 1123; *Glens Falls Gas Light Co. v. Van Vranken*, 11 N. Y. App. Div. 420, 42 N. Y. S. 339. See remarks on subsequent New York decisions later in this section, and *infra* n. 84.

NORTH CAROLINA. *Correll v. Greensboro Water Co.*, 124 N. C. 328, 32 S. E. 720, 46 L. R. A. 513, 70 Am. St. Rep. 598; *Chandler v. Jones*, 173 N. E. 427, 92 S. E. 145.

OHIO. *Flickinger v. Saum*, 40 Ohio St. 591, 601; *Irwin v. Lombard University*, 56 Ohio St. 9, 20, 46 N. E. 63, 36 L. R. A. 239, 60 Am. St. Rep. 727.

OKLAHOMA. *Smith v. Jos. W. Moon Buggy Co. (Okl.)*, 169 Pac. 875.

PENNSYLVANIA. *Strohecker v. Grant*, 16 S. & R. 237, 241, *semble*; *Ayer's Appeal*, 28 Pa. 179; *Hostetter v. Hollinger*, 117 Pa. 606, 12 Atl. 741. See also *Sweeney v. Houston*, 243 Pa. 542, 90 Atl. 347, L. R. A. 1915 A. 779. But see *contra* *Edmundson v. Penny*, 1 Barr, 334, 44 Am. Dec. 137; *Guthrie v. Kerr*, 85 Pa. 303.

Recovery is allowed only where money or property is placed in the hands of the promisor as consideration for his promise. *First Methodist Episcopal Church v. Isenberg*, 246 Pa. 221, 92 Atl. 141.

RHODE ISLAND. *Adams v. Union R. R. Co.*, 21 R. I. 134, 42 Atl. 515, 44 L. R. A. 273; *Gould v. United Traction Mut. Aid Assoc.*, 26 R. I. 142, 143, 58 Atl. 624; *Waterhouse v. Waterhouse*, 29 R. I. 485, 72 Atl. 642, 22 L. R. A. (N. S.) 639. See also *Blake v. Atlantic Nat. Bank*, 33 R. I. 464, 82 Atl. 225, 39 L. R. A. (N. S.) 874. But see *contra* *Wilbur v. Wilbur*, 17 R. I. 295, 21 Atl. 497.

Courts⁷¹ Connecticut,⁷² Georgia,⁷³ Michigan,⁷⁴ Minnesota,⁷⁵

SOUTH CAROLINA. *Thompson v. Gordon*, 3 Strobbh. 196.

TEXAS. *Meyer v. Walker-Smith Grocer Co.*, 60 Tex. Civ. App. 462, 127 S. W. 1118; *Peters v. Lindsey* (Tex. Civ. App.), 144 S. W. 694; *Bridge-water v. Hooks* (Tex. Civ. App.), 159 S. W. 1004; *Hales v. Peters* (Tex. Civ. App.), 162 S. W. 386.

UTAH. See *Montgomery v. Rief*, 15 Utah, 495, 50 Pac. 623.

VERMONT. *Hodges v. Phelps*, 65 Vt. 303, 26 Atl. 625. But see *contra* *Crampton v. Ballard*, 10 Vt. 251; *Hall v. Huntoon*, 17 Vt. 244, 44 Am. Dec. 332; *Fugure v. Mut. Soc. of St. Joseph*, 46 Vt. 362.

VIRGINIA (statutory). *Taliaferro v. Day*, 82 Va. 79; But see *contra* prior to statute *Ross v. Milne*, 12 Leigh, 204, 37 Am. Dec. 646, also *Newberry Land Co. v. Newberry*, 95 Va., 111, 27 S. E. 897.

WEST VIRGINIA (statutory). *Johnson v. McClung*, 26 W. Va. 659, 670; *Butts v. Butts* (W. Va.), 94 S. E. 360.

WISCONSIN. *Grant v. Diebold Safe Co.*, 77 Wis. 72, 45 N. W. 951; *Tweeddale v. Tweeddale*, 116 Wis. 517, 93 N. W. 440, 61 L. R. A. 509; *Sedgwick v. Blanchard*, 164 Wis. 421, 160 N. W. 267.

UNITED STATES. *National Bank v. Grand Lodge*, 98 U. S. 123, 25 L. Ed. 75. *Conf.* *Constable v. National Steamship Co.*, 154 U. S. 51, 14 Sup. Ct. Rep. 1062, 38 L. Ed. 903; *German Alliance Ins. Co. v. Home Water Supply Co.*, 226 U. S. 220, 33 Sup. Ct. 32, 57 L. Ed. 195, 42 L. R. A. (N. S.) 1000; *Sayward v. Dexter*, 72 Fed. Rep. 758, 44 U. S. App. 376, 19 C. C. A. 176; *United States v. National Surety Co.*, 92 Fed. Rep. 549, 34 C. C. A. 526; *Brown & Haywood Co. v. Ligon*, 92 Fed. 851; *Goodyear Shoe Mach. Co. v. Dancel*, 119 Fed. 692, 56 C. C. A. 300.

⁷¹ *Goodyear Shoe Mach. Co. v. Dancel*, 19 Fed. Rep. 692, 56 C. C. A. 300, and see cases in the preceding paragraph. But see *Pennsylvania Steel Co. v. New York City Ry. Co.*, 198 Fed. 721, 117 C. C. A. 503.

⁷² *Baxter v. Camp*, 71 Conn. 245, 41 Atl. 803, 42 L. R. A. 514, 71 Am. St. Rep. 169. The court leaves the question open whether a suit in equity in which the representatives of the promisees were joined could be maintained.

⁷³ *Ogles v. Nashville &c. Ry. Co.*, 130 Ga. 430, 60 S. E. 1048, 124 Am. St. Rep. 175. *Cf.* Code, § 3664; *Wilson v. First Presbyterian Church*, 56 Ga. 554; *Crawford v. Wilson*, 139 Ga. 654, 78 S. E. 30, 44 L. R. A. 773; *Carr v. Louisville &c. R. Co.*, 141 Ga. 219, 80 S. E. 716; *Jordan v. Dixie Culvert &c. Co.*, 146 Ga. 284, 91 S. E. 68.

⁷⁴ *Board of Commerce v. Security Trust Co.*, 225 Fed. 454, 464, 140 C. C. A. 486; *Wheeler v. Stewart*, 94 Mich. 445, 54 N. W. 172; *Linneman v. Morros*, 98 Mich. 178, 57 N. W. 103 (the court left open the question whether there was an equitable right); *Knights of the Modern Maccabees v. Sharp*, 163 Mich. 449, 128 N. W. 786, 33 L. R. A. (N. S.) 780; *Signs v. Bush's Est.*, 199 Mich. 192, 165 N. W. 820; *Preston v. Preston* (Mich.), 172 N. W. 371 (suit in equity allowed).

⁷⁵ *Jefferson v. Asch*, 53 Minn. 446, 55 N. W. 604, 25 L. R. A. 257, 39 Am. St. Rep. 618; *Union Ry. Storage Co. v. McDermott*, 53 Minn. 407, 55 N. W. 606. In the first of these cases the court says, "Where there is nothing but the promise, no consideration from such stranger and no duty or obligation to him on the part of the promisee, he cannot sue upon it."

New Hampshire,⁷⁶ Vermont,⁷⁷ Virginia,⁷⁸ and to some degree Pennsylvania,⁷⁹ and Oregon,⁸⁰ do not allow an action. But in the Federal Courts and those of Connecticut, Michigan, Vermont, Virginia, it seems a suit in equity may be maintained.⁸¹ The law of New York is not very clear. It has been held in recent decisions that in order to entitle one who is not a party to a contract to sue upon it, the promisee must owe him some duty;⁸² but it seems that a moral duty is enough, and this gives the court considerable latitude.⁸³ And recent decisions make

⁷⁶ *Curry v. Rogers*, 21 N. H. 247.

⁷⁷ *Crampton v. Ballard*, 10 Vt. 251; *Hall v. Huntoon*, 17 Vt. 244, 44 Am. Dec. 332; *Figure v. Mut. Soc. of St. Joseph*, 46 Vt. 362. But in *Hodges v. Phelps*, 65 Vt. 303, 26 Atl. 625, it was held that a devise subject to the payment of a legacy imposed a personal liability on the devisee, if he accepted the devise.

⁷⁸ *Ross v. Milne*, 12 Leigh, 204, 37 Am. Dec. 646. But see Code, § 2415, construed in *Newberry Land Co. v. Newberry*, 95 Va. 111, 27 S. E. 897. In *Taliaferro v. Day*, 82 Va. 79, an accepted devise subject to a legacy was held to impose a personal liability.

⁷⁹ *Edmundson v. Penny*, 1 Barr. 334, 44 Am. Dec. 137; *Guthrie v. Kerr*, 85 Pa. 303. See, however, *Ayer's Appeal*, 28 Pa. 179; *Merriman v. Moore*, 90 Pa. 78, 81; *Hostetter v. Hollinger*, 117 Pa. 606, 12 Atl. 741; *In re Edmundson's Est.*, 259 Pa. 429, 103 Atl. 277. If the promisor receives property as the consideration for a promise to make payment, though the promisor is under no obligation to use the property received or its proceeds for the purpose, the Pennsylvania court apparently by an unwarranted extension of the law of trusts holds the promisor liable.

⁸⁰ See *infra*, § 371, n.

⁸¹ See cases in preceding notes.

⁸² *Vrooman v. Turner*, 69 N. Y. 280, 283, 25 Am. Rep. 195; *Beveridge v. N. Y. Elevated R. R.*, 112 N. Y. 1, 26, 19 N. E. 489, 2 L. R. A. 648; *Loril-*

lard v. Clyde, 122 N. Y. 498, 25 N. E. 917, 10 L. R. A. 113; *Durnherr v. Rau*, 135 N. Y. 219, 32 N. E. 49; *Townsend v. Rackham*, 143 N. Y. 516, 38 N. E. 731; *Sullivan v. Sullivan*, 161 N. Y. 554, 56 N. E. 116; *Coleman v. Hiler*, 85 Hun, 547, 33 N. Y. S. 357. See also *Glens Falls Gas Light Co. v. Van Vranken*, 11 N. Y. App. Div. 420, 42 N. Y. S. 339; *Opper v. Hirsch*, 68 N. Y. S. 879, 33 N. Y. Misc. 560. In *Roseau v. Rouss*, 180 N. Y. 116, 72 N. E. 916, the court said, "A promise for the benefit of a third person must not only be supported by a sufficient consideration, but the one furnishing it must have a legal interest in the performance of the promise." Compare the cases of *Little v. Banks*, 85 N. Y. 258, and *Todd v. Weber*, 95 N. Y. 181, 47 Am. Rep. 20.

⁸³ *Buchanan v. Tilden*, 158 N. Y. 109, 52 N. E. 724, 44 L. R. A. 170, 70 Am. St. 454; *Bouton v. Welsh*, 170 N. Y. 554, 63 N. E. 539; *Case v. Case*, 203 N. Y. 263, 96 N. E. 440, Ann. Cas. 1913 B. 311; *Knowles v. Erwin*, 43 Hun, 150, affd. 124 N. Y. 633, 26 N. E. 759; *Whitcomb v. Whitcomb*, 92 Hun, 443, 36 N. Y. S. 607; *Babcock v. Chase*, 92 Hun, 264, 36 N. Y. S. 879; *Luce v. Gray*, 92 Hun, 599, 36 N. Y. S. 1065. In all these cases the promise was to pay money to a dependent relative. See also *De Cicco v. Schweiser*, 221 N. Y. 431, 117 N. E. 807, L. R. A. 1918 E. 1004, Ann. Cas. 1918 C. 816 (affianced wife).

it probable that ultimately any contract for the sole benefit of a third person may be enforced by him.⁸⁴ Minnesota has adopted the same requirement of an obligation from the promisee to the beneficiary.⁸⁵ Missouri has also held some duty necessary and a moral duty sufficient,⁸⁶ but a late decision inconsistently dispenses with the requirement.⁸⁷ A suggestion of the sort is occasionally found in other States.⁸⁸ The supposed

⁸⁴ In *Seaver v. Ransom*, 224 N. Y. 233, 120 N. E. 639, a promise to pay the niece of the promisee's wife was enforced. In *Pond v. New Rochelle Water Co.*, 183 N. Y. 330, 76 N. E. 211, 1 L. R. A. (N. S.) 958, 5 Ann. Cas. 504, an inhabitant of a village to which the defendant had contracted to supply water was allowed to sue for breach of the contract. In *Smyth v. New York*, 203 N. Y. 106, 96 N. E. 409, the plaintiff was allowed to sue a contractor who had agreed with the city to pay for injuries to property abutting on a proposed subway. The plaintiff's property was injured and the court conceded that the plaintiff had no direct right against the city. See also *Farnsworth v. Boro Oil & Gas Co.*, 216 N. Y. 40, 48, 109 N. E. 860. In *Gulla v. Barton*, 164 N. Y. App. Div. 293, 149 N. Y. S. 952, the plaintiff was a member of a trade union with which the defendant had contracted to pay his employees certain wages. The plaintiff was allowed to sue on this promise. In *Seaver v. Ransom*, 224 N. Y. 233, 120 N. E. 639, 640, Pound, J., for the court said: "In New York the right of the beneficiary to sue on contracts made for his benefit is not clearly or simply defined. It is at present confined: First. To cases where there is a pecuniary obligation running from the promisee to the beneficiary, 'a legal right founded upon some obligation of the promisee in the third party to adopt and claim the promise as made for his benefit.' Secondly. To cases where the con-

tract is made for the benefit of the wife or child of a party to the contract. . . .

"The right of the third party is also upheld in, thirdly, the public contract cases, where the municipality seeks to protect its inhabitants by covenants for their benefit; and, fourthly, the cases where, at the request of a party to the contract, the promise runs directly to the beneficiary although he does not furnish the consideration. It may be safely said that a general rule sustaining recovery at the suit of the third party would include but few classes of cases not included in these groups, either categorically or in principle."

⁸⁵ *Kramer v. Gardner*, 104 Minn. 370, 116 N. W. 925, 22 L. R. A. (N. S.) 492; *Clark v. P. M. Hennessey Const. Co.*, 122 Minn. 476, 142 N. W. 873; and see Minnesota cases, *infra*, § 381.

⁸⁶ *Phoenix Ins. Co. v. Trenton Water Co.*, 42 Mo. App. 118; *Howsamon v. Trenton Water Co.*, 119 Mo. 304, 24 S. W. 784, 23 L. R. A. 146, 41 Am. St. Rep. 654; *St. Louis v. Von Phul*, 133 Mo. 561, 34 S. W. 843, 54 Am. St. Rep. 695; *Devers v. Howard*, 144 Mo. 671, 46 S. W. 625; *Glencoe Lime Co. v. Wind*, 76 Mo. App. 163.

⁸⁷ *Crone v. Stinde*, 156 Mo. 262, 55 S. W. 863, 56 S. W. 907.

⁸⁸ *Merchants' Union Trust Co. v. New Philadelphia G. Co. (Del. Ch.)*, 83 Atl. 520; *Fidelity & Casualty Co. v. Martin*, 163 Ky. 12, 173 S. W. 307; *Sample v. Hale*, 34 Neb. 220, 51 N. W. 837; *Lyman v. Lincoln*, 38 Neb. 794, 57

necessity results from a confusion of the two distinct types of cases. The early New York cases bearing on the right of a creditor to sue one who had promised the debtor to pay the debt recognized that the creditor's right was derivative and that it was by virtue of his claim against the debtor that he acquired a right to sue upon the promise to the debtor. But the requirement of a debt or duty is wholly inapplicable to contracts for the sole benefit of a third person. It might equally well be said that a gift should be invalid unless the donor was under a duty to make it. Moreover, if such a requirement were proper a moral obligation could not suffice. When an alleged obligation is of such a character that the obligee cannot enforce it directly against the obligor, it can no more furnish ground for a derivative right against one who has promised the obligor to pay it, than it could for garnishment as a debt due to the obligor. In the first case in New York which definitely established the requirement of a duty from the promisee to the plaintiff,⁸⁹ it was true not only that the promisee was under no duty to the plaintiff, but also that the plaintiff was not intended by the promisee as the beneficiary of the contract. The benefit expected to result to the plaintiff was merely incidental to the general object of the contract. This was sufficient ground for the decision; but in the later cases where the doctrine was applied the result was needlessly to defeat an intended gift; and in other cases where the court enforced the promise unsatisfactory reasoning is resorted to, in order to escape the supposed necessity of finding some duty owed by the promisee.

§ 369. Life insurance cases.

There are several recurring situations which illustrate the contract for the sole benefit of a third person. The commonest is the case already referred to of a life insurance policy for the benefit of another. This case may well be regarded as depending upon the nature of a policy of insurance as a mercantile instrument. At all events the insurance decisions form

N. W. 531; *Mack Mfg. Co. v. Massachusetts &c. Ins. Co.*, 103 S. Car. 55, 87 S. E. 439.

⁸⁹ *Vrooman v. Turner*, 69 N. Y. 280, 283, 25 Am. Rep. 195.

a class by themselves, and but little reference is made in them to the general law of contracts. Presumably everywhere a beneficiary to whom the insurer has promised the insured that the insurance money shall be paid is given a right to enforce the policy, and generally by a direct action. This result has been reached in England⁹⁰ and Massachusetts⁹¹ by statute, but in most states without the aid of a Statute.⁹² Where the policy reserves to the insured a right to change the beneficiary, there is a defeasible vested interest in the latter.⁹³

§ 370. Receipt of property as consideration for a promise to make a payment.

Another common illustration arises on these or similar facts: A parent gives property to a son, who upon receiving it promises to make specified payments to daughters or others either at once or upon the death of the donor. There is properly no trust or even equitable charge, because it is contemplated that the son shall deal as he sees fit with the property transferred to him and pay the beneficiaries from any source he chooses. Courts are rightly almost universally unwilling to deny the

⁹⁰ 45 & 46 Vict., c. 75, § 11; Mass. Stats. 1887, c. 214, § 73; 1894, c. 225. (See *Cleaver v. Mut. Reserve Fund Life Assoc.*, [1892] 1 Q. B. 147.

⁹¹ *Nims v. Ford*, 159 Mass. 575, 35 N. E. 100; *Wright v. Vermont Life Ins. Co.*, 164 Mass. 302, 41 N. E. 303.

⁹² See, e. g., *Mutual Benefit L. Ins. Co. v. Swett*, 222 Fed. 200, 137 C. C. A. 640, Ann. Cas. 1917 B. 298; *Johnson v. New York L. Ins. Co.*, 56 Colo. 178, 138 Pac. 414, L. R. A. 1916 A. 868; *Neary v. Metropolitan L. Ins. Co. (Conn.)*, 103 Atl. 661; *Perry v. Tweedy*, 128 Ga. 402, 57 S. E. 782, 119 Am. St. Rep. 393, 11 Ann. Cas. 46; *Mutual Life Ins. Co. v. Devine*, 180 Ill. App. 422; *Mutual Life Ins. Co. v. Guller (Ind. App.)*, 119 N. E. 173; *Townsend v. Fidelity & Casualty Co.*, 163 Ia. 713, 144 N. W. 574, L. R. A. 1915 A. 109; *Filley v. Illinois Life Ins. Co.*, 91 Kan. 220, 137 Pac. 793, 93 Kans. 193, 144 Pac. 257, L. R. A. 1915 D. 130, 134;

Breard v. New York Life Ins. Co., 138 La. 774, 70 So. 799; *Martin v. Aetna L. Ins. Co.*, 73 Me. 25; *Metropolitan Ins. Co. v. Clanton*, 76 N. J. Eq. 4, 73 Atl. 1052; *In re Gebert*, 95 N. Y. Misc. 477, 160 N. Y. S. 782; *Mutual Benefit L. Ins. Co. v. Cummings*, 66 Or. 272, 126 Pac. 982, 133 Pac. 1169, 47 L. R. A. (N. S.) 252, Ann. Cas. 1915 B. 535. *Marquet v. Aetna Life Ins. Co.*, 128 Tenn. 213, 159 S. W. 733, L. R. A. 1915 B. 749, Ann. Cas. 1915 B. 677. See also *infra*, § 396, n. 8, and numerous cases, collected in *Cooley, Ins. Briefs*, p. 3755. Cf. cases of fraternal beneficiary societies, *infra*, § 396a.

⁹³ *Roberts v. Northwestern & Co.*, 143 Ga. 780, 85 S. E. 1043; *Indiana & Co. Life Ins. Co. v. McGinnis*, 180 Ind. 9, 101 N. E. 289, 45 L. R. A. (N. S.) 192; *Mutual Life Ins. Co. v. Guller (Ind. App.)*, 119 N. E. 173, 177; *Holder v. Prudential Ins. Co.*, 77 S. C. 299, 57 S. E. 853.

beneficiaries a remedy in such a case.⁹⁴ Even in England there are cases that have never been overruled, in which a beneficiary was allowed to recover in an action of debt against a devisee whose devise was left upon the condition that he should make a payment to the beneficiary. If the devisee accepts the gift he is personally liable to perform the duty which he thereby assumes, and his liability is not restricted to the value of the property he has received.⁹⁵ So far as this question of personal liability is concerned these cases present quite as much difficulty in principle as the cases where the gift is made *inter vivos*.

⁹⁴ *Beals v. Beals*, 20 Ind. 163; *Henderson v. McDonald*, 84 Ind. 149; *Waterman v. Morgan*, 114 Ind. 237, 16 N. E. 590; *Stevens v. Flannagan*, 131 Ind. 122, 30 N. E. 898; *Grant v. Bradstreet*, 87 Me. 583, 33 Atl. 165; *Weinreich v. Weinreich*, 18 Mo. App. 364; *Weinhard v. R. R. Thompson Est. Co.*, 242 Fed. 315 (D. C. Oreg.); *Knowles v. Erwin*, 43 Hun, 150, 124 N. Y. 633, 26 N. E. 759; *Luce v. Gray*, 92 Hun, 599, 36 N. Y. S. 1065; *Feldman v. McGuire*, 34 Oreg. 309, 55 Pac. 872; *Thompson v. Gordon*, 3 Strobh. 196. See also *Lawrence v. Oglesby*, 178 Ill. 122, 52 N. E. 945; *Burson v. Bogart*, 49 Col. 410, 113 Pac. 516.

Contra are *Townsend v. Rackham*, 143 N. Y. 516, 38 N. E. 731; *Coleman v. Hiler*, 85 Hun, 547, 33 N. Y. S. 357 (the promisee in these cases was under no moral duty to the beneficiaries); *Guthrie v. Kerr*, 85 Pa. 303 (*cf. Hostetter v. Hollinger*, 117 Pa. 606, 12 Atl. 741). Relief in an action at law was also denied in *Baxter v. Camp*, 71 Conn. 245, 41 Atl. 803, 42 L. R. A. 514, 71 Am. St. Rep. 169, and *Linneman v. Moross*, 98 Mich. 178, 57 N. W. 103, 39 Am. St. Rep. 528, but it was suggested that the plaintiff might have a remedy in equity.

⁹⁵ *Ewer v. Jones*, 2 Ld. Ray. 934, 2 Salk. 415; 6 Mod. 25; *Webb v. Jiggs*, 4 M. & S. 113; *Braithwaite v. Skinner*,

5 M. & W. 313. In the last case it was said by some of the judges that the plaintiff's recovery would be restricted to the value of the land.

In the United States the devisee is personally liable without restriction. *Harland v. Person*, 93 Ala. 273, 9 So. 379; *Williams v. Nichol*, 47 Ark. 254, 1 S. W. 243; *Millington v. Hill*, 47 Ark. 301, 1 S. W. 547; *Lord v. Lord*, 22 Conn. 595; *Olmstead v. Brush*, 27 Conn. 530; *Zimmer v. Sennott*, 134 Ill. 505, 25 N. E. 774; *La Valle v. Droit*, 179 Ill. App. 484; *Porter v. Jackson*, 95 Ind. 210, 48 Am. Rep. 704; *Owing's Case*, 1 Bland 370, 17 Am. Dec. 311; *Felch v. Taylor*, 13 Pick. 133; *Bacon v. Woodward*, 12 Gray, 376, 382; *Adams v. Adams*, 14 Allen, 650 *Pren-tice v. Brimhall*, 123 Mass. 291, 293; *Smith v. Jewett*, 40 N. H. 530, 535; *Wiggin v. Wiggin*, 43 N. H. 561; *Glen v. Fisher*, 6 Johns. Ch. 33, 10 Am. Dec. 310; *Gridley v. Gridley*, 24 N. Y. 130; *Loder v. Hatfield*, 71 N. Y. 92; *Brown v. Knapp*, 79 N. Y. 136; *Yearly v. Long*, 40 Ohio St. 27; *Flickinger v. Saum*, 40 Ohio St. 591; *Hoover v. Hoover*, 5 Pa. 351; *Etter v. Greenawalt*, 98 Pa. 422; *Dreer v. Pennsylvania Co.*, 108 Pa. 226, *In re Edmundson's Est.*, 259 Pa. 429, 103 Atl. 277; *Jordan v. Donahue*, 12 R. I. 199; *Hodges v. Phelps*, 65 Vt. 303, 26 Atl. 625; *Taliaferro v. Day*, 82 Va. 79.

§ 371. No distinction if promise based on other valid consideration.

In most jurisdictions no distinction is made and recovery is equally allowed when the promise is based on valid consideration other than a transfer of property; for instance, services or forbearance of a claim.⁹⁶

§ 372. Bonds to secure performance of building contracts or other duty.

It is a common stipulation in a building contract that the contractor will pay all bills for labor and materials. In most cases the fulfilment of this promise by the contractor operates to discharge a liability of the owner of the building, whose building would be liable to satisfy the liens given by the law to workmen and materialmen. It cannot, therefore, be inferred that the promisee requires the promise in order to benefit such creditors of the contractor. The natural inference is that his object is to protect himself or his building. When, however, the owner of the building is a municipality, or county, or State such an inference cannot so readily be justified, for the laws give no liens against the buildings of such owners. In such cases if the stipulation can be regarded as the result of more than the accidental insertion of a provision common in building contracts without reflection as to its necessity, it must be supposed that the object was to benefit creditors of the con-

⁹⁶ *Allen v. Davison*, 16 Ind. 416; *Marlett v. Wilson*, 30 Ind. 240; *Strong v. Marcy*, 33 Kan. 109, 5 Pac. 366; *Clarke v. McFarland's Exec.*, 5 Dana, 45; *Benge v. Hiatt's Adm.*, 82 Ky. 666, 56 Am. Rep. 912; *Felton v. Dickinson*, 10 Mass. 287 (overruled by *Marston v. Bigelow*, 150 Mass. 45, 22 N. E. 71, 5 L. R. A. 43); *Todd v. Weber*, 95 N. Y. 181, 47 Am. Rep. 20; *Buchanan v. Tilden*, 158 N. Y. 109, 52 N. E. 724, 70 Am. St. Rep. 454; *Whitcomb v. Whitcomb*, 92 Hun. 443, 36 N. Y. S. 607; *Babcock v. Chase*, 92 Hun. 264, 36 N. Y. S. 879.

See also *Lawrence v. Oglesby*, 178

Ill. 122, 52 N. E. 945; and see cases cited *supra*, § 368.

But in Pennsylvania, though the promise is perhaps enforceable by the beneficiary when the consideration is the transfer of property, it is not if the consideration is anything else. *Edmundson v. Penny*, 1 Barr, 334, 44 Am. Dec. 137. And such is the law of Oregon. *Weinhard v. R. R. Thompson Est. Co.*, 242 Fed. 315; *Washburn v. Interstate Investment Co.*, 28 Ore. 436, 36 Pac. 533, 38 Pac. 620; *Brower Lumber Co. v. Miller*, 28 Ore. 565, 43 Pac. 659, 52 Am. St. 807.

tractor. This supposition becomes a certainty when the legislature in view of litigation in the courts in regard to the matter enacts that all building contracts made by towns or counties shall contain such a stipulation. Creditors have in some States been allowed not only to take advantage of the promise but to sue the contractor and his sureties upon a bond given by him to secure the performance of his contract.⁹⁷ Similarly a bond given by a liquor dealer to a municipality to ensure performance by him of the requirements of law has been held enforceable by individuals injured by his failure to observe those requirements.⁹⁸ This result can hardly be supported on any other theory than that the bonds are statutory obligations and that the statute though not so providing expressly is to be construed as giving not simply the municipality but also individuals the

⁹⁷ *King v. Downey*, 24 Ind. App. 262, 56 N. E. 680; *Baker v. Bryan*, 64 Ia. 561, 21 N. W. 83; *Des Moines Bridge Works v. Marzen*, 87 Neb. 684, 128 N. W. 31 (but see *Hunt v. King*, 97 Ia. 88, 66 N. W. 71); *St. Louis v. Von Phul*, 133 Mo. 561, 34 S. W. 843, 54 Am. St. Rep. 695 (overruling *Kansas City Sewer Pipe Co. v. Thompson*, 120 Mo. 218), 25 S. W. 522; *Devers v. Howard*, 144 Mo. 671, 46 S. W. 625; *Glencoe Lime Co. v. Wind*, 86 Mo. App. 163; *Sample v. Hale*, 34 Neb. 220, 51 N. W. 837; *Lyman v. City of Lincoln*, 38 Neb. 794, 57 N. W. 531; *Doll v. Crume*, 41 Neb. 655, 59 N. W. 806; *Korsmeyer Co. v. McClay*, 43 Neb. 649, 62 N. W. 50; *Kaufmann v. Cooper*, 46 Neb. 644, 65 N. W. 796; *Hickman v. Layne*, 47 Neb. 177, 66 N. W. 298; *King v. Murphy*, 49 Neb. 670, 68 N. W. 1029; *Rohman v. Gaiser*, 53 Neb. 474, 73 N. W. 923; *Pickle Marble Co. v. McClay*, 54 Neb. 661, 74 N. W. 1062; *Gastonia v. McEntee-Peterson Co.*, 131 N. C. 363, 42 S. E. 858; *Baker City Mercantile Co. v. Idaho Pipe Co.*, 67 Or. 372, 136 Pac. 23. *Contra*, *Jefferson v. Asch*, 53 Minn. 446, 55 N. W. 604, 25 L. R. A. 257, 39 Am.

St. Rep. 618; *Union Ry. Storage Co. v. McDermott*, 53 Minn. 407, 55 N. W. 606; *Buffalo Cement Co. v. McNaughton*, 90 Hun, 74, 35 N. Y. S. 453, 156 N. Y. 702, 51 N. E. 1089; 157 N. Y. 703, 52 N. E. 1123; *Parker v. Jeffery*, 26 Ore. 186, 37 Pac. 712; *Brower Lumber Co. v. Miller*, 28 Ore. 565, 43 Pac. 659, 52 Am. St. Rep. 807; *Lancaster v. Frescoln*, 203 Pa. 640. See also *Montgomery v. Rief*, 15 Utah, 495, 50 Pac. 623, and 71 Cent. L. Journal, 429.

An action on the bond presents the difficulty that the creditors who recover not only are not the promisees, but are not the persons who are to receive payment. The promise is to pay the penalty of the bond, not to the creditors, but to the town or county. This difficulty is not much alluded to in the cases. See, however, *Jefferson v. Asch*, and *Buffalo Cement Co. v. McNaughton*, *supra*. In some of the decisions where recovery was allowed, the result was due to statutes.

⁹⁸ *Koski v. Pakkala*, 121 Minn. 450, 141 N. W. 793, 47 L. R. A. (N. S.) 183; *Lynch v. Brennan*, 131 Minn. 136, 154 N. W. 795, L. R. A. 1916 E. 269.

right to enforce it. In some jurisdictions statutes do expressly so provide.⁹⁹

§ 372a. Contracts of public service corporations.

A public service corporation frequently enters into a contract with a municipality for the performance of acts in which individual members of the municipality are interested and when a breach of the contract inflicts injury on such an individual the question arises whether he may maintain an action or whether the right is solely in the municipality. Three situations may be distinguished here: (1) The public service corporation undertakes contractually to perform duties which would, in any event, attach to it by virtue of its public profession, though perhaps the extent of the duty would not be exactly defined except for the contract; (2) The performance undertaken is not a duty imposed by law upon the corporation or upon the municipality, but finds its only reason for existence in the contract with the municipality. (3) The municipality is under a legal duty to the public to perform the acts which the corporation undertakes on its behalf. In the first case the corporation is liable to a member of the public for violation of the duty.¹ A common carrier is bound on payment of a reasonable charge to perform its functions to every member of the public who may make application. What is a reasonable charge may depend upon the terms upon which a franchise was granted and accepted or upon the provisions of a contract with a municipality. If a water company owes a public duty to maintain its service or to maintain a certain pressure of water, a violation of that duty entitles an individual injured thereby to recover appropriate damages.² So a water company³ or a gas company⁴ or a

⁹⁹ See *Guaranty Co. v. Pressed Brick Co.*, 191 U. S. 416, 427, 48 L. Ed. 242, 24 Sup. Ct. 142; *Hill v. American Surety Co.*, 200 U. S. 197, 50 L. Ed. 437, 26 S. Ct. 168; *Mankin v. Ludowici-Celadon Co.*, 215 U. S. 533, 54 L. Ed.

315, 30 S. Ct. 174; *United States Fidelity Co. v. Bartlett*, 231 U. S. 237, 58 L. Ed. 200, 34 S. Ct. 88.

¹ See *Wyman Pub. Serv. Corp.*, §§ 330 *et seq.*

² *Guardian Trust &c. Co. v. Fisher*,

³ *Pond v. New Rochelle Water Co.*, 183 N. Y. 330, 76 N. E. 211, 1 L. R. A. (N. S.) 958.

⁴ *Farnsworth v. Boro Oil & Gas Co.*, 216 N. Y. 40, 109 N. E. 860.

telephone company which receives a franchise upon a contract to give service at certain prices, comes under a duty to each individual of the community to furnish service at that price.⁵ A street railway company under authority of law has in many instances contracted with a municipality to carry passengers for a five cent fare. A member of the public who is aggrieved by breach of such a contract may sue the railway company;⁶ but his right is based on the duty imposed by law to carry for a reasonable charge which under the circumstances is five cents. The importance of recognizing that the plaintiff's right is not contractual has been pointed out.⁷ If the right were contractual "the rate of fare could not be raised without the consent of every one who rode on the street cars, and the city would have no legal right to consent to modify the terms of the agreement."

§ 373. Contracts for the sole benefit of inhabitants of a community.

The preceding section indicates that a contract with a municipality for a performance of public advantage can rarely be regarded as made for the sole benefit of the individual inhabitants, any more than the contracts of a private corporation can be regarded as made for the sole benefit of the individual stockholders;⁸ though it need not be denied that if it is clearly

200 U. S. 57, 26 S. Ct. 186, 50 L. Ed. 367; *Mugge v. Tampa Water Works Co.*, 52 Fla. 371, 42 So. 81, 6 L. R. A. (N. S.) 1171. In these decisions it is clearly stated that the plaintiff's right of recovery for loss of his property by fire through the failure of the supply of water which the water company had contracted to maintain was based on the company's public duty and the action was *ex delicto*. Cf. *German Alliance Ins. Co. v. Home Water Supply Co.*, 226 U. S. 220, 33 S. Ct. 32, 57 L. Ed. 195, 42 L. R. A. (N. S.) 1000; *House v. Houston Waterworks Co.*, 88 Tex. 233, 31 S. W. 179, 28 L. R. A. 532.

⁵ *Lutes v. Fayette Home Telephone*

Co., 155 Ky. 555, 160 S. W. 179; *Rochester Telephone Co. v. Ross*, 195 N. Y. 429, 88 N. E. 793.

⁶ *Adams v. Union R. Co.*, 21 R. I. 134, 42 Atl. 515, 44 L. R. A. 273.

⁷ *International Ry. Co. v. Rann*, 224 N. Y. 83, 120 N. E. 153.

⁸ In *International Ry. Co. v. Rann*, 224 N. Y. 83, Pound, J., said, speaking of an agreement by a railway company with the city of Buffalo to charge only five cents for fare:

"The agreement confers rights upon the city of Buffalo. The city may terminate it for non-performance or it may release the railroad companies from performance or consent to modify its terms, or it may compel perform-

intended to create rights in the individuals rather than in the community as a whole the intent will be given effect.⁹ The commonest illustration of the foregoing principles arises where a water company contracts to furnish water sufficient to supply the hydrants of a town or district, and the failure of the water company to keep its promise to the town results in the destruction of a building by a fire which might have been extinguished but for the lack of water, or in other damage. The injured individual is not generally allowed to sue on such a promise. Though the town or district which is the promisee, not being itself liable for the lack of water or for the destruction of the building, has no pecuniary interest in the performance of the promise, yet it may be doubted whether the stipulation was exacted for the benefit of such people as might have their buildings destroyed from lack of water. It is a more reasonable construction that the object of the promise is to benefit the community as a whole, and that the city as the representative of the community is the proper plaintiff. In fact, the plaintiff is not usually allowed to recover.¹⁰

ance by suit. *Washington County Water Co. v. Hagerstown*, 116 Md. 497, 82 Atl. 826. The city is the real party to the agreement. The individual inhabitants are not, nor can they become, parties thereto. They merely have the benefit of it while it remains in force. The rule as to private contracts which permits the third party for whose benefit it is made to become a party thereto, *Gifford v. Corrigan*, 117 N. Y. 257, 22 N. E. 756, 6 L. R. A. 610, can have no application to contracts like this which are primarily municipal regulations. *Little Rock R. & E. Co. v. Dowell*, 101 Ark. 223, 142 S. W. 165, Ann. Cas. 1913 D. 1086.

⁹ See *Adams v. Union R. Co.*, 21 R. I. 134, 139, 42 Atl. 515, 44 L. R. A. 273; *Jenkins v. Chesapeake &c. R. Co.*, 61 W. Va. 597, 57 S. E. 48, 49 L. R. A. (N. S.) 1166.

¹⁰ *German Alliance Ins. Co. v. Home Water Co.*, 226 U. S. 220, 33 S. Ct. 32, 57 L. Ed. 195, 42 L. R. A. (N. S.)

1000; *Boston Safe Deposit Co. v. Salem Water Co.*, 94 Fed. 238, 240; *Lovejoy v. Bessemer Waterworks Co.*, 146 Ala. 374, 41 So. 76, 6 L. R. A. (N. S.) 429; *Ukiah County v. Ukiah Water Co.*, 142 Cal. 173, 75 Pac. 773, 64 L. R. A. 231, 100 Am. St. Rep. 107; *Nickerson v. Bridgeport Hydraulic Co.*, 46 Conn. 24, 33 Am. Rep. 1; *Fowler v. Water Co.*, 83 Ga. 219, 9 S. E. 673, 20 Am. St. Rep. 313; *Bush v. Artesian Water Co.*, 4 Idaho, 618, 43 Pac. 69, 95 Am. St. Rep. 161; *Fitch v. Seymour Water Co.*, 139 Ind. 214, 37 N. E. 962, 47 Am. St. Rep. 258; *Davis v. Water Works*, 54 Ia. 59, 6 N. W. 126, 37 Am. Rep. 185; *Becker v. Keokup Water Works*, 79 Ia. 419, 44 N. W. 694, 18 Am. St. Rep. 377; *Mott v. Cherryvale Water Co.*, 48 Kans. 12, 28 Pac. 989, 15 L. R. A. 375, 30 Am. St. Rep. 267; *Hone v. Presque Isle Water Co.*, 104 Me. 217, 71 Atl. 769, 21 L. R. A. (N. S.) 1021; *Wilkinson v. Light, Heat & Water Co.*, 78

§ 374. Contracts to perform a duty of a municipality.

Where by contract the duty of a municipality is assumed by a corporation, the case seems indistinguishable from any case where a debt or obligation is assumed. The obligation assumed may be pecuniary¹¹ or for performance of other kinds. Not infrequently a street railway company undertakes the duty of keeping in repair a portion of the streets adjacent to its tracks. The duty of repair is one to which the municipality is itself subject, and when the railway company assumes the duty, it has been held that thereby an obligation is created which may be enforced by an individual member of the public who is injured, directly against the company;¹² and the same conclusion has been reached where a railroad company contracted with a city to assume the damages caused by a change of grade made by the city in its streets.¹³ But, as in any case of the assumption of a debt, it would seem that any right of such an individual against the corporation was

Miss. 389, 28 So. 877; Phoenix Ins. Co. v. Trenton Water Co., 42 Mo. App. 118; Howsmon v. Trenton Water Co., 119 Mo. 304, 24 S. W. 784, 23 L. R. A. 146, 41 Am. St. Rep. 654; Metz v. Cape Girardeau Waterworks Co., 202 Mo. 324, 100 S. W. 651; Eaton v. Fairbury Water Works, 37 Neb. 546, 56 N. W. 201, 21 L. R. A. 653, 40 Am. Rep. 510; Ferris v. Carson Water Co., 16 Nev. 44, 40 Am. Rep. 485; Wainwright v. Queens County Water Co., 78 Hun, 148, 28 N. Y. S. 987; Blunk v. Dennison Water Co., 71 Ohio St. 250, 73 N. E. 210; Beck v. Kittanning Water Co. (Pa.), 11 Atl. 300; Ancrum v. Camden Water Co., 82 S. Car. 284, 64 S. E. 151, 21 L. R. A. (N. S.) 1029; Foster v. Lookout Water Co., 3 Lea, 42; House v. Houston Waterworks Co., 88 Tex. 233, 31 S. W. 179, 28 L. R. A. 532; Britton v. Green Bay Waterworks Co., 81 Wis. 48, 51 N. W. 84, 29 Am. St. Rep. 856. But see Mugge v. Tampa Water Works, 52 Fla. 371, 42 So. 81, 6 L. R. A. (N. S.) 1171, 120 Am. St. Rep. 207; Paducah Lumber

Co. v. Paducah Water Supply Co., 89 Ky. 340, 12 S. W. 554, 13 S. W. 249, 7 L. R. A. 77, 25 Am. St. Rep. 536; Gorrell v. Greensboro Water Supply Co., 124 N. C. 328, 32 S. E. 720, 46 L. R. A. 513, 70 Am. St. Rep. 598. In Pittsfield Cottonwear Co. v. Pittsfield Shoe Co., 71 N. H. 522, 53 Atl. 807, 60 L. R. A. 116 (commented on in 16 Harv. L. Rev. 456), in a case similar in principle the defendant was held liable in tort. See also *supra*, § 372a.

¹¹ In Porter v. Richmond & D. R. Co., 97 N. C. 46, 2 S. E. 374, the defendant contracted with the city of Charlotte to pay part of the salary of a policeman on duty at its depot. The policeman was held entitled to sue.

¹² Jenree v. Metropolitan St. Ry., 86 Kans. 479, 121 Pac. 510, 39 L. R. A. (N. S.) 1112; City of Brooklyn v. Brooklyn City R. Co., 47 N. Y. 475, 485; McMahon v. Second Ave. R. Co., 75 N. Y. 231, 237.

¹³ Rigney v. New York & Co. Co., 217 N. Y. 31, 111 N. E. 226.

in its nature merely derivative, and that his direct right remained after the contract, as before, against the municipality.

§ 375. Obligation of carrier—in regard to mail.

A case which may be compared with that of a corporation under contract with a municipality is the case of a carrier under contract with the national government to carry mails. It has been urged that such a contract is made for the benefit of individuals who send matter through the post. It has, however, been held that the carrier,¹⁴ is not liable directly to one who sends mail, or to an insurance company which has paid a loss to such a sender and has become subrogated to his rights;¹⁵ nor is a carrier who contracts with the government to carry a mail agent, liable on this contract to the agent.¹⁶ It is difficult to distinguish on principle these cases from those involving a municipality. In both it seems to be true that the contract is made for the benefit of the people as a community rather than for the benefit of particular individuals, and that any right of action should be vested in the government.

§ 376. Telegraph company cases.

A telegraph company's contract made with the sender of a telegram to deliver it to the person addressed is sometimes treated as a contract made for the sole benefit of the latter, who is allowed to sue for this reason.¹⁷ In some cases this construction is fair enough, but senders of telegrams perhaps more

¹⁴ It should be observed that a carrier while engaged in transporting mail is not a common carrier, but an agency of government, and as much subject to its laws and regulations as every other branch of the post office.

¹⁵ *United States v. American Surety Co.*, 155 Fed. 941; *United States v. Atlantic Coast Line R. Co.*, 206 Fed. 190; *Boston Insurance Company v. Chicago, etc., Ry. Co.*, 118 Iowa, 423, 92 N. W. 88, 59 L. R. A. 796.

¹⁶ *Nolton v. Western Railroad*, 15 N. Y. 444, 69 Am. Dec. 623.

¹⁷ *Western Union Tel. Co. v. Hope*,

11 Ill. App. 289, 291 (but see *Western Union Tel. Co. v. Dubois*, 128 Ill. 248, 21 N. E. 4, 15 Am. St. Rep. 109); *Western Union Tel. Co. v. Fenton*, 52 Ind. 1, 3 (statutory); *Markel v. Western Union Tel. Co.*, 19 Mo. App. 80 (statutory); *Aiken v. Western Union Tel. Co.*, 5 S. C. 358; *Western Union Tel. Co. v. Jones*, 81 Tex. 271, 16 S. W. 1006. The cases allowing a right of action, based on various reasons, are collected in *Joyce on Electric Law*, § 1008; *Wyman, Public Service Corporations*, § 348.

frequently are seeking objects of their own rather than the benefit of another.

§ 377. Charitable subscriptions.

One of the numerous ways of making out a fictitious consideration for charitable subscriptions is to regard the promises of the subscribers as mutual promises to pay the beneficiary, who is then allowed to sue as on a contract made for its benefit.¹ In fact, in such subscriptions the promise of each subscriber on a fair construction, almost always runs directly to the beneficiary or to trustees representing it. The subscribers do not mutually promise one another.

§ 378. Action by an undetermined beneficiary.

In a New Jersey case¹⁹ the beneficiary was undetermined when the contract was made. The defendant contracted to pay \$750 to the owner of the foal by the defendant's stallion that first trotted a mile in 2.30. The plaintiff who answered the description was allowed to sue on the contract though not a party to it.²⁰ So the winner of a "popularity contest" instituted by a newspaper was allowed to recover the prize, though the contract must have been made with the voters and the winner was indeterminate until the end of the contest.²¹

§ 379. Enforcement of beneficiary's right by injunction.

An Indiana decision²² presents the rather unusual case of

¹⁸ *Rogers v. Galloway Female College*, 64 Ark. 627, 44 S. W. 454, 39 L. R. A. 636; *Wilson v. First Presbyterian Church*, 56 Ga. 554; *Irwin v. Lombard University*, 56 Ohio St. 9, 20, 46 N. E. 63, 36 L. R. A. 239, 60 Am. St. Rep. 727. See also *Hale v. Ripp*, 32 Neb. 259, 49 N. W. 218; *Roberts v. Cobb*, 31 Hun, 150; *supra*, § 116.

Contra is *Curry v. Rogers*, 21 N. H. 247. A curious case where the promises actually were by the subscribers to each other is *New Orleans St. Joseph's Assoc. v. Magnier*, 16 La. Ann. 338. A number of hatters agreed to

close their shops on Sunday. For any breach it was agreed that the offender should pay the plaintiff \$100. The plaintiff was not allowed to recover because its benefit was not the object of the contract.

¹⁹ *Whitehead v. Burgess*, 61 N. J. L. 75, 38 Atl. 802.

²⁰ See also cases where a creditor unidentified at the time of making a contract to pay a claim answering the description of his, is allowed to sue, *infra*, § 389.

²¹ *Smead v. Stearns*, 173 Ia. 174, 155 N. W. 307.

²² *Ferris v. American Brewing Co.*,

the enforcement by injunction of a promise for the benefit of a third person. The defendant as lessee of certain premises had covenanted with the lessor to sell on the premises no beer except that manufactured by the plaintiff company. The lessor was a relative of stockholders in the company, but had no pecuniary interest in the matter. The company was granted an injunction to enforce the covenant.²³

§ 380. Confusion in regard to contracts to discharge a debt.

It is in regard to contracts to discharge a debt of the promisee that the greatest confusion prevails. In the first place the intrinsic difficulty of the case is greater than where the third person is the sole beneficiary of the contract. Trust, agency, novation, must here be carefully distinguished, and the facts may not clearly indicate in which class a particular case belongs, since the parties may not have sufficiently expressed any intention. Further, it is in this class of cases that the reasoning of the courts is most artificial. New York by the decision of *Lawrence v. Fox*²⁴ has done more than any other jurisdiction to spread and strengthen the theory that a third person has a direct right of action on such a contract. In a later case²⁵ the New York court said: "It is not every promise made by one to another from the performance of which a benefit may inure to a third, which gives a right of action to such third person; he being neither privy to the contract, nor to the consideration. The contract must be made for his benefit as its object, and he must be the party intended to be benefited."

This language, or similar language, is adopted in other cases.²⁶ It seems hard to suppose, however, that the courts

155 Ind. 539, 58 N. E. 701, 52 L. R. A. 305.

²³ To similar effect is *Anders v. Gardner*, 151 N. C. 604, 66 S. E. 665; and in *Chicago, etc., R. R. v. Bell*, 44 Neb. 44, 62 N. W. 314, an agreement not to sue a third person was effectively used as a bar to an action against the latter. See also *Ayer's Appeal*, 28 Pa. 179.

²⁴ 20 N. Y. 268.

²⁵ *Simson v. Brown*, 68 N. Y. 355, 361.

²⁶ *Central Trust Co. v. Berwind-White Co.*, 95 Fed. 391; *Thomas Mfg. Co. v. Prather*, 65 Ark. 27, 44 S. W. 218; *Hall v. Alford*, 20 Ky. L. Rep. 1482, 49 S. W. 444; *Jefferson v. Asch*, 53 Minn. 446, 55 N. W. 604, 25 L. R. A. 257, 39 Am. St. Rep. 618; *Clark v. Hennessey Const. Co.*, 122 Minn. 476, 142 N. W. 873; *State v. St. Louis, etc., Rail-*

which use it really believe that the intent of the promisee in such a case as *Lawrence v. Fox* is to benefit the third party. When a grantor of premises subject to a mortgage requires the grantee to assume and agree to pay the mortgage, is it the

road, 125 Mo. 596, 617, 28 S. W. 1074; *Garnsey v. Rogers*, 47 N. Y. 233, 7 Am. Rep. 440; *Vrooman v. Turner*, 69 N. Y. 280, 283, 25 Am. Rep. 195; *Beveridge v. New York Elevated Railroad*, 112 N. Y. 1, 26, 19 N. E. 489, 2 L. R. A. 648; *Mollison v. Gubelman*, 170 N. Y. S. 985; *Parker v. Jeffery*, 26 Oreg. 186, 188, 37 Pac. 712; *Davidson v. Madden*, 89 Oreg. 209, 173 Pac. 320. In *Silver King Coalition Mines Co. v. Silver King C. M. Co.*, 204 Fed. 166, 175, 122 C. C. A. 402, however, Sanborn, J., said, after quoting the extract from the New York decision here quoted in the text: "Many authorities are cited that have repeated or approved this statement of the law. *Austin v. Seligman*, 18 Fed. 519, 522; *Sayward v. Dexter, H. & Co.*, 72 Fed. 758, 764, 765, 19 C. C. A. 176; *Constable v. National Steamship Co.*, 154 U. S. 51, 74, 14 S. Ct. 1062, 38 L. Ed. 903; *American Exchange National Bank v. Northern Pac. R. Co.*, 78 Fed. 130; *Central Trust Co. v. Berwind-White Coal Co.*, 95 Fed. 391; *Electric Appliance Co. v. United States F. & Co.*, 110 Wis. 434, 85 N. W. 648, 53 L. R. A. 609, 613; *Parker v. Jeffery*, 26 Or. 186, 37 Pac. 712; *Burton v. Larkin*, 37 Kans. 246, 250, 13 Pac. 398, 59 Am. Rep. 541; *Howsmon v. Trenton Water Co.*, 119 Mo. 304, 308, 24 S. W. 784, 23 L. R. A. 146, 41 Am. St. Rep. 654; *Wright v. Terry*, 23 Fla. 160, 2 So. 6. But none of these cases was a suit in equity and in none of them were the equitable doctrines that a creditor may have the benefit of any security or obligation given by the principal debtor to the surety, and that, to avoid circuity of action, the creditor may be, and is, when he sues upon the contract of the grantee to pay the latter's indebted-

ness to the creditor, in equity substituted for the grantee and promisee, upon which this suit stands, either invoked or available. Authorities are conflicting upon the proposition that it is essential to the maintenance of an action at law by the creditor of a grantor upon the contract of his grantee to pay the grantor's debts that the contract should be made for the creditor's benefit as its object and that he should be the party intended to be benefited. *Coster v. Mayor*, 43 N. Y. 399, 411, and cases there cited; *Arnold v. Nichols*, 64 N. Y. 117, 119. That, however, is a moot question in this case. It is unnecessary to consider or discuss it, and it is here dismissed, because this is a suit in equity, and not an action at law. In such a suit it is sufficient that the grantee has agreed with the grantor to be primarily liable for the latter's obligation to the creditor, so that, as between the parties to the agreement, the first is the principal and the second the surety. The creditor of the surety is then entitled in equity to be substituted in his place, and to maintain his suit against the grantee to the same extent as the grantor could have maintained it, and it is immaterial whether the contract was made and intended for the benefit of the creditor or of the grantor, for the creditor has all the rights of both to enforce the obligation of the grantee. *Keller v. Ashford*, 133 U. S. 610, 623, 10 S. Ct. 494, 33 L. Ed. 667, and the authorities there cited; *Barker v. Pullman's Palace Car Co.*, 124 Fed. 555, 568, 569; *Willard v. Wood*, 164 U. S. 502, 519, 520, 17 S. Ct. 176, 41 L. Ed. 531; *Johns v. Wilson*, 180 U. S. 440, 447, 448, 21 S. Ct. 445, 45 L. Ed. 613."

welfare of the mortgagee that the grantor is considering, or is it his own?

§ 381. Most jurisdictions allow the creditor an action at law.

Whatever may be the answer to these questions, the American jurisdictions are few which do not allow the creditor a direct action at law against the promisor.²⁷ Connecti-

²⁷ The following are cases where an action at law or direct action was allowed against one who promised to pay the debt of the promisee to the plaintiff. Cases of assumption of mortgages are not included. Such cases are separately collected, *infra*, § 383.

ALABAMA. *Huckabee v. May*, 14 Ala. 263; *Hoyt v. Murphy*, 18 Ala. 316; *Mason v. Hall*, 30 Ala. 599; *Henry v. Murphy*, 54 Ala. 246; *Young v. Hawkins*, 74 Ala. 370; *Dimmick v. Register*, 92 Ala. 458, 9 So. 79; *North Ala. Development Co. v. Short*, 101 Ala. 333, 13 So. 385; *Potts v. First Nat. Bank*, 102 Ala. 286, 14 So. 663; *Mackintosh v. Stewart*, 181 Ala. 328, 61 So. 956.

ALASKA. *Fish v. First Nat. Bank*, 157 Fed. 87, 84 C. C. A. 502.

ARKANSAS. *Chamblee v. McKenzie*, 31 Ark. 155; *Talbot v. Wilkins*, 31 Ark. 411; *Hecht v. Caughron*, 46 Ark. 132; *Ringo v. Wing*, 49 Ark. 457, 464, 5 S. W. 787; *Benjamin v. Birmingham*, 50 Ark. 433, 8 S. W. 183; *Spear Min. Co. v. Shinn*, 93 Ark. 346, 124 S. W. 1045; *National Trust & Credit Co. v. Polk*, 123 Ark. 24, 183 S. W. 195; *Crigger v. Sloss*, 124 Ark. 599, 186 S. W. 85. But see *contra* *Hicks v. Wyatt*, 23 Ark. 55, and *conf.* *Thomas Mfg. Co. v. Prather*, 65 Ark. 27, 44 S. W. 218.

CALIFORNIA. *Lewis v. Covillaud*, 21 Cal. 189; *Morgan v. Overman Co.*, 37 Cal. 534; *Malone v. Crescent Co.*, 77 Cal. 38, 18 Pac. 858; *Smith v. Los Angeles, etc., Ry. Co.*, 98 Cal. 210, 33 Pac. 53; *Alvord v. Spring Valley Gold Co.*, 106 Cal. 547, 40 Pac. 27; *Whitney v. American Ins. Co.*, 127 Cal. 464, 59

Pac. 897 (overruling *McLaren v. Hutchinson*, 18 Cal. 80, *contra*); *J. F. Hall Martin Co. v. Hughes*, 18 Cal. App. 513, 123 Pac. 617; *Sherwood v. Gill* (Cal. App.), 173 Pac. 171, *cf.* *Wilson v. Shea*, 29 Cal. App. 788, 157 Pac. 543.

COLORADO. *Lehow v. Simonton*, 3 Col. 346; *Green v. Morrison*, 5 Col. 18; *Starbird v. Cranston*, 24 Col. 20, 48 Pac. 652; *Wilson v. Lunt*, 11 Col. App. 56, 52 Pac. 296; *Burson v. Bogart*, 49 Colo. 410, 113 Pac. 516.

FLORIDA. *Hunter v. Wilson*, 21 Fla. 250; *Wright v. Terry*, 23 Fla. 160, 2 So. 6.

ILLINOIS. *Eddy v. Roberts*, 17 Ill. 505; *Brown v. Strait*, 19 Ill. 88; *Bristow v. Lane*, 21 Ill. 194; *Rabbermann v. Wiskamp*, 54 Ill. 179; *Wilson v. Bevans*, 58 Ill. 232; *Beasley v. Webster*, 64 Ill. 458; *Steele v. Clark*, 77 Ill. 471; *Snell v. Ives*, 85 Ill. 279; *Shober Co. v. Kerting*, 107 Ill. 344; *Schmidt v. Glade*, 126 Ill. 485, 18 N. E. 762; *Cobb v. Heron*, 78 Ill. App. 654, 180 Ill. 49, 54 N. E. 189; *Hartman v. Pistorius*, 248 Ill. 568, 94 N. E. 131; *Mathers v. Carter*, 7 Ill. App. 225; *Struble v. Hake*, 14 Ill. App. 546; *Boals v. Nixon*, 26 Ill. App. 517; *Williamson-Stewart Co. v. Seaman*, 29 Ill. App. 68; *McCasland v. Doorley*, 47 Ill. App. 513; *Rothermel v. Bell & Zoller Co.*, 79 Ill. App. 667; *Kee v. Cahill*, 86 Ill. App. 561; *American Splane Co. v. Barber*, 91 Ill. App. 359; *Hartman v. Six*, 155 Ill. App. 202; *Sabo v. Nimett*, 178 Ill. App. 459; *Stein v. Deutsch*, 178 Ill. App. 615.

INDIANA. *Cross v. Truesdale*, 28

Ind. 44; *Davis v. Calloway*, 30 Ind. 112, 95 Am. Dec. 671; *Haggerty v. Johnston*, 48 Ind. 41; *Campbell v. Patterson*, 58 Ind. 66; *Loeb v. Weis*, 64 Ind. 285; *South Side Planing Mill Assoc. v. Cutler, etc., Co.*, 64 Ind. 560; *Rhodes v. Matthews*, 67 Ind. 131; *Fisher v. Wilmoth*, 68 Ind. 449; *Clodfelter v. Hulett*, 72 Ind. 137; *Medsker v. Richardson*, 72 Ind. 323; *Hendricks v. Frank*, 86 Ind. 278; *Harrison v. Wright*, 100 Ind. 515, 533, 50 Am. Rep. 805; *Warren v. Farmer*, 100 Ind. 593; *Wolke v. Fleming*, 103 Ind. 105, 2 N. E. 325, 53 Am. Rep. 495; *Redelsheimer v. Miller*, 107 Ind. 485, 8 N. E. 447; *Leake v. Ball*, 116 Ind. 214, 17 N. E. 918; *Boruff v. Hudson*, 138 Ind. 280, 37 N. E. 786; *Snider v. Greer-Wilkinson Co.*, 51 Ind. App. 348, 96 N. E. 960. See also *Reed v. Adams & Co. Works*, 57 Ind. App. 259, 106 N. E. 882. The early Indiana cases before the enactment of the code allowed relief only in equity. *Salmon v. Brown*, 6 Blackf. 347; *Farlow v. Kemp*, 7 Blackf. 544; *Britzell v. Fryberger*, 2 Ind. 176; *Conklin v. Smith*, 7 Ind. 107, 109, 63 Am. Dec. 416; *Bird v. Lanius*, 7 Ind. 615, 618.

Iowa. *Johnson v. Knapp*, 36 Ia. 616; *Blair Co. v. Walker*, 39 Ia. 406; *Gilbert v. Sanderson*, 56 Ia. 349, 9 N. W. 293, 41 Am. Rep. 103; *Poole v. Hintrager*, 60 Ia. 180, 14 N. W. 223; *Clinton Nat. Bank v. Studemann*, 74 Ia. 104, 37 N. W. 112; *Knott v. Dubuque, etc., Ry. Co.*, 84 Ia. 462, 51 N. W. 57; *First Nat. Bank of Pipestone v. Rowley*, 92 Ia. 530, 61 N. W. 195; *Hawley v. Exchange Bank*, 97 Ia. 187, 66 N. W. 152; *Weiser v. Ross*, 150 Ia. 353, 130 N. W. 387.

KANSAS. *Harrison v. Simpson*, 17 Kan. 508; *Kansas Pac. Ry. Co. v. Hopkins*, 18 Kan. 494; *Floyd v. Ort*, 20 Kan. 162; *Alliance Mut. L. Ass. Soc. v. Welch*, 26 Kan. 632, 641; *Brenner v. Luth*, 28 Kan. 581; *West v. W. U. Tel. Co.*, 39 Kan. 93, 17 Pac. 807, 7

Am. St. Rep. 530; *Manufacturing Co. v. Burrows*, 40 Kan. 361, 19 Pac. 809; *Mumper v. Kelley*, 43 Kan. 256, 23 Pac. 558; *Howell v. Hough*, 46 Kan. 152, 26 Pac. 436; *Hardesty v. Cox*, 53 Kan. 618, 36 Pac. 985; *Ballard v. Home Nat. Bank*, 91 Kan. 91, 136 Pac. 935, L. R. A. 1916 C: 161; *Staley v. Weston*, 92 Kan. 317, 140 Pac. 878; *Saylors v. State Bank*, 99 Kan. 515, 163 Pac. 454; *Emerson-Brantingham Co. v. Lyons*, 102 Kans. 733, 172 Pac. 513.

KENTUCKY. *Garvin v. Mobley*, 1 Bush, 48; *Dodge's Adm. v. Moss*, 82 Ky. 441. But see *Hall v. Alford*, 105 Ky. 664, 49 S. W. Rep. 444; *Matheny v. Chester*, 141 Ky. 790, 133 S. W. 754; *First Nat. Bank v. Doherty*, 156 Ky. 381, 161 S. W. 211; *Weber-Wolters Dry Goods Co. v. Scott*, 172 Ky. 280, 189 S. W. 223; *Caldwell v. Ryan*, 173 Ky. 233, 190 S. W. 1078.

LOUISIANA. *Mayor v. Bailey*, 5 Mart. 321; *Marigny v. Remy*, 3 Mart. (N. S.) 607, 15 Am. Dec. 172; *Cucullu v. Walker*, 16 La. Ann. 198; *Watson v. Feibel*, 139 La. 375, 71 So. 585; *People's Bank v. Shreveport Ice & Co.*, 142 La. 802, 77 So. 636 (after acceptance by the creditor). See also Civil Code, Arts. 1884, 1896.

MAINE. *Burbank v. Gould*, 15 Me. 118; *Hinkley v. Fowler*, 15 Me. 285; *Bohanan v. Pope*, 42 Me. 93; *Coffin v. Bradbury*, 89 Me. 476, 36 Atl. 988; *Baldwin v. Emery*, 89 Me. 496, 498, 36 Atl. 994.

MARYLAND. *Small v. Schaefer*, 24 Md. 143; *Seigman v. Hoffacker*, 57 Md. 321, 325. But see *contra* *Hand v. Evans Marble Co.*, 88 Md. 226, 40 Atl. 899.

MASSACHUSETTS. *Arnold v. Lyman*, 17 Mass. 400, 9 Am. Dec. 154; *Carnegie v. Morrison*, 2 Met. 381; *Fitch v. Chandler*, 4 Cush. 254; *Brewer v. Dyer*, 7 Cush. 337; *Putnam v. Field*, 103 Mass. 556, overruled by later decisions *contra*; *Flint v. Pierce*, 99 Mass.

68, 96 Am. Dec. 691; Exchange Bank *v.* Rice, 107 Mass. 37, 9 Am. Rep. 1; Rogers *v.* Union Stone Co., 130 Mass. 581, 39 Am. Rep. 478; Aigen *v.* Boston & Me. R. R., 132 Mass. 423; Morrill *v.* Lane, 136 Mass. 93; Borden *v.* Boardman, 157 Mass. 410, 32 N. E. 469; White *v.* Mt. Pleasant Mills, 172 Mass. 462, 52 N. E. 632. See also more recent decisions, *infra*, n. 29.

MINNESOTA. Sanders *v.* Clason, 13 Minn. 379; Hawley *v.* Wilkinson, 18 Minn. 525; Jordan *v.* White, 20 Minn. 91; Sullivan *v.* Murphy, 23 Minn. 6; Maxfield *v.* Schwartz, 43 Minn. 221, 45 N. W. 429, 45 Minn. 150, 47 N. W. 448, 10 L. R. A. 606; Lovejoy *v.* Howe, 55 Minn. 353, 57 N. W. 57; Sonstiby *v.* Keeley, 7 Fed. Rep. 447. But see Bell *v.* Mendenhall, 71 Minn. 331, 73 N. W. 1086; Gaffney *v.* Sederberg, 114 Minn. 319, 131 N. W. 333; Barry *v.* Jordan, 116 Minn. 34, 133 N. W. 78; Gunn *v.* McAlpine, 125 Minn. 343, 147 N. W. 111.

MISSISSIPPI. Sweatman *v.* Parker, 49 Miss. 19, 30; Barnes *v.* Jones, 111 Miss. 337, 71 So. 573.

MISSOURI. Bank of Missouri *v.* Benoist, 10 Mo. 519; Robbins *v.* Ayres, 10 Mo. 538, 47 Am. Dec. 125; Corl *v.* Riggs, 12 Mo. 430; Meyer *v.* Lowell, 44 Mo. 328; Flanagan *v.* Hutchinson, 47 Mo. 237; Rogers *v.* Gosnell, 51 Mo. 466, 58 Mo. 589; Schuster *v.* Kas. City, etc., Ry. Co., 60 Mo. 290; Mosman *v.* Bender, 80 Mo. 579; Green *v.* Estes, 82 Mo. 337; Ellis *v.* Harrison, 104 Mo. 270, 16 S. W. 198; Winn *v.* Lippincott Investment Co., 125 Mo. 528, 28 S. W. 998; State *v.* St. Louis & S. F. Ry. Co., 125 Mo. 596, 615, 28 S. W. 1074; Porter *v.* Woods, 138 Mo. 539, 540, 39 S. W. 794; Beardalee *v.* Morgner, 4 Mo. App. 139; Harvey Lumber Co. *v.* Herriman Lumber Co., 39 Mo. App. 214; Nelson Distilling Co. *v.* Loe, 47 Mo. App. 31; Tennent-Stribling Shoe Co. *v.* Rudy, 53 Mo. App. 196; Street *v.* Goodale, 77 Mo. App. 318; Rothwell

v. Skinker, 84 Mo. App. 169; Citizens' Bank *v.* Douglas, 178 Mo. App. 664, 161 S. W. 601. Two early cases *contra* are overruled. Manny *v.* Frasier, 27 Mo. 419; Page *v.* Becker, 31 Mo. 466. See also Davis *v.* Dunn, 121 Mo. App. 490, 97 S. W. 226.

NEBRASKA. Shamp *v.* Meyer, 20 Neb. 223, 29 N. W. 379; Meyer *v.* Shamp, 26 Neb. 729, 730, 42 N. W. 757, 51 Neb. 424; Fonner *v.* Smith, 31 Neb. 107, 47 N. W. 632, 11 L. R. A. 528; Kaufman *v.* U. S. Nat. Bank, 31 Neb. 661, 48 N. W. 738; Barnett *v.* Pratt, 37 Neb. 349, 55 N. W. 1050; Union Pac. Ry. Co. *v.* Metcalf, 50 Neb. 452, 461, 69 N. W. 961; Tecumseh Nat. Bank *v.* Best, 50 Neb. 518, 70 N. W. 41.

NEVADA. Alcalá *v.* Morales, 3 Nev. 132; Bishop *v.* Stewart, 13 Nev. 25; Jones *v.* Pacific Wood, L. & F. Co., 13 Nev. 359, 375, 29 Am. Rep. 308; Miliani *v.* Tognini, 19 Nev. 133, 7 Pac. 279.

NEW JERSEY. Gibson *v.* Victor Talking Mach. Co., 232 Fed. 225; Berry *v.* Doremus, 30 N. J. L. 399; Joslin *v.* New Jersey Car Spring Co., 36 N. J. L. 141. See also Price *v.* Trusdell, 28 N. J. Eq. 200, 202; Katzenbach *v.* Holt, 43 N. J. Eq. 536, 550, 12 Atl. 383; Bennett *v.* Merchantville Building Assoc., 44 N. J. Eq. 116, 118, 13 Atl. 852; Cocks *v.* Varney, 45 N. J. Eq. 72, 77, 17 Atl. 108; Collier *v.* De Brigard, 80 N. J. L. 94, 77 Atl. 513; Chambers *v.* Philadelphia Pickling Co., 81 N. J. L. 388, 79 Atl. 273; Tapscott *v.* McVey, 83 N. J. Law, 747, 85 Atl. 343.

NEW YORK. Gold *v.* Phillips, 10 Johns. 412; Farley *v.* Cleveland, 4 Cow. 432, 15 Am. Dec. 387, 9 Cow. 639; Ellwood *v.* Monk, 5 Wend. 235; Barker *v.* Bucklin, 2 Denio, 45, 43 Am. Dec. 726; Del. & Hudson Canal Co. *v.* Westchester County Bank, 4 Denio, 97; Lawrence *v.* Fox, 20 N. Y. 268; Judson *v.* Gray, 17 How. Pr. 289; Dingeldein *v.* Third Avenue R. Co., 37 N. Y. 575;

Barker v. Bradley, 42 N. Y. 316, 1 Am. Rep. 521; *Coster v. Mayor of Albany*, 43 N. Y. 399; *Secor v. Lord*, 3 Keyes, 525; *Hutchings v. Miner*, 46 N. Y. 456, 460, 7 Am. Rep. 369; *Claffin v. Ostrom*, 54 N. Y. 581; *Barlow v. Myers*, 64 N. Y. 41, 21 Am. Rep. 582; *Arnold v. Nichols*, 64 N. Y. 117; *Litchfield v. Flint*, 104 N. Y. 543, 11 N. E. 58; *Hallenbeck v. Kindred*, 109 N. Y. 620, 15 N. E. 887; *Warren v. Wilder*, 114 N. Y. 209, 21 N. E. 159; *Hannigan v. Allen*, 127 N. Y. 639, 27 N. E. 402; *Clark v. Howard*, 150 N. Y. 232, 44 N. E. 695; *Bradley v. McDonald*, 157 N. Y. App. D. 572, 142 N. Y. S. 702, 218 N. Y. 351, 113 N. E. 340; *Seaman v. Hasbrouck*, 35 Barb. 151; *Adams v. Wadhams*, 40 Barb. 225; *Brown v. Curran*, 14 Hun, 260; *Cock v. Moore*, 18 Hun, 31; *Kingsbury v. Earle*, 27 Hun, 141; *Schmid v. New York, etc., R. Co.*, 32 Hun, 335, affd. 98 N. Y. 634; *Edick v. Green*, 38 Hun, 202; *Pulver v. Skinner*, 42 Hun, 322; *Reynolds v. Lawton*, 62 Hun, 596, 17 N. Y. S. 432; *Bogardus v. Young*, 64 Hun, 398, 19 N. Y. S. 885; *Cook v. Berrott*, 66 Hun, 633, 21 N. Y. S. 358; *Beemer v. Packard*, 92 Hun, 546, 38 N. Y. S. 1045; *Anguish v. Blair*, 160 N. Y. App. D. 52, 145 N. Y. S. 392. But see *Etna Nat. Bank v. Fourth Nat. Bank*, 46 N. Y. 82, 7 Am. Rep. 314; *Merrill v. Green*, 55 N. Y. 270; *Wheat v. Rice*, 97 N. Y. 296; *Serviss v. McDonnell*, 107 N. Y. 260, 14 N. E. 314; *Corner v. Mackey*, 147 N. Y. 574, 582, 42 N. E. 29; *Rigney v. New York Central, etc., R. Co.*, 217 N. Y. 31, 111 N. E. 226; *Fairchild v. Feltman*, 32 Hun, 398; *Metropolitan Trust Co. v. New York, etc., Ry. Co.*, 45 Hun, 84; *Clark v. Howard*, 74 Hun, 228, 26 N. Y. S. 620; *Feist v. Schiffer*, 79 Hun, 275, 29 N. Y. S. 423; *Mollison v. Gubelman*, 170 N. Y. S. 985.

NORTH CAROLINA. *Voorhees v. Porter*, 134 N. C. 591, 603, 47 S. E. 31, 65 L. R. A. 736; *Orinoco Supply Co.*

v. Shaw Bros. Lumber Co., 160 N. C. 428, 431, 76 S. E. 273, 42 L. R. A. (N. S.) 707; *Withers v. Poe*, 167 N. C. 374, 83 S. E. 614; *Crumpler v. Hines*, 174 N. C. 283, 93 S. E. 780. Earlier decisions are expressly or impliedly overruled, *e. g.*, *Morehead v. Wriston*, 73 N. C. 398; *Peacock v. Williams*, 98 N. C. 324, 4 S. E. 550; *Woodcock v. Bostic*, 118 N. C. 822, 24 S. E. 362.

OHIO. *Crumbaugh v. Kugler*, 3 Ohio St. 544, 549; *Bagaley v. Waters*, 7 Ohio St. 359; *Dodge v. Nat. Exchange Bank*, 30 Ohio St. 1; *Emmitt v. Brophy*, 42 Ohio St. 82.

OKLAHOMA. *Eastman Land Co. v. Long-Bell Lumber Co.*, 30 Okla. 555, 120 Pac. 276; *Staver Carriage Co. v. Jones*, 32 Okla. 713, 123 Pac. 148.

OREGON. *Baker v. Eglin*, 11 Ore. 333, 8 Pac. 280; *Hughes v. Oregon Ry. & Nav. Co.*, 11 Ore. 437, 5 Pac. 206; *Schneider v. White*, 12 Ore. 503, 8 Pac. 652; *Strong v. Kamm*, 13 Ore. 172, 9 Pac. 331; *Feldman v. McGuire*, 34 Ore. 309, 310, 55 Pac. 872; *Oregon Mill & Grain Co. v. Kirkpatrick*, 66 Or. 21, 133 Pac. 69; *Baker City Mercantile Co. v. Idaho &c. Pipe Co.*, 67 Ore. 372, 136 Pac. 23; *Davidson v. Madden (Oreg.)*, 173 Pac. 320. But see *contra Washburn v. Interstate Invest. Co.*, 26 Ore. 436, 36 Pac. 533, 38 Pac. 620.

PENNSYLVANIA (with some limitation). See *supra*, §§ 348, 381. See allowing the creditor a right, *Strohacker v. Grant*, 16 S. & R. 237, 241; *Hind v. Holdship*, 2 Watts, 104, 26 Am. Dec. 107; *Commercial Bank v. Wood*, 7 W. & S. 89; *Beers v. Robinson*, 9 Barr, 229; *Bellas v. Fagely*, 19 Pa. 273; *Townsend v. Long*, 77 Pa. 143, 18 Am. Rep. 438; *White v. Thielens*, 106 Pa. 173; *Delp v. Brewing Co.*, 123 Pa. 42, 15 Atl. 871; *Howes v. Scott*, 224 Pa. 7, 73 Atl. 186; *In re Edmundson's Est.*, 259 Pa. 429, 103 Atl. 277. But see denying an action *Blymire v. Boistle*, 6 Watts, 182; *Ramsdale v.*

cut,²⁸ Delaware,²⁹ Massachusetts,²⁹ Michigan,³⁰ are committed

Horton, 3 Barr, 330; Campbell v. Lacock, 40 Pa. 448; Robertson v. Reed, 47 Pa. 115; Torrens v. Campbell, 74 Pa. 470; Kountz v. Holthouse, 85 Pa. 235, 237; Adams v. Kuehn, 119 Pa. 76, 13 Atl. 184; Freeman v. Pa. R. R. Co., 173 Pa. 274, 33 Atl. 1034. See also Brown v. German-American Title & Trust Co., 174 Pa. 443, 455, 34 Atl. 335; Sweeney v. Houston, 243 Pa. 542, 90 Atl. 347, L. R. A. 1915 A. 779.

RHODE ISLAND. Merriman v. Social Mfg. Co., 12 R. I. 175; Wood v. Moriarty, 15 R. I. 518, 9 Atl. 427; Kehoe v. Patton, 23 R. I. 360, 50 Atl. 655.

SOUTH CAROLINA. See McBride v. Floyd, 2 Bailey, 209; Brown v. O'Brien, 1 Rich. 268, 44 Am. Dec. 254; Redfearn v. Craig, 57 S. C. 534, 35 S. E. 1024.

TENNESSEE. Moore v. Stovall, 2 Lea, 543; Lookout Mountain R. Co. v. Houston, 1 Pickle, 224; O'Connor v. O'Conner, 88 Tenn. 76, 82, 12 S. W.

447, 7 L. R. A. 33. But see Campbell v. Findley, 3 Humph. 330.

TEXAS. Spann v. Cochran, 63 Tex. 240; Bennett v. Rosenthal, 3 Willson Civ. Cas. 196; Bartley v. Conn, 4 Tex. Civ. App. 299, 23 S. W. 382.

UTAH. Brown v. Markland, 16 Utah, 360, 52 Pac. 597, 67 Am. St. Rep. 629.

VERMONT. See Arlington v. Hinds, 1 D. Chip. 431, 12 Am. Dec. 704; Pangborn v. Saxton, 11 Vt. 79, *semble*; Corey v. Powers, 18 Vt. 587; Rutland & B. R. Co. v. Cole, 24 Vt. 33; Chapman v. Mears, 56 Vt. 389; Congregational Soc. v. Flagg, 72 Vt. 248, 47 Atl. 782.

WASHINGTON. Don Yook v. Washington Mill Co., 16 Wash. 459, 47 Pac. 964; Union Machinery &c. Co. v. Darnell, 89 Wash. 226, 154 Pac. 183.

WISCONSIN. Kimball v. Noyes, 17 Wis. 695; Putney v. Farnham, 27 Wis. 187, 9 Am. Rep. 459; McDowell v. Laev, 35 Wis. 171; Bassett v. Hughes,

²⁸ Morgan v. Randolph-Clowes Co., 73 Conn. 396, 47 Atl. 658, 51 L. R. A. 653. See also Baxter v. Camp, 71 Conn. 245, 41 Atl. 803, 42 L. R. A. 514, 71 Am. St. Rep. 169. These cases overrule earlier decisions, *e. g.*, Crocker v. Higgins, 7 Conn. 342; Steene v. Aylesworth, 18 Conn. 244, 252; Atwood v. Burpee, 77 Conn. 42, 58 Atl. 237.

²⁹ Merchants' Union Trust Co. v. New Philadelphia Graphite Co. (Del. Ch.), 83 Atl. 520.

³⁰ Mellen v. Whipple, 1 Gray, 317; Flint v. Pierce, 99 Mass. 68, 96 Am. Dec. 691; Exchange Bank v. Rice, 107 Mass. 37, 9 Am. Rep. 1; Rogers v. Union Stone Co., 130 Mass. 581, 39 Am. Rep. 478; Aigen v. Boston & Maine R. R., 132 Mass. 423; Morrill v. Lane, 136 Mass. 93; Borden v. Boardman, 157 Mass. 410, 32 N. E. 469;

White v. Mt. Pleasant Mills, 172 Mass. 462, 52 N. E. 632. See also cases of mortgage, *infra*, n. 43. Cf. Berry v. Friedman, 192 Mass. 131, 137, 78 N. E. 305; Forbes v. Thorpe, 209 Mass. 570, 95 N. E. 955, 959.

³¹ Pipp v. Reynolds, 20 Mich. 88; Turner v. McCarty, 22 Mich. 265; Halsted v. Francis, 31 Mich. 113; Hartford Fire Ins. Co. v. Davenport, 37 Mich. 609; Hicks v. McGarry, 38 Mich. 667; Hunt v. Strew, 39 Mich. 368, 371; Booth v. Conn. Mut. Life Ins. Co., 43 Mich. 299, 5 N. W. 381; Ayres v. Gallup, 44 Mich. 13, 5 N. W. 1072; Edwards v. Clements, 81 Mich. 513, 45 N. W. 1107; Minnock v. Eureka F. & M. Ins. Co., 90 Mich. 236, 51 N. W. 367; Bliss v. Plummer's Estate, 103 Mich. 181, 61 N. W. 263; Edwards v. Thoman, 187 Mich. 361, 153 N. W. 806.

against the doctrine. The United States Supreme Court,³⁰ Maryland,³¹ New Hampshire,³² Pennsylvania,³³ and Wyoming,³⁴

43 Wis. 319; *Hoile v. Bailey*, 58 Wis. 434, 17 N. W. 322; *Winninghoff v. Wittig*, 64 Wis. 180, 24 N. W. 912; *Johannes v. Phenix Ins. Co.*, 66 Wis. 50, 27 N. W. 414, 57 Am. Rep. 249; *Jones v. Foster*, 67 Wis. 296, 309, 30 N. W. 697; *Ingram v. Osborn*, 70 Wis. 184, 193, 35 N. W. 304; *Nix v. Wiswell*, 84 Wis. 334, 54 N. W. 620; *Fulmer v. Wightman*, 87 Wis. 573, 58 N. W. 1106; *New York Life Ins. Co. v. Hamlin*, 100 Wis. 17, 23, 75 N. W. 421; *Lenz v. Chicago & N. W. R. Co.*, 111 Wis. 198, 86 N. W. 607; *Concrete Steel Co. v. Illinois Surety Co.*, 163 Wis. 41, 157 N. W. 543.

³⁰ *National Bank v. Grand Lodge*, 98 U. S. 123, 25 L. Ed. 75. See also *Constable v. National S. S. Co.*, 154 U. S. 51, 14 Sup. Ct. Rep. 1062, 38 L. Ed. 903; *Johns v. Wilson*, 180 U. S. 440, 21 Sup. Ct. Rep. 445, 45 L. Ed. 613; *German Alliance Ins. Co. v. Home Water Supply Co.*, 226 U. S. 220, 33 Sup. Ct. 32, 57 L. Ed. 195, 42 L. R. A. (N. S.) 1000; *Nebraska Bank v. Nebraska Hydraulic Co.*, 14 Fed. 763; *Jesup v. Illinois Central R. Co.*, 43 Fed. 483, 493; *Hennessy v. Bond*, 77 Fed. 403, 23 C. C. A. 203; *Mercantile Trust Co. v. Baltimore & Ohio R. Co.*, 94 Fed. 722; *Goodyear Shoe Mach. Co. v. Dancel*, 119 Fed. Rep. 692, 56 C. C. A. 300; *Silver King Coalition Mines Co. v. Silver King Consol. Min. Co.*, 204 Fed. 166, 122, C. C. A. 402. *Cf.* *Guardian Trust &c. Co. v. Fisher*, 200 U. S. 57, 26 S. Ct. 186, 50 L. Ed. 367.

³¹ *Hand v. Evans Marble Co.*, 88 Md. 226, 40 Atl. 899. But see *Small v. Schaefer*, 24 Md. 143; *Seigman v. Hoffacker*, 57 Md. 321.

³² *Warren v. Batchelder*, 15 N. H. 129. *Conf.* *Warren v. Batchelder*, 16 N. H. 580; *Lang v. Henry*, 54 N. H. 57; *Hunt v. New Hampshire Fire*

Assoc., 68 N. H. 305, 308, 38 Atl. 145, 38 L. R. A. 514, 73 Am. St. Rep. 602. In the case last cited the court say, "The debt is in equity his debt." "If for technical reasons the law is powerless to enforce the duty, equity is subject to no such weakness."

³³ *Blymire v. Boistle*, 6 Watts, 182, 31 Am. Dec. 458; *Ramsdale v. Horton*, 3 Barr, 330; *Campbell v. Lacock*, 40 Pa. 448; *Robertson v. Reed*, 47 Pa. 115; *Torrens v. Campbell*, 74 Pa. 470; *Kountz v. Holthouse*, 85 Pa. 235, 237; *Adams v. Kuehn*, 119 Pa. 76, 13 Atl. 184; *Freeman v. Pennsylvania R. R. Co.*, 173 Pa. 274, 33 Atl. 1034. But see *Strohecker v. Grant*, 16 S. & R. 237, 241; *Hind v. Holdship*, 2 Watts, 104; *Commercial Bank v. Wood*, 7 W. & S. 89; *Vincent v. Watson*, 18 Pa. 96; *Bellas v. Fagely*, 19 Pa. 273; *Townsend v. Long*, 77 Pa. 143, 18 Am. Rep. 438; *White v. Thielens*, 106 Pa. 173; *Delp v. Brewing Co.*, 123 Pa. 42, 15 Atl. 871; *Howes v. Scott*, 224 Pa. 7, 73 Atl. 186; *Sweeney v. Houston*, 243 Pa. 542, 90 Atl. 347, L. R. A. 1915 A. 779. See also mortgage cases.

The rule in Pennsylvania seems to be that in general the creditor cannot sue, but "among the exceptions are cases where the promise to pay the debt of a third person rests upon the fact that money or property is placed in the hands of the promisor for that particular purpose, also where one buys out the stock of a tradesman and undertakes to take the place, fill the contracts, and pay the debts of his vendor." *Adams v. Kuehn*, 119 Pa. 76, 86, 13 Atl. 184. The first exception thus stated is that of a trust, but in its application of the rule the Pennsylvania court has gone beyond trusts properly so called.

³⁴ *McCarteney v. Wyoming Nat. Bank*, 1 Wyo. 382.

at least, do not accept it completely and unequivocally. Several other jurisdictions in most cases, at least, hold the creditor's only right to be derivative and equitable, though in some of them code procedure has been substituted for a bill in equity in the enforcement of derivative rights.³⁵

§ 382. What amounts to an assumption of a mortgage.

The most universal illustration of the right of a creditor to sue on a promise to his debtor to pay the debt arises where the grantee of premises subject to a mortgage assumes and agrees to pay the mortgage debt. In England one who buys property expressed to be subject to a mortgage becomes thereby bound as by contract to indemnify the mortgagor from liability though no promise in terms is made to do so;³⁶ and the same construction is adopted in Pennsylvania.³⁷ In the United States generally, however, no promise or legal or equitable obligation

³⁵ *Sheppard v. Bridges*, 137 Ga. 615, 74 S. E. 245. *Cf.* *Ford v. Finney*, 35 Ga. 258, 261. See also *Union City &c. Co. v. Wright*, 145 Ga. 730, 89 S. E. 822; *Leffler Co. v. Lane*, 146 Ga. 741, 92 S. E. 214.

The early Indiana law allowed a remedy in equity only. *Bird v. Lan-ius*, 7 Ind. 615; and since the code has made legal and equitable procedure the same, it has still been recognised that the creditor's right is equitable. *Davis v. Calloway*, 30 Ind. 112, 95 Am. Dec. 671; *Hendricks v. Frank*, 86 Ind. 278, 284. How far under a statute in Virginia and West Virginia the creditor would be allowed more than an equitable right, is open to question. Apart from statute any right of the creditor is clearly derivative. In Virginia, see *Vanmeters' Ex. v. Vanmeters*, 3 Gratt. 148 (in equity); *Jones v. Thomas*, 21 Gratt. 96 (*semble* recovery allowable). *Contra* is *Stewart v. James River & Kanawha Co.*, 24 Gratt. 294. See also *McIlvaine v. Big Stony Lumber Co.*, 105 Va. 613, 54 S. E. 473; *Casselmann's Adm. v. Gordon*, 118 Va. 553, 88 S. E. 58. In West Virginia, recovery was al-

lowed in *Hooper v. Hooper*, 32 W. Va. 526, 9 S. E. 937; *Bensimer v. Fell*, 35 W. Va. 15, 29, 12 S. E. 1078. But see *contra* *Johnson v. McClung*, 26 W. Va. 659; *King v. Scott*, 76 W. Va. 58, 84 S. E. 954. Montana Civ. Code, Sec. 3102, provides that "a contract made expressly for the benefit of a third person may be enforced by him." But in *McDonald v. American Nat. Bank*, 25 Mont. 456, 495, 65 Pac. 896, the court said: "There must be a consideration passing from the third person by virtue of which he may assert the existence of a promise in his favor." See also *Tatem v. Eglanol Mining Co.*, 45 Mont. 367, 123 Pac. 28.

³⁶ *Waring v. Ward*, 7 Ves. 332; *Mills v. United Counties Bank*, [1912] 1 Ch. 231.

³⁷ *Faulkner v. McHenry*, 235 Pa. 298, 83 Atl. 827. Though thus held liable to the mortgagor, yet by Act of June, 12, 1878, the grantee is not liable to the mortgagee; while he is so liable if he assumes the debt. See case cited *infra*, § 383, n. 49. See also *Lamka v. Donnelly*, 163 Ia. 255, 143 N. W. 869.

is implied from merely purchasing property subject to a mortgage, other than that the mortgaged property shall be primarily bound for the debt. It is necessary that there be a promise in terms to pay the mortgage, in order to impose personal liability. The word "assume" is the word of art ordinarily used to express such a promise.³⁸ The rule generally prevailing in the United States seems sound. There is no reason why purchase of an equity of redemption should of itself imply an undertaking by the purchaser to pay the mortgage.³⁹

§ 383. A mortgagee is generally allowed an action against a grantee who has assumed the mortgage.

If it be supposed that the mortgagee undertakes to pay the mortgage, the question then arises can this undertaking be sued upon only by the mortgagor to whom it was made, or does the mortgagee acquire a right to enforce it. In England,⁴⁰ Ireland,⁴¹ and Canada,⁴² such a promise gives the mortgagee no right. But the only one of the United States where it has definitely been decided that the mortgagee cannot proceed against the grantee is Massachusetts.⁴³ Of the other jurisdictions which

³⁸ The grantee is under no personal obligation unless he assumes or agrees to pay the mortgage. *Shepherd v. May*, 115 U. S. 505, 6 S. Ct. Rep. 119, 29 L. Ed. 456; *Hibernia S. & L. Soc. v. Dickinson*, 167 Cal. 616, 140 Pac. 265; *Lloyd v. Lowe* (Colo.), 165 Pac. 609; *Hubbard v. Ensign*, 46 Conn. 576; *Raffel v. Clark*, 87 Conn. 567, 89 Atl. 184; *Lippitt v. Thames L. & T. Co.*, 88 Conn. 185, 90 Atl. 369; *Bristol Sav. Bank v. Stiger*, 86 Ia. 344, 53 N. W. 265; *Fiske v. Tolman*, 124 Mass. 254, 26 Am. Rep. 659; *Chilton v. Brooks*, 72 Md. 554, 20 Atl. 125; *Kerman v. Leeper*, 172 Mo. App. 286, 157 S. W. 984; *Lawrence v. Towle*, 59 N. H. 28; *Klapworth v. Dressler*, 2 Beas. Ch. 62, 79 Am. Dec. 69; *Equitable Life Assur. Soc. v. Bostwick*, 110 N. Y. 628, 3 N. E. 296; *Keller v. Lee*, 66 N. Y. App. Div. 184, 72 N. Y. S. 948; *Henry v. Heggie*, 163 N. C. 523, 79 S. E. 982; *Van Eman v. Mosing*, 36 Okla. 555, 129 Pac. 2.

³⁹ As to whether acceptance of a deed containing a statement that the grantee assumes a mortgage is conclusive proof of such assumption, see *supra*, § 90.

⁴⁰ *Tweddell v. Tweddell*, 2 Bro. Ch. 152; *Oxford v. Rodney*, 14 Ves. 417; *Barham v. Thanet*, 3 M. & K. 607; *Re Errington*, [1894] 1 Q. B. 11; *Bonner v. Tottenham Society*, [1899] 1 Q. B. 161.

⁴¹ *Barry v. Harding*, 1 Jones & Lat. 475, 485.

⁴² *Aldous v. Hicks*, 21 Ont. 95; *Frontenac Loan Co. v. Hysop*, 21 Ont. 577. See also *Williams v. Balfour*, 18 Can. S. C. 472. *Re Cozier*, 24 Grant, 537, *contra*, is overruled.

⁴³ *Mellen v. Whipple*, 1 Gray, 317; *Pettee v. Peppard*, 120 Mass. 522, 523; *Prentice v. Brimhall*, 123 Mass. 291; *Coffin v. Adams*, 131 Mass. 133; *Rice v. Sanders*, 152 Mass. 108, 24 N. E. 1079, 8 L. R. A. 315; *Cressey v. Willis*,

do not accept the doctrine of *Lawrence v. Fox*, Connecticut ⁴⁴ and Michigan ⁴⁵ have statutes which cover the case; the United States Supreme Court, ⁴⁶ North Carolina ⁴⁷ and Vermont, ⁴⁸ give equitable relief on substantially the principles herein advocated; and if the attitude of the Maryland and Pennsylvania courts towards this class of cases is inconsistent with their general rule governing promises to a debtor to pay his debt they are not deterred on that account from giving the mortgagee relief. ⁴⁹

159 Mass. 249, 34 N. E. 265. No attempt seems to have been made in Massachusetts to enforce the mortgagee's claim by a bill in equity against the mortgagor and his grantee. Apparently it is assumed that no relief would be granted. In *Rice v. Sanders* it is said that the grantee's promise "gave no additional rights to the mortgagee." The language of the court, however, in *Forbes v. Thorpe*, 209 Mass. 570, 95 N. E. 955, 959, quoted *supra*, § 364, n. 48, gives some reason to suppose that if the mortgage debt could not be collected from the mortgagor, a properly drawn bill in equity might make the grantee's promise to the mortgagor available as an asset of the latter.

⁴⁴ Gen. Stat. (1902), Sec. 587; *Morgan v. Randolph-Clowes Co.*, 73 Conn. 396, 398, 47 Atl. 658, 51 L. R. A. 653.

⁴⁵ Comp. Laws (1915), § 12680; *Crawford v. Edwards*, 33 Mich. 354; *Miller v. Thompson*, 34 Mich. 10; *Taylor v. Whitmore*, 35 Mich. 97; *Carley v. Fox*, 38 Mich. 387; *Winans v. Wilkie*, 41 Mich. 264, 1 N. W. 1049; *Unger v. Smith*, 44 Mich. 22, 5 N. W. 1069; *Corning v. Burton*, 102 Mich. 86, 62 N. W. 1040; *Jehle v. Brooks*, 112 Mich. 131, 70 N. W. 440; *Terry v. Durand Land Co.*, 112 Mich. 665, 71 N. W. 525. It is essential that the grantee and the mortgaged land be within the jurisdiction. *Booth v. Connecticut Mut. Life Ins. Co.*, 43 Mich. 299, 5 N. W. 381; *Kollen v. Sooy*, 172 Mich. 214, 137 N. W. 808.

⁴⁶ See *infra*, § 384.

⁴⁷ See North Carolina decisions cited in this section, *infra*, n. 8.

⁴⁸ *Lamoille County Sav. &c. Co. v. Belden*, 90 Vt. 535, 98 Atl. 1002.

⁴⁹ In the following cases it was held that a mortgagee may sue at law a grantee of the mortgagor who assumes the mortgage.

ALABAMA. *Orman v. North Alabama Co.*, 53 Fed. 469, 55 Fed. 18, 13 U. S. App. 215, 5 C. C. A. 22; *People's Sav. Bank v. Jordan* (Ala.), 76 So. 442.

ARIZONA. *Johns v. Wilson*, 180 U. S. 440, 446, 21 Sup. Ct. Rep. 445, 45 L. Ed. 613; *Holmes v. Bennett*, 14 Ariz. 298, 127 Pac. 753.

ARKANSAS. *Patton v. Adkins*, 42 Ark. 197; *Benjamin v. Birmingham*, 50 Ark. 433, 8 S. W. 183; *Felker v. Rice*, 110 Ark. 70, 161 S. W. 162; *Nakdimen v. Brasil*, 131 Ark. 144, 198 S. W. 524.

CALIFORNIA. *Wormouth v. Hatch*, 33 Cal. 121; *Biddel v. Brizzolara*, 64 Cal. 354; *Williams v. Naftager*, 103 Cal. 438, 37 Pac. 411; *Alvord v. Spring Valley Gold Co.*, 106 Cal. 547, 40 Pac. 27; *Tulare County Bank v. Madden*, 109 Cal. 312, 41 Pac. 1092; *Hopkins v. Warner*, 109 Cal. 133, 41 Pac. 868; *Roberts v. Fitzallen*, 120 Cal. 482, 52 Pac. 818; *Daniels v. Johnson*, 129 Cal. 415, 61 Pac. 1107, 79 Am. St. Rep. 123; *Dodds v. Spring*, 174 Calif. 412, 163 Pac. 351.

COLORADO. *Green v. Morrison*, 5 Col. 18; *Stuyvesant v. Western Mte.*

§ 384. Enforcement in equity of the mortgagee's right against the grantee.

It is a curious circumstance that though a promise by a third person to pay a mortgage debt cannot be distinguished in

Co., 22 Col. 28, 43 Pac. 144; *Skinner v. Harker*, 23 Col. 333, 48 Pac. 648; *Starbird v. Cranston*, 24 Col. 20, 48 Pac. 652; *Cobb v. Fishel*, 15 Col. App. 384, 62 Pac. Rep. 625. See also *Lloyd v. Lowe* (Colo.), 165 Pac. 609.

CONNECTICUT. See *Bassett v. Bradley*, 48 Conn. 224; *Lynch v. Moser*, 72 Conn. 714, 46 Atl. 153. *Conf.* *Meech v. Ensign*, 49 Conn. 191, 44 Am. Rep. 225; *Raffel v. Clark*, 87 Conn. 567, 89 Atl. 184; General Stat., § 983.

GEORGIA. See *Ford v. Finney*, 35 Ga. 258.

ILLINOIS. *Rogers v. Herron*, 92 Ill. 583; *Thompson v. Dearborn*, 107 Ill. 87; *Bay v. Williams*, 112 Ill. 91, 54 Am. Rep. 209; *Hasle v. Bondy*, 173 Ill. 302, 50 N. E. 671; *Webster v. Fleming*, 178 Ill. 140, 52 N. E. 975; *Cotes v. Bennett*, 183 Ill. 82, 55 N. E. 661; *Harts v. Emery*, 84 Ill. App. 317, 184 Ill. 560, 56 N. E. 865; *Baer v. Knewitz*, 39 Ill. App. 470; *Ingram v. Ingram*, 71 Ill. App. 497, 172 Ill. 287, 50 N. E. 198; *Robinson v. Holmes*, 75 Ill. App. 203; *Boisot v. Chandler*, 82 Ill. App. 261; *Eggleston v. Morrison*, 84 Ill. App. 625; *Murray v. Emery*, 85 Ill. App. 348, 187 Ill. 408, 58 N. E. Rep. 327; *Seeman v. Mills*, 197 Ill. App. 589; *Cory v. Pullen*, 204 Ill. App. 590.

INDIANA. *Day v. Patterson*, 18 Ind. 114; *McDill v. Gunn*, 43 Ind. 315; *Smith v. Ostermeyer*, 68 Ind. 432; *Risk v. Hoffman*, 69 Ind. 137; *Carnahan v. Tousey*, 93 Ind. 561; *Stanton v. Kenrick*, 135 Ind. 382, 35 N. E. 19; *Berkshire L. I. Co. v. Hutchings*, 100 Ind. 496; *Lowe v. Hamilton*, 132 Ind. 406, 31 N. E. 1117.

IOWA. *Corbett v. Waterman*, 11 Ia. 86; *Moses v. Clerk of Dallas Court*,

12 Ia. 139; *Thompson v. Bertram*, 14 Ia. 476; *Scott's Adm. v. Gill*, 19 Ia. 187; *Bowen v. Kurts*, 37 Ia. 239; *Ross v. Kennison*, 38 Ia. 396; *Lamb v. Tucker*, 42 Ia. 118; *Luney v. Mead*, 60 Ia. 469, 15 N. W. 290; *Beeson v. Green*, 103 Ia. 406, 72 N. W. 555; *Boice v. Coffee*, 158 Ia. 705, 138 N. W. 857.

KANSAS. *Anthony v. Herman*, 14 Kan. 494; *Schmucker v. Sibert*, 18 Kan. 104, 26 Am. Rep. 765; *Rickman v. Miller*, 39 Kan. 362, 18 Pac. 304; *Searing v. Benton*, 41 Kan. 758, 21 Pac. 800; *Anthony v. Mott*, 10 Kans. App. 105, 61 Pac. Rep. 509.

LOUISIANA. *Ferguson's Succession*, 17 La. Ann. 255; *Vinet v. Bres*, 48 La. Ann. 1254, 20 So. 693.

MINNESOTA. *Jordan v. White*, 20 Minn. 91; *Follansbee v. Johnson*, 28 Minn. 311, 9 N. W. 882; *Lahmers v. Schmidt*, 35 Minn. 434, 29 N. W. 169; *Scanlan v. Grimmer*, 71 Minn. 351, 74 N. W. 146, 70 Am. St. Rep. 326.

MISSISSIPPI. *Vigniau v. Ruffins*, 1 Miss. 312; *Lee v. Newman*, 55 Miss. 365; *Barnes v. Jones*, 111 Miss. 337, 71 So. 573.

MISSOURI. *Belt v. McLaughlin*, 12 Mo. 433; *Cress v. Blodgett*, 64 Mo. 449; *Heim v. Vogel*, 69 Mo. 529; *Fitzgerald v. Barker*, 4 Mo. App. 105, 70 Mo. 685, 13 Mo. App. 192, 85 Mo. 13, 96 Mo. 661, 9 Am. St. Rep. 375; *Nelson v. Brown*, 140 Mo. 580, 41 N. W. 960, 62 Am. St. Rep. 755; *Pratt v. Conway*, 148 Mo. 291, 49 S. W. 1028, 71 Am. St. Rep. 602; *Saunders v. McClintock*, 46 Mo. App. 216; *Commercial Bank v. Wood*, 56 Mo. App. 214; *Wayman v. Jones*, 58 Mo. App. 313; *Am. Nat. Bank v. Klock*, 58 Mo. App. 335; *Citizens' Bank v. Douglass*, 178 Mo. App. 664, 161 S. W. 601; *Greer v.*

principle from a promise to pay any other debt, the question has been to some extent separately dealt with. Perhaps, be-

Orchard, 175 Mo. App. 494, 161 S. W. 875. Page *v.* Becker, 31 Mo. 466, *contra*, is overruled.

NEBRASKA. Cooper *v.* Foss, 15 Neb. 515, 19 N. W. 506; Bond *v.* Dolby, 17 Neb. 49, 23 N. W. 351; Rockwell *v.* Blair Bank, 31 Neb. 128, 47 N. W. 641; Hare *v.* Murphy, 45 Neb. 809, 64 N. W. 211, 29 L. R. A. 851, 60 Neb. 135, 82 N. W. 312.

NEVADA. Ruhling *v.* Hackett, 1 Nev. 360.

NEW YORK. Burr *v.* Beers, 24 N. Y. 178, 80 Am. Dec. 327; Ricard *v.* Sanderson, 41 N. Y. 179; Thorp *v.* Keokuk Coal Co., 48 N. Y. 253; Campbell *v.* Smith, 71 N. Y. 26, 27 Am. Rep. 5; Parkinson *v.* Sherman, 74 N. Y. 88, 30 Am. Rep. 268; Thayer *v.* Marsh, 75 N. Y. 340; Ayers *v.* Dixon, 78 N. Y. 318, 323; Judson *v.* Dada, 79 N. Y. 373; Hand *v.* Kennedy, 83 N. Y. 149; Root *v.* Wright, 84 N. Y. 72; Gifford *v.* Corrigan, 117 N. Y. 257, 22 N. E. 756, 6 L. R. A. 610, 15 Am. St. Rep. 508; New York L. I. Co. *v.* Aitkin, 125 N. Y. 660, 26 N. E. 732; Wager *v.* Link, 134 N. Y. 122, 31 N. E. 213, 150 N. Y. 549, 44 N. E. 1103; Blass *v.* Terry, 156 N. Y. 122, 50 N. E. 953; Hyde *v.* Miller, 168 N. Y. 590, 60 N. E. 1113. Compare the early New York decisions cited *infra*, § 384.

NORTH CAROLINA. Springs *v.* Cole, 171 N. C. 418, 88 S. E. 721.

NORTH DAKOTA. See Moore *v.* Booker, 4 N. D. 543, 62 N. W. 607.

OHIO. Thompson *v.* Thompson, 4 Ohio St. 333, 353; Brewer *v.* Maurer, 38 Ohio St. 543, 43 Am. Rep. 436; Society of Friends *v.* Haines, 47 Ohio St. 423, 25 N. E. 119; Pendery *v.* Allen, 50 Ohio St. 121, 33 N. E. 716, 19 L. R. A. 367.

OREGON. Windle *v.* Hughes, 40 Or. 1, 65 Pac. 1058; Knighton *v.* Chamberlin, 84 Oreg. 153, 164 Pac. 703.

PENNSYLVANIA. Hoff's App., 24 Pa. 200; Lennig's Est., 52 Pa. 135, 139; Merriman *v.* Moore, 90 Pa. 78; Blood *v.* Crew Levick Co., 177 Pa. 606, 35 Atl. 871, 55 Am. St. Rep. 741; Wunderlich *v.* Sadler, 189 Pa. 469, 470, 42 Atl. 109. See also Sloan *v.* Klein, 230 Pa. 132, 79 Atl. 403; Faulkner *v.* McHenry, 235 Pa. 298, 83 Atl. 827.

RHODE ISLAND. Urquhart *v.* Brayton, 12 R. I. 169; Mechanics Savings Bank *v.* Goff, 13 R. I. 516.

SOUTH DAKOTA. Granger *v.* Roll, 6 S. D. 611, 62 N. W. 970; Miller *v.* Kennedy, 12 S. D. 478, 481, 81 N. W. 906; Hull *v.* Hayward, 13 S. D. 291, 295, 83 N. W. 270, 79 Am. St. Rep. 890; Connor *v.* Jones, 72 N. W. Rep. 463.

TENNESSEE. Moore *v.* Stovall, 2 Lea, 543; Merrimon *v.* Parkey, 136 Tenn. 645, 191 S. W. 327.

TEXAS. McCown *v.* Schrimpf, 21 Tex. 22, 73 Am. Dec. 221; Huffman *v.* Western Mortgage Co., 13 Tex. Civ. App. 169, 36 S. W. 306.

UTAH. Clark *v.* Fisk, 9 Utah, 94, 33 Pac. 248; Thompson *v.* Cheeseman, 15 Utah, 43, 48 Pac. 477; McKay *v.* Ward, 20 Utah, 149, 57 Pac. 1024, 46 L. R. A. 623.

VIRGINIA. Casselman's Adm. *v.* Gordon, 118 Va. 553, 88 S. E. 58.

WASHINGTON. Ordway *v.* Downey, 18 Wash. 412, 51 Pac. 1047, 52 Pac. 228, 63 Am. St. Rep. 892; Ver Planck *v.* Lee, 19 Wash. 492, 53 Pac. 724; Frazey *v.* Casey, 96 Wash. 422, 165 Pac. 104.

WISCONSIN. Bishop *v.* Douglass, 25 Wis. 696; Kollock *v.* Parcher, 52 Wis. 393, 9 N. W. 67; Palmeter *v.* Carey, 63 Wis. 426, 21 N. W. 793, 23 N. W. 586; Enos *v.* Sanger, 96 Wis. 150, 70 N. W. 1069, 37 L. R. A. 862, 65 Am. St. Rep. 38; Morgan *v.* South Milwaukee Co., 97 Wis. 275, 72 N. W.

cause the subject of mortgages fell within the scope of equity jurisdiction, the attempt was early made by mortgagees to sue in equity those who had assumed an obligation to pay the mortgage, while no such attempt was made with other debts. The earlier cases were in New York, and the result of them is thus summarized in a later decision which first extended the mortgagee's right to a direct action at law.

"If the plaintiff had sought to foreclose the mortgages in question and to charge the defendant with the deficiency which might remain after applying the proceeds of the sale, and had made both the mortgagor and the present defendant parties, the authorities would be abundant to sustain the action in both aspects."⁵⁰

The earlier New York doctrine has had considerable following in other jurisdictions. Alabama,⁵¹ California,⁵² Connecticut,⁵³ Indiana,⁵⁴ Maryland,⁵⁵ Michigan,⁵⁶ New Jersey,⁵⁷ North

872; *Stites v. Thompson*, 98 Wis. 329, 73 N. W. 774.

⁵⁰ *Burr v. Beers*, 24 N. Y. 178, *per* Denio, J., citing *Curtis v. Tyler*, 9 Paige, 432; *Halsey v. Reed*, 9 Paige, 446; *March v. Pike*, 10 Paige, 595; *King v. Whitely*, 10 Paige, 465; *Blyer v. Monholland*, 2 Sandf. Ch. 478; *Vail v. Foster*, 4 N. Y. 312; *Trotter v. Hughes*, 12 N. Y. 74, 62 Am. Dec. 137; *Belmont v. Coman*, 22 N. Y. 438, 78 Am. Dec. 213. See also *Wager v. Link*, 150 N. Y. 549, 44 N. E. 1103.

⁵¹ *Young v. Hawkins*, 74 Ala. 370.

⁵² *Williams v. Naftager*, 103 Cal. 438, 37 Pac. 411; *Alvord v. Spring Valley Gold Co.*, 106 Cal. 547, 40 Pac. 27; *Tulare County Bank v. Madden*, 109 Cal. 312, 41 Pac. 1092; *Hopkins v. Warner*, 109 Cal. 133, 41 Pac. 868. In California by statute an independent action cannot be maintained even against the mortgagor on a debt secured by mortgage. Code Civ. Proc., § 720. The mortgaged property must

first be exhausted. *Stockton Savings & Loan Soc. v. Harrold*, 127 Cal. 612, 617, 60 Pac. 165.

⁵³ *Bassett v. Bradley*, 48 Conn. 224. See also Gen. Stat., § 983; *Morgan v. Randolph-Clowes Co.*, 73 Conn. 396, 398, 47 Atl. 658, 51 L. R. A. 653.

⁵⁴ See early Indiana cases cited, *supra*, § 381, n. 27.

⁵⁵ *George v. Andrews*, 60 Md. 26, 45 Am. Rep. 706; *Chilton v. Brooks*, 72 Md. 554, 20 Atl. 125; *Stokes v. Detrick*, 75 Md. 256, 23 Atl. 846.

⁵⁶ *Crawford v. Edwards*, 33 Mich. 354; *Miller v. Thompson*, 34 Mich. 10.

⁵⁷ *Klapworth v. Dressler*, 13 N. J. Eq. 62, 78 Am. Dec. 69; *Pruden v. Williams*, 26 N. J. Eq. 210; *Crowell v. Currier*, 27 N. J. Eq. 152; *Crowell v. Hospital*, 27 N. J. Eq. 650; *Wise v. Fuller*, 29 N. J. Eq. 257; *Green v. Stone*, 54 N. J. Eq. 387, 34 Atl. 1099, 55 Am. St. Rep. 577; *Whittaker v. Belvidere Co.*, 55 N. J. Eq. 674, 688, 38 Atl. 289.

Carolina,⁵⁸ North Dakota,⁵⁹ Vermont,⁶⁰ Virginia,⁶¹ Washington,⁶² and the United States Supreme Court⁶³ have adopted it.

The phrase commonly used is that the mortgagee is "subrogated" to the rights of the mortgagor, who is the promisee. The use of the word subrogation is not wholly fortunate. It suggests analogies which do not exist, with the position of a surety who has paid the debt. In fact, the relief granted is merely the application towards the payment of the debt by a court of equity of the mortgagor's property, consisting of the promise running to him from the grantee of the mortgaged premises; and whatever terminology is used there is no doubt that this is substantially the meaning of the courts which have followed the early New York decisions.

§ 385. Mortgagor should be party to the suit.

Even courts which derive the right of the mortgagee to sue the grantee from his right to enforce the mortgagor's rights, too frequently allow the suit to be maintained without joinder of the mortgagor. The essential reason why the proceeding should be in equity is because the mortgagor ought to be joined, since it is his property—that is, a promise to him—of which the plaintiff is seeking to avail himself, and that property should not be taken without giving the owner his day in court. Moreover, it is unfair to the grantee to charge him at the suit of the mortgagee unless at the same time all claim against him on the part of the mortgagor is extinguished. This cannot be judicially determined unless the mortgagor is joined.⁶⁴

⁵⁸ *Woodcock v. Bostic*, 118 N. C. 822, 24 S. E. 362; *Baber v. Hanie*, 163 N. C. 588, 80 S. E. 57.

⁵⁹ *Moore v. Booker*, 4 N. Dak. 543, 62 N. W. 607.

⁶⁰ *Davis v. Hulett*, 58 Vt. 90, 4 Atl. 139; *Hodges v. Phelps*, 65 Vt. 303, 26 Atl. 625; *Lamoille County Sav. &c. Co. v. Belden*, 90 Vt. 535, 98 Atl. 1002.

⁶¹ *Willard v. Worsham*, 76 Va. 392; *Osborne v. Cabell*, 77 Va. 462; *Francisco v. Shelton*, 85 Va. 779, 8 S. E. 789; *Fisher v. White*, 94 Va. 236, 26 S. E. 573; *Ellett v. McGhee*, 94 Va. 377, 26 S. E. 874.

⁶² *Fraze v. Casey*, 96 Wash. 422, 165 Pac. 104.

⁶³ *Keller v. Ashford*, 133 U. S. 610, 10 S. Ct. 494, 33 L. Ed. 667; *Willard v. Wood*, 135 U. S. 309, 314, 10 S. Ct. 831, 34 L. Ed. 210. See also *Winters v. Hub Mining Co.*, 57 Fed. 287. But in a case arising under the Arizona Code, which assimilates legal and equitable procedure, a direct action was allowed against the grantee in *Johns v. Wilson*, 180 U. S. 440, 21 S. Ct. 445, 45 L. Ed. 613.

⁶⁴ In *Keller v. Ashford*, 133 U. S. 610, 626, 10 S. Ct. 494, 33 L. Ed. 667,

§ 386. Successive purchases of mortgaged property.

It frequently happens that several grantees successive buy the premises and assume payment of the mortgage. It rightly held that the last grantee can be charged as well as the immediate grantee of the mortgagor. The same reasoning which justifies charging the first grantee through his obligation to the mortgagee's debtor requires the application of the obligation of the second grantee to the first grantee in order to satisfy the obligation of the latter to the mortgagor, and so on.⁶⁵ Moreover, all who have assumed the mortgage may be charged though they have parted with the premises.⁶⁶

They have made a valid contract to pay the mortgage, which they cannot abrogate by selling the premises, though they may get such protection as any promise which their grantee may make to assume the mortgage can give. As between the grantor and grantee, the latter becomes principal debtor and the former a surety. Accordingly, if the mortgagee gives time to the grantee, he is generally held to forfeit all right to assert a claim against the grantor.⁶⁷ A few decisions to the contrary

the court noticed the question and disposed of it thus: "Although the mortgagor might properly have been made a party to this bill, yet as no objection was taken on that ground at the hearing, and the omission to make him a party cannot prejudice any interest of his, or any right of either party to this suit, it affords no ground for refusing relief." See also *Silver King Coalition Mines Co. v. Silver King Consol. Min. Co.*, 204 Fed. 166, 122 C. C. A. 402; *Miller v. Thompson*, 34 Mich. 10; *Pruden v. Williams*, 26 N. J. Eq. 210.

⁶⁵ See, e. g., *Flint v. Cadenasso*, 64 Cal. 83, 28 Pac. 62; *Ingram v. Ingram*, 71 Ill. App. 497, 172 Ill. 287, 50 N. E. 198; *Risk v. Hoffman*, 69 Ind. 137; *Carnahan v. Tousey*, 93 Ind. 561; *Boice v. Coffeen*, 158 Ia. 705, 138 N. W. 857; *Corning v. Burton*, 102 Mich. 86, 96, 62 N. W. 1040; *Gifford v. Corrigan*, 117 N. Y. 257, 22 N. E. 756, 6 L. R. A. 610, 15 Am. St. Rep. 508;

Baber v. Hanie, 163 N. C. 588, 80 S. E. 57; *Merrimon v. Parkey*, 136 Tenn. 645, 191 S. W. 327.

⁶⁶ *Ingram v. Ingram*, 71 Ill. App. 497, 172 Ill. 287, 50 N. E. 198; *Carnahan v. Tousey*, 93 Ind. 561; *Corning v. Burton*, 102 Mich. 86, 96, 62 N. W. 1040; *Hyde v. Miller*, 168 N. Y. 590, 60 N. E. 1113. In Pennsylvania by Act of June 12, 1878, one who has assumed a mortgage does not continue liable to the mortgagee by virtue of his assumption after he has himself conveyed the land unless in conveying he expressly assumes a continuing liability. *Sloan v. Kline*, 230 Pa. 132, 79 Atl. 403.

⁶⁷ *Herd v. Twohy*, 133 Cal. 55, 65 Pac. 139; *Wyatt v. Dufrene*, 106 Ill. App. 214; *Union Stove & M. Works v. Caswell*, 48 Kan. 689, 29 Pac. 1072, 16 L. R. A. 85; *George v. Andrews*, 60 Md. 26, 45 Am. Rep. 706; *Chilton v. Brooks*, 72 Md. 544, 20 Atl. 125; *Mt. v. Todd*, 36 Mich. 473; *Dedrick*

lay stress on the fact that there is no direct contractual relation between the creditor and the grantee of the mortgaged premises and that there is a direct contractual relation between the mortgagor and his grantee which cannot be affected by any arrangement between the mortgagee and the grantee.⁶⁸ But as it has been truly said:⁶⁹ "The creditor need not be a party to the contract which creates the relation of principal and surety between his debtors, or between his debtor and a third person; neither is the right of subrogation dependent on privity of contract between the creditor and the surety." The rule that the giving of time to a principal debtor discharges a surety depends in part at least on the impairment thereby caused to the surety's right by subrogation to sue the principal debtor, after the surety has himself paid the debt. Therefore, even though the grantee of the mortgaged premises takes them subject only to the mortgage without assuming the debt, an extension of the mortgage discharges the mortgagor to the extent of the value of the mortgaged property,⁷⁰ for the mort-

DenBleyker, 85 Mich. 475, 48 N. W. 633; Nelson v. Brown, 140 Mo. 580, 41 S. W. 960, 62 Am. St. Rep. 755; Commercial Bank v. Wood, 56 Mo. App. 214; Wayman v. Jones, 58 Mo. App. 313; Citizens Bank v. Douglass, 178 Mo. App. 664, 161 S. W. 601; Merriam v. Miles, 54 Neb. 566, 74 N. W. 861, 69 Am. St. Rep. 731; Calvo v. Davies, 73 N. Y. 211, 29 Am. Rep. 130; Hyde v. Miller, 168 N. Y. 590, 60 N. E. 1113; Paine v. Jones, 14 Hun, 577; Jester v. Sterling, 25 Hun, 344; Fish v. Hayward, 28 Hun, 456; Metzger v. Nova Realty Co., 160 App. Div. 394, 145 N. Y. S. 549; Walter v. Nova Realty Co., 160 App. Div. 400, 145 N. Y. S. 553; Dillaway v. Peterson, 11 S. Dak. 210, 76 N. W. 925; Miller v. Kennedy, 12 S. Dak. 473, 81 N. W. 906; Hull v. Hayward, 13 S. Dak. 291, 83 N. W. 270; Schroeder v. Kinney, 15 Utah, 462, 49 Pac. 894. See also Hodges v. Elyton Co., 109 Ala. 617, 20 So. 23; Home Natl. Bank v. Waterman's Est., 134 Ill. 461, 29 N. E. 503; Mulvane v. Sedgley, 63 Kans. 105, 64

Pac. 1038, 55 L. R. A. 552. In the Federal courts the law established by State courts is applied, and in accordance with that law the Supreme Court held the surety discharged in Union Life Ins. Co. v. Hanford, 143 U. S. 187, 12 S. Ct. 437, 36 L. Ed. 118. See also Johns v. Wilson, 180 U. S. 440, 448, 21 S. Ct. 445, 45 L. Ed. 613. But where at liberty to apply its own rule the court holds the surety still bound. See cases in the following note.

⁶⁸ Shepherd v. May, 115 U. S. 505, 29 L. Ed. 456; Keller v. Ashford, 133 U. S. 610, 625, 33 L. Ed. 667; Union Life Ins. Co. v. Hanford, 143 U. S. 187, 190, 12 S. Ct. 437, 36 L. Ed. 118; Seeman v. Mills, 197 Ill. App. 589; Corbett v. Waterman, 11 Ia. 86; James v. Day, 37 Ia. 164; Conn. Mut. Ins. Co. v. Mayer, 8 Mo. App. 18 (overruled); see also Ridgley v. Robertson, 67 Mo. App. 45; Aldous v. Hicks, 21 Ont. 95.

⁶⁹ Travers v. Dorr, 60 Minn. 173, 178, 62 N. W. 269.

⁷⁰ Travers v. Dorr, 60 Minn. 173, 62

gaged property stands in effect in the position of principal debtor. The possibility of injury in such a case is clear, for though the mortgagor would still have a right to pay the debt to the mortgagee, he would not thereby acquire by right of subrogation an immediate power of foreclosing the mortgage, since that has been extended. If the grantee assumes the mortgage debt, an extension of time given by contract to the grantee should for the same reason discharge the mortgagor to the extent of the value of the mortgaged property.

Whether the mortgagor should be freed from personal liability beyond that amount, depends on whether the mortgagee is to be regarded as having a direct right of his own against the grantee, to which right the mortgagor may be subrogated or whether, as is believed the better though not commonly held view, the mortgagee's right is merely derivative,—a right to apply to his claim an obligation running not to himself but to his debtor. Even if the mortgagee's right against the grantee is held to be direct no more technical application of the doctrine that giving time to a principal debtor discharges the surety can be found. No possibility of injury to the mortgagor beyond the value of the property seems to exist, for the mortgagor can sue his grantee for damages if the latter fails to pay the mortgage as he agreed. Moreover, the mortgagor if he likes, when the debt is due, can pay it himself, in spite of the fact that the creditor has made an agreement with the grantee to extend the debt. And if the mortgagor discharges the debt he would have an action for money paid against the grantee, since the payment was not made officiously but in discharge of his own legal liability, which the grantee had assumed but failed to discharge. The only possible right of which the mortgagor is deprived is the right to be subrogated to the direct claim which it is assumed that the mortgagee has against the grantee personally; and there is

N. W. 269; *Murray v. Marshall*, 94 N. Y. 611; *Antisdel v. Williamson*, 165 N. Y. 372, 375, 59 N. E. 207; *Metzger v. Nova Realty Co.*, 160 N. Y. App. D. 394, 145 N. Y. S. 549; *Walter v. Nova Realty Co.*, 160 N. Y. App. D. 400, 145 N. Y. S. 553; *Bunnell v. Carter*,

14 Utah, 100, 46 Pac. 755. But see *contra*, *Chilton v. Brooks*, 72 Md. 554, 20 Atl. 125; and the decisions cited above which hold that the mortgagor is not discharged even where the grantee has assumed payment of the mortgage.

no real injury to the mortgagor in failing to get this subrogation, since the right of paying the debt himself and suing for money paid is in every respect a practical equivalent. On the other hand, if the mortgagee has no direct contractual right against the grantee, but only a right against the mortgagor, through which the obligation of the grantee to the mortgagor may be reached, the absurdity of talking about subrogation to such a right of the mortgagee is apparent. The only right the mortgagee has is to enforce the obligation of the grantee to the mortgagor, and no action of the mortgagee can deprive the mortgagor of this right. He does not need to be subrogated to the right; he has it without subrogation. The doctrine of giving time to the principal, therefore, should have no application beyond the value of the mortgaged property.

A curious situation arises when a mortgagor transfers the premises to one who, though taking them subject to the mortgage, does not agree to pay it, and this grantee thereafter transfers the premises to another who by the deed assumes and agrees to pay the mortgage. The promisee has no interest in the performance of this promise, since he is not personally liable for the debt, and he is no longer the owner of the premises. It may be thought that the only intelligent object for requiring the promise from the grantee is a wish to benefit the mortgagee. In that view the case would fall within the first type of promises for the benefit of a third person and the mortgagee would be the sole beneficiary. But it is hard to suppose that the promisee had any such intention. The object in fact of such a stipulation, if its insertion is not altogether a mistake, in which case the grantee would be entitled to reformation of the deed, is doubtless to guard against a supposed or possible liability on the part of the promisee which in fact does not exist. The decisions which generally deny the mortgagee a right to recover in such a case, therefore, seem sound.⁷¹

⁷¹ *Ward v. De Oca*, 120 Cal. 102, 52 Pac. 130; *Sherwood v. Lowell* (Cal. App.), 167 Pac. 554; *Colorado Sav. Bank v. Bales*, 101 Kan. 100, 165 Pac. 843; *Morris v. Mix*, 4 Kan. App. 654, 46 Pac. 58; *Brown v. Stillman*, 43 Minn. 126, 45 N. W. 2; *Nelson v. Rogers*, 47

Minn. 103, 49 N. W. 526; *Crone v. Stinde*, 68 Mo. App. 122 (reversed); *Hicks v. Hamilton*, 144 Mo. 495, 46 S. W. 432, 66 Am. St. Rep. 431 (overruled); *Harberg v. Arnold*, 78 Mo. App. 237 (overruled); *Wise v. Fuller*, 29 N. J. Eq. 257, 266; *Norwood v. De Hart*,

§ 387. Assumption of mortgage by second mortgagee.

Another peculiar situation arises where a mortgagor makes a second mortgage and the second mortgagee agrees to pay off the first mortgage. Subsequently the first mortgagee endeavors to take advantage of this promise. He is denied the right and justly. In the ordinary case where a purchaser assumes and agrees to pay a mortgage he has received a *quid pro quo* for the amount of the mortgage. He owes the amount of the mortgage to some one. In the case under consideration, however, the second mortgagee does not owe the amount of the first mortgage. He has agreed virtually to lend the amount of it to the mortgagor by paying the first mortgage. A promise to lend a debtor money, though on technically good consideration, is not one which a court of equity should enforce for the benefit of a creditor. Nor can breach of the promise by the second mortgagee be ground for substantial damages. The only consequence of the breach is that the debtor continues liable to the first mortgagee instead of to the second mortgagee for the amount of the first mortgage. As the rights of the first mortgagee against the promisor cannot exceed the rights of the promisee there is no asset of value applicable to the mortgage. As the court said in the first case that presented these facts, "if the action were allowed, any one who promised to advance money to another to pay his debts would be liable to an action by the creditor."⁷²

30 N. J. Eq. 412; *Mount v. Van Ness*, 33 N. J. Eq. 262, 265; *Eakin v. Shults*, 61 N. J. Eq. 156, 47 Atl. 274; *King v. Whitely*, 10 Paige, 465; *Trotter v. Hughes*, 12 N. Y. 74, 62 Am. Dec. 137; *Vrooman v. Turner*, 69 N. Y. 280, 25 Am. Rep. 195; *Smith v. Cross*, 16 Hun, 487; *Young Men's Assoc. v. Croft*, 34 Oreg. 106; *Portland Trust Co. v. Nunn*, 34 Oreg. 106, 55 Pac. 439, 75 Am. St. Rep. 568; *Fry v. Ausman*, 29 S. Dak. 30, 135 N. W. 708, 39 L. R. A. (N. S.) 150; *Osborne v. Cabell*, 77 Va. 462.

Recovery was allowed in *Cobb v. Fishel*, 15 Col. App. 384, 62 Pac. Rep. 625; *Dean v. Walker*, 107 Ill. 540, 47

Am. Rep. 467; *Marble Bank v. Mesarvey*, 101 Ia. 285, 70 N. W. 198; *Heim v. Vogel*, 69 Mo. 529; *Crone v. Stinde*, 156 Mo. 282, 55 S. W. 863; *Llewellyn v. Butler*, 186 Mo. App. 525, 172 S. W. 413; *Hare v. Murphy*, 45 Neb. 809, 64 N. W. 211, 29 L. R. A. 851; *McDonald v. Finseth*, 32 N. Dak. 400, 155 N. W. 863, L. R. A. 1916 D. 149; *Brewer v. Mauer*, 38 Ohio St. 543, 43 Am. Rep. 436; *Merriman v. Moore*, 90 Pa. 78; *McKay v. Ward*, 20 Utah, 149, 57 Pac. 1024, 46 L. R. A. 623; *Casselman's Adm. v. Gordon*, 118 Va. 553, 88 S. E. 58; *Enos v. Sanger*, 96 Wis. 150, 70 N. W. 1069, 37 L. R. A. 862.

⁷² *Garnsey v. Rogers*, 47 N. Y. 233,

§ 388. Assumption of liabilities of outgoing partner.

Another class of promises to satisfy a debtor's liability deserves particular mention—the promise of an individual or firm to pay the liabilities of an outgoing partner. It is in this kind of case that the greatest difficulty arises in determining whether there is a novation. On principle it is clear that to work a novation the promisor must make an agreement with the creditor to become directly liable to him in consideration that the creditor will accept him as debtor in place of the original debtor.⁷³ It is not enough, therefore, for the creditor to learn of the promise to the original debtor and express assent to that arrangement. Such assent does not necessarily include an agreement to give up the claim against the original debtor. Moreover, the promisor must assent to enter into a contractual relation directly with the creditor. Assuming that there is no novation the case is indistinguishable from any contract to discharge a promisee's debt to a third person. By a curious freak the law of New York⁷⁴ does not allow the creditor a remedy on a promise made to his debtor in this class of cases. The law of Pennsylvania,⁷⁵ on the other hand, though not generally

7 Am. Rep. 440. The further distinction suggested by the court that the promise was not made for the benefit of the mortgagee amounts to nothing. It is true, but it is also true in any case where a grantee agrees to pay a mortgage.

The case has been followed several times, and it has been held immaterial that the deed creating the second mortgage is on its face absolute. *Pardee v. Treat*, 82 N. Y. 385; *Roe v. Barker*, 82 N. Y. 431; *Root v. Wright*, 84 N. Y. 72; *Cole v. Cole*, 110 N. Y. 630, 17 N. E. 682; *Smith v. Cross*, 16 Hun, 487. See also *Savings Bank v. Thornton*, 112 Calif. 255, 44 Pac. 466; *Boyd v. Winte (Okla.)*, 164 Pac. 781.

A similar principle was applied in favor of a grantee in whose name as trustee a deed with a clause of assumption had been taken without his knowledge. *Gifford v. Corrigan*, 105 N. Y. 223, 11 N. E. 498. In a second trial of

the case, it appearing that the grantee had knowledge of the deed, he was held liable though a bare trustee. *Gifford v. Corrigan*, 117 N. Y. 257, 22 N. E. 756, 6 L. R. A. 610.

⁷³ See *infra*, § 1869.

⁷⁴ *Merrill v. Green*, 55 N. Y. 270; *Wheat v. Rice*, 97 N. Y. 296; *Serviss v. McDonnell*, 107 N. Y. 260, 14 N. E. 314; *Corner v. Mackey*, 147 N. Y. 574, 42 N. E. 29; *Edick v. Green*, 38 Hun, 202. But see *Clafin v. Ostrom*, 54 N. Y. 581; *Arnold v. Nichols*, 64 N. Y. 117; *Hannigan v. Allen*, 127 N. Y. 639, 27 N. E. 402, compare *Lyon v. Clochessy*, 86 N. Y. S. 245, 43 N. Y. Misc. 67.

⁷⁵ *Townsend v. Long*, 77 Pa. 143, 18 Am. Rep. 438; *White v. Thielens*, 106 Pa. 173; *Adams v. Kuehn*, 119 Pa. 76, 86, 13 Atl. 184; *Delp v. Brewing Co.*, 123 Pa. 42, 15 Atl. 871; *Sargent v. Johns*, 206 Pa. 386, 55 Atl. 1051. But it is essential under the Pennsylvania law that property shall have

adopting the doctrine of *Lawrence v. Fox*,⁷⁶ makes an exception here in favor of the creditor. In fact, there is no reason discriminating in this class of cases for or against the creditor and so the matter is generally treated.⁷⁷ Questions of suretyship may arise, analogous to those in mortgage cases where the party assuming the debt is regarded as the principal debtor.⁷⁸

§ 389. Right of holder of check against bank.

On the same principle the holder of a check has sometimes been given a right against the bank on which the check was drawn.⁷⁹ The common argument in favor of such a right is that a check is an equitable assignment of part of the fund in the bank.⁸⁰ If it be granted that this is unsound, that a check is in its nature a general order to pay its amount not an assignment of a part of a particular deposit, the further argument remains that the bank has promised its depositor to pay the latter's checks and that the holder of a check may sue upon this promise. It may be urged that the bank in effect promises to pay such debtors of the depositor as the latter indicates, upon presentation of a check in proper form. No distinction can be made because the creditor to be paid is indefinite at the time the promise was made. Such is the fact in many cases of promises to discharge debts, and it is rightly regarded as in-

been transferred when the promise is made. *Campbell v. Lacock*, 40 Pa. 448; *Robertson v. Reed*, 47 Pa. 115; *Torrens v. Campbell*, 74 Pa. 470; *Sweeney v. Houston*, 243 Pa. 542, 90 Atl. 347, L. R. A. 1915 A. 779.

⁷⁶ 20 N. Y. 268.

⁷⁷ See, e. g., allowing the action, *Fish v. First Nat. Bank*, 157 Fed. 87, 84 C. C. A. 502; *Leffler Co. v. Lane*, 146 Ga. 741, 92 S. E. 214; *Maxfield v. Schwartz*, 43 Minn. 221, 45 N. W. 429; *Lovejoy v. Howe*, 55 Minn. 353, 57 N. W. 57; *Ellis v. Harrison*, 104 Mo. 270, 16 S. W. 198; *Shamp v. Meyer*, 20 Neb. 223, 29 N. W. 379; *Merriman v. Social Mfg. Co.*, 12 R. I. 175; *Spann v. Cochran*, 63 Tex. 240; denying the action, *Morgan v. Randolph*

Clowes Co., 73 Conn. 396, 47 Atl. 658, 51 L. R. A. 653; *Ayres v. Gallu*, 44 Mich. 13, 5 N. W. 1072.

⁷⁸ *Oakeley v. Pasheller*, 4 Cl. & F. 207; *Sheppard v. Bridges*, 137 Ga. 615, 74 S. E. 245. See also *infra* § 1258.

⁷⁹ *Harrison v. Wright*, 100 Ind. 515, 533; *Hawley v. Exchange Bank*, 97 La. 187, 66 N. W. 152; *Harrison v. Simpson*, 17 Kan. 508; *Chanute Bank v. Crowell*, 6 Kan. App. 533, 51 Pac. 575; *Fonner v. Smith*, 31 Neb. 107, 47 N. W. 632, 11 L. R. A. 528, 28 Am. St. Rep. 510. *Conf. Aetna Nat. Bank v. Fourth Nat. Bank*, 46 N. Y. 82, 7 Am. Rep. 314. See also *infra*, §§ 425, 1209, *ad fin.*

⁸⁰ *Ibid.*

material;⁸⁰ but the transaction when carefully considered seems to indicate an intent to make the bank an agent of the depositor, rather than an independent contractor even after a check is drawn. Thus the bank pays the first check presented, not the first check drawn, without inquiry whether more checks have been drawn than the balance available to meet them. The bank also obeys the order of its depositor to stop payment of a check.⁸¹

§ 390. Rights of the promisee.

It is when the rights of the promisee are considered that the difficulties in the American law become apparent. It seems obviously unfair to subject the promisor to suits both by the creditor and the promisee, and on the other hand the doctrine that a promisee in a contract made upon good consideration furnished by him cannot sue upon it is hard to reconcile with principle. In cases where the third person is the sole beneficiary the injury to the promisee in depriving him of a right of action is purely technical, because breach of the promise causes him no pecuniary damage; but in the case of a promise to pay a debt the promisee is vitally interested in the performance of the promise. The results reached by the courts are various. In Alabama, in a case of the latter type, the court said: "The promise enured to the benefit of the creditors and *prima facie* they alone can claim payment or sue for the breach of the agree-

⁸⁰ Thomas Mfg. Co. v. Prather, 65 Ark. 27, 44 S. W. 218; Morgan v. Overman Co., 37 Cal. 534; Whitney v. American Ins. Co., 127 Cal. 464, 59 Pac. 897; Williamson Stewart Co. v. Seaman, 29 Ill. App. 68; Brenner v. Luth, 28 Kan. 581; Ballard v. Home Nat. Bank, 91 Kan. 91, 136 Pac. 935; Saylor v. State Bank, 99 Kan. 515, 163 Pac. 454; Bell v. Mendenhall, 71 Minn. 331, 73 N. W. 1086; Gaffney v. Sederberg, 114 Minn. 319, 131 N. W. 333; State v. St. Louis & S. F. Ry. Co., 125 Mo. 596, 615, 28 S. W. 1074; Glencoe Lime Co. v. Wind, 86 Mo. App. 163; Johannes v. Phenix Ins. Co., 66 Wis. 50, 56, 37 N. W. 414, 57 Am. Rep. 249;

Lens v. Chicago, etc., Ry. Co., 111 Wis. 198, 86 N. W. 607. Many other decisions might be added. Dow v. Clark, 7 Gray, 198, decided when the Massachusetts court was disposed to restrict the creditor's right of action, seems to be the only contrary decision. In Gunn v. McAlpine, 125 Minn. 343, 147 N. W. 111, where there was a partial failure of consideration the court held that from each creditor's claim there should be deducted the same proportion that the portion of the consideration which failed bore to the total agreed consideration.

⁸¹ See *supra*, § 350.

ment,"⁸² and in Maine, it was said in an early case, "the promisee can recover only nominal damages since the defendant may be liable to the beneficiary,"⁸³ but this case has been overruled.⁸⁴ In Nebraska the consignor cannot sue on a bill of lading, though the contract is with him, in the absence of proof that he was the owner of the goods, that he was liable for their loss, or that he had sustained special damage.⁸⁵ In Nevada, also, it was held that a promisee without pecuniary interest in the performance of a promise could not sue upon it.⁸⁶ In Rhode Island the rule is the same.⁸⁷ In New York if the third person can sue, it seems the promisee cannot. A more complete somersault than the New York court has made on this subject when dealing with mortgages cannot be imagined. In the days before *Lawrence v. Fox*⁸⁸ was decided it had been held that the mortgagee, though not entitled to sue directly a grantee who had assumed the mortgage, might be "subrogated" to the right of the mortgagor—the promisee. Now the court holds that the promisee cannot sue, but upon paying the mortgage debt he is entitled to be subrogated to the right of the mortgagee to sue upon this promise.⁸⁹ Ohio has reached the same con-

⁸² *Dimmick v. Register*, 92 Ala. 458, 460, 9 So. 79; *North Alabama Development Co. v. Short*, 101 Ala. 333, 13 So. 385.

⁸³ *Burbank v. Gould*, 15 Me. 118.

⁸⁴ *Baldwin v. Emery*, 89 Me. 496, 36 Atl. 994. In *Martin v. Aetna Ins. Co.*, 73 Me. 25, 28, it was held in a case of the sole beneficiary type that the promisee might sue as trustee for the beneficiary.

⁸⁵ *Union Pacific Ry. Co. v. Metcalf*, 50 Neb. 452, 69 N. W. 961. See, *contra*, *Snider v. Adams Express Co.*, 77 Mo. 523, where consignor was allowed to recover as trustee for consignee. See 4 *Elliott on Railroads*, § 1692.

⁸⁶ *Ferris v. Carson Water Co.*, 16 Nev. 44, 40 Am. Rep. 485. It is to be observed that the promisee has a very marked pecuniary interest in a promise to discharge his debts.

⁸⁷ *Adams v. Union R. R. Co.*, 21

R. I. 134, 42 Atl. 515, 44 L. R. A. 273.

⁸⁸ 20 N. Y. 268.

⁸⁹ *Miller v. Winchell*, 70 N. Y. 437, 439; *Ayers v. Dixon*, 78 N. Y. 318. For the earlier New York decisions, see *supra*. In *Clafin v. Ostrom*, 54 N. Y. 581, 584, it was held that the promisee or his assignee might sue upon a promise to assume the debts of a firm, and in *Ward v. Cowdrey*, 51 Hun, 641, 5 N. Y. S. 282, *affd.* 119 N. Y. 614, 23 N. E. 1143, it was held that a promisee might sue in the absence of proof that the third person knew of or acquiesced in the arrangement. The beneficiary in these cases could not have sued. A grantor who had paid the debt was held not entitled to sue on the promise as the land was the principal debtor in *Keller v. Lee*, 66 N. Y. App. Div. 184, 72 N. Y. S. 948.

clusion⁹⁰ though it is in conflict with an earlier Ohio decision which was not cited.⁹¹

§ 391. Ground for denying recovery by the promisee.

The idea behind the cases which deny the promisee a right of action is that by the assent of the third person a novation is created;⁹² but as has been already shown, a contract with a debtor to pay his debt, even though the creditor assents, does not amount to a novation.

§ 392. Recovery by the promisee generally allowed.

Whatever the hardship upon the promisor may be in being liable to two persons when he promised but one, most courts have found it the simpler alternative, a recovery by either party being a bar to an action by the other.⁹³ In mortgage

⁹⁰ *Poe v. Dixon*, 60 Ohio St. 124, 71 Am. St. Rep. 713, 54 N. E. 86. *Cf.* *Blood v. Crew Levick Co.*, 171 Pa. 328, 337, 33 Atl. 344. The court there said: "As to the amount still due and unpaid on the mortgages . . . the plaintiff cannot recover to her own use until she has been compelled to make payment and then only to the extent of payments actually made. An action might be maintained by the holder of the mortgage in the name of the covenantor for his use upon the express covenant to pay contained in the deed; and I see no reason why an action might not be brought by a covenantor to recover damages sustained by reason of the breach."

⁹¹ *Wilson v. Stilwell*, 9 Ohio St. 467, 75 Am. Dec. 477. A retiring partner, who had received a promise from the remaining partner that the latter would pay the firm debts was held entitled to sue upon the promise without having first paid the debts himself.

⁹² See also *Brewer v. Dyer*, 7 Cush. 337, 341. The promisee "might likewise have a remedy on the contract in case the plaintiff should not elect to adopt it."

⁹³ *Union Mut. L. I. Co. v. Hanford*, 143 U. S. 187, 12 S. Ct. 437, 36 L. Ed. 118; *Steene v. Aylesworth*, 18 Conn. 244, 252; *Tinkler v. Swainie*, 71 Ind. 562; *Rodenbarger v. Bramblett*, 78 Ind. 213; *Foster v. Marsh*, 25 Ia. 300; *Smith v. Smith*, 5 Bush, 625, 632; *Baldwin v. Emery*, 89 Me. 496, 36 Atl. 994; *Rogers v. Gosnell*, 51 Mo. 466, 469; *Snider v. Adams Express Co.*, 77 Mo. 523; *Beardslee v. Morgner*, 4 Mo. App. 139, 143; *Megher v. Stewart*, 6 Mo. App. 498, 500; *Weinreich v. Weinreich*, 18 Mo. App. 364, 372; *Anthony v. German Am. Ins. Co.*, 48 Mo. App. 65; *American Nat. Bank v. Klock*, 58 Mo. App. 335; *Gunnell v. Emerson*, 73 Mo. App. 291 (*conf.* *Bethany v. Howard*, 149 Mo. 504, 51 S. W. 94); *Strong v. Kamm*, 13 Oreg. 172, 9 Pac. 331; *Edmundson v. Penny*, 1 Barr, 334, 44 Am. Dec. 137; *Hoff's Appeal*, 24 Pa. 200; *Blood v. Crew Levick Co.*, 171 Pa. 328; *Snyder v. Summers*, 1 Lea, 534; *Callender v. Edmison*, 8 S. Dak. 81, 65 N. W. 425; *Hull v. Hayward*, 13 S. Dak. 291, 83 N. W. 270; *Jones v. Thomas*, 21 Gratt. 96. See also authorities in next note.

cases especially the promisor may thus find himself in a difficult position between the mortgagee and the promisee, the grantor of the premises. If the promisor fails to keep his promise to pay the debt, he is liable to the promisee to the full amount of the debt;⁹⁴ and unless the promise can bear the construction of a promise to indemnify against loss, this seems sound. But the recovery of the promisee cannot affect the mortgagee's rights against the property, and if he forecloses the mortgage, the promisor loses the property though he has already paid the debt. The proper relief for the promisor is an application to equity when he is sued by the promisee, for an injunction against the action on terms of payment of the debt to the mortgagee. Equity should grant such an injunction, for it does not injure the promisee, since the terms imposed amount to a decree of specific performance of the promise.⁹⁵ It seems also that if the mortgage has been foreclosed and the mortgagee thereby paid and the promisee freed from liability as mortgagor, the promisor should be entitled to an injunction against the collection of any judgment of the promisee against him, or if a judgment has already been collected, to an action on principles of quasi-contract to recover back the amount collected less costs and any payment or remaining liability of the promisee to the mortgagee.

⁹⁴ *Meyer v. Hartman*, 72 Ill. 442; *Stout v. Folger*, 34 Ia. 71, 11 Am. Rep. 138; *Furnas v. Durgin*, 119 Mass. 500, 20 Am. Rep. 341; *Locke v. Homer*, 131 Mass. 93, 41 Am. Rep. 199; *Walton v. Ruggles*, 180 Mass. 24, 61 N. E. 267; *Strohauer v. Volts*, 42 Mich. 444, 4 N. W. 161; *Dorrington v. Minnick*, 15 Neb. 397, 19 N. W. 456; *Rawson v. Copland*, 2 Sandf. Ch. 251; *Recort v. Higgins*, 48 N. Y. 532; *Sage v. Truslow*, 88 N. Y. 240; *Wilson v. Stilwell*, 9 Ohio St. 467, 15 Am. Dec. 477; *Calender v. Edmison*, 8 S. Dak. 81, 65 N. W. 425. See also *infra*, § 1408. But see *Faulkner v. McHenry*, 235 Pa. 298, 83 Atl. 827. And it makes no difference that the promisor has sold the land again. *Reed v. Paul*, 131

Mass. 129. But if the mortgagee has been paid from sale of the land the promisee can recover only nominal damages. *Muhlig v. Fiske*, 131 Mass. 110; *Williams v. Fowle*, 132 Mass. 385. See also *Wilson v. Bryant*, 134 Mass. 291.

⁹⁵ Compare *Ford v. Finney*, 35 Ga. 258. In that case the mortgagee sued the mortgagor. The latter having sold the premises to a third party, who had agreed to pay the mortgage, brought a bill in equity joining both the mortgagee and the purchaser, praying that the latter be compelled to pay the debt. The bill was sustained. See also *Wilson v. Stilwell*, 9 Ohio St. 467, 15 Am. Dec. 477.

§ 393. Creditor's right to sue both debtor and new promisor.

Diversity of opinion likewise prevails in regard to the right of a creditor whose debtor has received a promise to pay the debt, to sue both the new promisor and the original debtor. Courts which hold that the original contract is in effect an offer of novation to the creditor naturally hold that if the creditor accepts the promisor as his debtor he releases the original debtor, and on the other hand if he elects to sue the original debtor he thereby rejects the proffered novation and cannot afterwards sue the new promisor.⁹⁶ The more common doctrine, however, allows the creditor a right against both the original debtor and the new promisor.⁹⁷ And in some States

⁹⁶ *Henry v. Murphy*, 54 Ala. 246; *Hall v. Alford*, 20 Ky. L. Rep. 1482, 49 S. W. Rep. 444; *Floyd v. Ort*, 20 Kan. 162; *Searing v. Benton*, 41 Kan. 758, 21 Pac. 800 (compare *Kansas Pac. Ry. Co. v. Hopkins*, 18 Kan. 494, 499, and *Plano Mfg. Co. v. Burrows*, 40 Kan. 361, 19 Pac. 809. In the latter case the court said that "no one has the right to take the objection that the old debt is not extinguished, but the old debtor, and probably even he would not have such right"); *Bohanan v. Pope*, 42 Me. 93; *Brewer v. Dyer*, 7 Cush. 337; *Warren v. Batchelder*, 16 N. H. 580; *Wood v. Moriarty*, 15 R. I. 518, 522, 9 Atl. 427; *Phenix Iron Foundry v. Lockwood*, 21 R. I. 556, 45 Atl. 546. See also *Steinfeld v. Wing Wong*, 14 Ariz. 336, 128 Pac. 354; *Blake v. Atlantic Nat. Bank*, 33 R. I. 464, 82 Atl. 225, 39 L. R. A. (N. S.) 874; *McIlvane v. Big Stony Lumber Co.*, 105 Va. 613, 54 S. E. 473; *King v. Scott*, 76 W. Va. 58, 84 S. E. 954.

In no case, however, has a court held that a mortgagee by seeking to recover against one who had assumed a mortgage released the mortgagor; and in *Rouse v. Bartholomew*, 51 Kan. 425, 32 Pac. 1088, the Kansas court held the mortgagor was not released though the decision is inconsistent in princi-

ple with the previous decisions of the court as to other debts.

In *Young v. Hawkins*, 74 Ala. 370, it was held that recovering judgment against the original debtor in ignorance that a new promisor had agreed to pay the debt did not bar a subsequent recovery against the latter. To make a binding election it was said knowledge of the facts is essential.

⁹⁷ *United States v. Illinois Surety Co.*, 226 Fed. 653, 661, 141 C. C. A. 409; *Steinfeld v. Wing Wong*, 14 Ariz. 336, 128 Pac. 354; *Hopkins v. Warner*, 109 Cal. 133, 41 Pac. 868; *South Side Planing Mill Assoc. v. Cutler Co.*, 64 Ind. 560; *Davis v. Hardy*, 76 Ind. 272; *Rodenbarger v. Bramblett*, 78 Ind. 213; *Stanton v. Kendrick*, 135 Ind. 382, 389, 35 N. E. 19; *Rothermel v. Bell & Zoller Co.*, 79 Ill. App. 667; *Wickham v. Hyde Park Assoc.*, 80 Ill. App. 523; *Rouse v. Bartholomew*, 51 Kan. 425, 32 Pac. 1008; *Leckie v. Bennett*, 160 Mo. App. 145, 141 S. W. 706; *Davis v. Nat. Bank of Commerce*, 45 Neb. 589, 63 N. W. 852; *Stephany v. More*, 82 N. J. 186, 82 Atl. 731; *Fischer v. Hope Mut. Life Ins. Co.*, 69 N. Y. 161; *Poe v. Dixon*, 60 Ohio St. 124, 129, 54 N. E. 86, 71 Am. St. Rep. 713; *Feldman v. McGuire*, 34 Oreg. 309, 313, 55 Pac. 872; *Hawkins v. Western Nat. Bank* (Tex. Civ. App.), 145 S. W. 722,

he is allowed to join both as defendants in the same action. He ought to be compelled to do so.

§ 394. Defenses good against the promisee good against creditor.

Another question concerns the admissibility of certain defenses by the promisor. When sued by the third person, the promisor may rely on facts showing that the promisee could not enforce the contract. Is the third person barred because the promisee would be? It is necessary to observe some distinctions here. The foundation of any right the third person may have, whether he is a sole beneficiary or a creditor of the promisee, is the promisor's contract. Unless there is a valid contract no rights can arise in favor of any one. Moreover the rights of the third person, like the rights of the promisee, must be limited by the terms of the promise. If that is terms conditional, no one can acquire any rights under it unless the condition happens.⁹⁹ Further, if there is a contract valid at law, but subject to some equitable defence—as fraud,¹ mis-

Johnson v. Shuey, 40 Wash. 22, 82 Pac. 123. In this connection may be considered also the continuing liability of a lessee though the lease has been assigned by him and his assignee has also become liable. *Wood, Landlord and Tenant* (2d ed.), §§ 330, 337; *Zinwell Co. v. Ilkowitz*, 144 N. Y. S. 815, 83 Misc. 42; *Johnson v. Seaborg*, 69 Or. 27, 137 Pac. 191.

⁹⁹ *Roberts v. Abney* (Tex. Civ. App.), 189 S. W. 1101.

¹ *Ellis v. Conrad Seipp Brewing Co.*, 207 Ill. 291, 69 N. E. 808; *Russell v. Western Union Tel. Co.*, 57 Kan. 230, 45 Pac. 598; *Fenn v. Union Central Life Ins. Co.*, 48 La. Ann. 541, 19 So. 623; *Gill v. Weller*, 52 Md. 8; *Browning v. North Mo. Cent. Ry. Co. (Mo.)*, 188 S. W. 143. But see *Orman v. North Alabama Co.*, 53 Fed. 469, 55 Fed. 18, 13 U. S. App. 215, 5 C. C. A. 22; *East v. New Orleans Ins. Assoc.*, 76 Miss. 697, 26 So. 691; *Oakland Ins. Co. v. Bank of Commerce*,

47 Neb. 717, 66 N. W. 646, 36 L. R. 673, 58 Am. St. Rep. 663. See also *Davis v. Dunn*, 121 Mo. App. 490, S. W. 226. In the first case the person to whom a telegram was sent, who was treated as the beneficiary of the contract with the telegraph company, was held subject to the requirement in that contract that the claim must be presented within 60 days. In the last two cases a mortgagee was allowed to sue on policies of insurance taken out by the mortgagor "loss payable to mortgagee" though the mortgagor had acted in such a way as would avoid the policy as to him.

¹ *Green v. Turner*, 80 Fed. Rep. 486 Fed. Rep. 837, 59 U. S. App. 2530 C. C. A. 427; *Lloyd v. Lowe* (Colo. 1917), 165 Pac. 609; *Union City & Co. v. Wright*, 145 Ga. 730, 89 S. E. 822; *Benedict v. Hunt*, 32 Ia. 2; *Maxfield v. Schwartz*, 45 Minn. 1547 N. W. 448, 10 L. R. A. 606; *Ellis v. Harrison*, 104 Mo. 270, 278, 16 S. W.

take,² or failure of consideration,³—the defence may be set up against the third person. If the undertaking is to pay a debt or discharge a duty of the promisee, the rights of the third person can be derived only through the promisee, and whatever defence affects the latter affects the creditor. In the case of a promise for the sole benefit of a third person, the beneficiary may indeed be regarded as having a direct right, but he is in the position of a donee. It is no more equitable for a sole beneficiary, though himself innocent to try to enforce a promise procured by the fraud of another, than for the donee of trust property to insist on his legal title as against the *cestui que trust*.

198; *Saunders v. McClintock*, 46 Mo. App. 216; *American Nat. Bank v. Klock*, 58 Mo. App. 335; *Johnson v. Maier*, 194 Mo. App. 169, 187 S. W. 143; *Wise v. Fuller*, 29 N. J. Eq. 257; *Arnold v. Nichols*, 64 N. Y. 117; *Moore v. Ryder*, 65 N. Y. 438; *Trimble v. Strother*, 25 Ohio St. 378; *Bradshaw v. Provident Trust Co.*, 81 Oreg. 55, 158 Pac. 274; *Janness v. Simpson*, 84 Vt. 127, 78 Atl. 886; *Osborne v. Cabell*, 77 Va. 462. But see *contra*, *Georgia Home Ins. Co. v. Boykin*, 137 Ala. 350, 34 So. 1012. *Fitzgerald v. Barker*, 96 Mo. 661, 10 S. W. 45, and *Klein v. Isaacs*, 8 Mo. App. 568, also to the contrary must be regarded either as overruled or distinguished on the ground that the plaintiff bought the note, payment of which was assumed, on the faith of the defendant's promise to pay it.

² *Episcopal Mission v. Brown*, 158 U. S. 222, 15 S. Ct. 833, 39 L. Ed. 960; *Jones v. Higgins*, 80 Ky. 409; *Bogart v. Phillips*, 112 Mich. 697, 71 N. W. 320; *Rogers v. Castle*, 51 Minn. 428, 53 N. W. 651; *Gold v. Ogden*, 61 Minn. 88, 66 N. W. 266; *Bull v. Titworth*, 29 N. J. Eq. 73; *Stevens Institute of Technology v. Sheridan*, 30 N. J. Eq. 23; *O'Neill v. Clark*, 33 N. J. Eq. 444; *Green v. Stone*, 54 N. J. Eq. 387, 34

Atl. 1099, 55 Am. St. Rep. 577; *Crowe v. Lewin*, 95 N. Y. 423; *Wheat v. Rice*, 97 N. Y. 296; *Broadbent v. Hutter*, 163 Wis. 380, 157 N. W. 1095.

³ *Clay v. Woodrum*, 45 Kan. 116, 25 Pac. 619; *Amonett v. Montague*, 75 Mo. 43; *Judson v. Dada*, 79 N. Y. 373, 379; *Osborne v. Cabell*, 77 Va. 462.

Several decisions present the case of a purchaser with warranty of land subject to a mortgage, who has been evicted from the premises and is thereafter sued by the holder of the mortgage. The defence was held good in *Dunning v. Leavitt*, 85 N. Y. 30, 39 Am. Rep. 617; *Crowe v. Lewin*, 95 N. Y. 423; *Gifford v. Father Matthew Society*, 104 N. Y. 139, 10 N. E. 39. But see *contra*, *Blood v. Crew Levick Co.*, 177 Pa. 606, 35 Atl. 871, 55 Am. St. Rep. 741; *Hayden v. Snow*, 9 Biss. 511, 14 Fed. 70; s. c. *sub nom.* *Hayden v. Drury*, 3 Fed. 782. In the last case the decision was based on the fact that the plaintiff was a purchaser for value of the mortgage note after the defendant had assumed the mortgage. See also *Knapp v. Connecticut Mut. L. I. Co.*, 85 Fed. 329, 56 U. S. App. 452, 40 L. R. A. 861, 29 C. C. A. 171; *Connecticut Mut. L. I. Co. v. Knapp*, 62 Minn. 405, 64 N. W. 1137.

§ 395. Non-performance by promisee a good defence.

A more difficult case arises where the defence does not relate to the origin of the contract, but is based on supervening circumstances, such as non-performance by the promisee of a counter promise made by him, or discharge by the promisee by release or rescission. The defence of non-performance should be available against the third person whether he is a sole beneficiary or a creditor of the promisee. The defence is properly based on failure of consideration.^{3a} As the substantial matter the parties had in mind was the performance of the promises the defendant promisor has in substance not received what he bargained for. Under these circumstances it is unjust to allow a mere donee to enforce the promise; and if the third person is a creditor he is not entitled to any greater right than his debtor had.⁴

§ 396. Rescission or release—sole beneficiary.

The commonest defence, that of discharge by rescission or release, is different. In the case of a sole beneficiary it is like the attempted revocation of a gift. The promisor for good consideration has given the beneficiary a right. Later he seeks to take it away by procuring the extinction of the promise. If

^{3a} See *infra*, § 813.

⁴ *Episcopal Mission v. Brown*, 158 U. S. 222, 15 S. Ct. 833, 39 L. Ed. 960; *Pugh v. Barnes*, 106 Ala. 167, 19 So. 370; *Stuyvesant v. Western Mortgage Co.*, 22 Col. 28, 33, 43 Pac. 144; *Miller v. Hughes*, 95 Ia. 223, 63 N. W. 680; see also *Willard v. Wood*, 164 U. S. 502, 521, 17 S. Ct. 176, 41 L. Ed. 531; *Loeb v. Willis*, 100 N. Y. 231, 3 N. E. 177. But see apparently *contra* *Cress v. Blodgett*, 64 Mo. 449; *Commercial Bank v. Wood*, 7 W. & S. 89; *Fulmer v. Wightman*, 87 Wis. 573, 58 N. W. 1106. In Missouri and Nebraska it has been held that a surety for the promise of a contractor to a district or municipality to pay for his labor and materials is liable to workmen and material men in spite of the fact that the promisee, the district or munici-

pality, has paid the contractor during the progress of the work to an amount not allowed by the contract. The Missouri decision relies on the fact that the plaintiffs had become creditors on the faith of the defendant's suretyship before the promisee had committed any breach of duty. The Nebraska decisions make no such distinction. *School District v. Livers*, 147 Mo. 580, 49 S. W. 507; *Doll v. Crume*, 41 Neb. 655, 59 N. W. 806; *Kaufmann v. Cooper*, 46 Neb. 644, 65 N. W. 796; *King v. Murphy*, 49 Neb. 670, 68 N. W. 1029; *Sailing v. Morrell*, 97 Neb. 454, 150 N. W. 195. See also *United States Fidelity & Co. v. United States*, 191 U. S. 416, 24 S. Ct. 142, 48 L. Ed. 242. Cf. *State v. Adams*, (Ind. 1919), 118 N. E. 680, 681.

it be admitted that the beneficiary has a direct right of his own, it ought not to be extinguished without his consent. The only question can be, when does the beneficiary's right arise—when the promise for his benefit was made or when he was notified of it or assented to it? For unless a right has vested in the beneficiary before the rescission or release he cannot object. The question is analogous to that arising upon a gift of property or the creation of a trust for the benefit of another. As a gift is a pure benefit to the donee there seems no reason why his assent should not be presumed, unless and until he expresses dissent.⁵

According to this view the sole beneficiary acquires a right immediately upon the making of the contract and any subsequent rescission is ineffectual. There is weighty authority in support of this view,⁶ though there is also authority to the contrary.⁷ The almost universal doctrine that the beneficiary of a life insurance policy acquires a vested right of which he cannot be deprived subsequently is in accord.⁸

⁵ Ames, *Cas. Trusts*, 2d ed., 232-234.

⁶ *Henderson v. McDonald*, 84 Ind. 149, and *Waterman v. Morgan*, 114 Ind. 237, 16 N. E. 590; *Thompson v. Gordon*, 3 Strobh. 196. See also *Knowles v. Erwin*, 43 Hun, 150, *affd.*, 124 N. Y. 633, 26 N. E. 759. A few cases of the debtor and creditor type seem to hold a similar doctrine. *Starbird v. Cranston*, 24 Col. 20, 48 Pac. 652; *Bay v. Williams*, 112 Ill. 91, 54 Am. Rep. 209; *Cobb v. Heron*, 78 Ill. App. 654, 180 Ill. 49, 54 N. E. 189; *Rogers v. Gosnell*, 58 Mo. 589; *Tweeddale v. Tweeddale*, 116 Wis. 517, 93 N. W. 440, 61 L. R. A. 509, 96 Am. St. Rep. 1003 (overruling *Bassett v. Hughes*, 43 Wis. 319, and apparently applicable either to debtor or creditor type of case, or sole beneficiary); *Sedgwick v. Blanchard*, 164 Wis. 421, 160 N. W. 267.

⁷ In *People's Bank & Trust Co. v. Weidinger*, 73 N. J. L. 433, 64 Atl. 179, a contract for the sole benefit of children of the contracting parties was

held revocable by either of them until acted on by the other parties; being gratuitous so far as the beneficiaries were concerned. The death of one of the promisors was accordingly held a revocation. The court treats the case as analogous to promises in subscription papers which are generally held revocable until acted on. See *supra*, § 116. The analogy, however, seems far from perfect.

⁸ Numerous cases are collected in *Cooley, Ins. Briefs*, 3755, and 12 Col. L. Rev. 551. See *supra*, § 369. Also *Central Nat. Bank v. Hume*, 128 U. S. 195, 206, 9 S. Ct. 41, 32 L. Ed. 370, L. R. A. 1916 A. 868; *Johnson v. New York L. I. Co.*, 56 Colo. 178, 138 Pac. 414; *Desforges's Succession*, 135 La. 49, 64 So. 978, 52 L. R. A. (N. S.) 689; *Virgin v. Marwick*, 97 Me. 578, 55 Atl. 520; *Jacobs v. Strumwasser*, 84 N. Y. Misc. 28, 145 N. Y. S. 916; *Mutual Benefit L. I. Co. v. Cummings*, 66 Or. 272, 133 Pac. 116. Even the divorce of a wife named as beneficiary will not

§ 396a CONTRACTS FOR THE BENEFIT OF THIRD PERSONS

§ 396a. Fraternal benefit societies.

On principles not very easy to formulate the certificate of fraternal associations have been distinguished in this manner from insurance policies. In a decision of the United States Supreme Court⁹ Mr. Justice Brandeis, speaking for the court said:

"The difference between ordinary life insurance and that furnished by the fraternal benefit societies has been universally recognized in legislation and is a matter of common knowledge. The differences in the legal incidents of these different forms of protection have been illustrated by numerous decisions. The difference in respect to the insured's right to change the beneficiary has been frequently commented on and firmly established. In the absence of a special provision of law or of a rule of the association to the contrary, the naming of a person as beneficiary in the benefit certificate of a fraternal benefit association confers not a vested right, but an expectancy merely which may be defeated at any time by act of the insured member.¹⁰

deprive her of her right in the policy. *Marquet v. Aetna L. I. Co.*, 128 Tenn. 213, 159 S. W. 733, L. R. A. 1915 B. 749; *Filley v. Illinois L. I. Co.*, 91 Kan. 220, 137 Pac. 793, L. R. A. 1915 D. 130. Therefore the trustee in bankruptcy of the insured does not take a policy payable to a beneficiary, *Loveland on Bankruptcy*, § 398; and the cases make no inquiry as to whether the beneficiary was aware of the existence of the policy. Of course if the policy reserves the right to change the beneficiary, any interest of a beneficiary is wholly defeasible. *In re Hogan*, 194 Fed. 846, 114 C. C. A. 634; *Townsend v. Fidelity & Casualty Co.*, 163 Ia. 713, 144 N. W. 574, L. R. A. 1915 A. 109; *Jacobs v. Strumwasser*, 84 N. Y. Misc. 28, 145 N. Y. S. 916; *John Hancock Mut. L. I. Co. v. Bedford*, 36 R. I. 116, 89 Atl. 154. *Cf. Neary v. Metropolitan L. Ins. Co. (Conn.)*, 103 Atl. 661. In Wisconsin even without any reservation of the right in the policy,

an insured person who pays the premium may at any time dispose of the policy or will it away without the consent of the beneficiary. *Clark v. Deane*, 12 Wis. 223; *Armstrong v. Blanchard*, 150 Wis. 31, 136 N. W. 145. This local rule has, however, been changed by statute so far as concerns insurance effected by a husband for the benefit of his wife. *Boehmer v. Kalk*, 155 W. Va. 156, 144 N. W. 182, 49 L. R. A. (N. S.) 487.

⁹ *Supreme Council of Royal Arcanum v. Behrend*, 247 U. S. 394, 38 S. Ct. 522, 524, 62 L. Ed. 1182.

¹⁰ Citing: *Slaughter v. Grand Lodge*, 192 Ala. 301, 68 So. 367; *Jory v. Supreme Council A. L. H.*, 105 Cal. 203, 38 Pac. 524, 26 L. R. A. 733, 45 Am. St. Rep. 17; *Masonic Mutual Benefit Assn. v. Tolles*, 70 Conn. 537, 544, 4 Atl. 448; *Smith v. Locomotive Engineers Mutual Life, etc., Ins. Assn.*, 138 Ga. 717, 76 S. E. 44; *Delaney v. Delaney*, 175 Ill. 187, 51 N. E. 961

The right of a member of a fraternal benefit society to change the beneficiary has been denied in a few cases which have failed to distinguish between benefit certificates and ordinary life policies.¹¹ A different case is presented where the insured has contracted with the beneficiary that he shall remain such. A contract of that nature may be enforced by appropriate proceeding if consistent with the general law and with the laws of the association."¹²

§ 396b. Distinction between sole beneficiary cases and others often not observed.

In most jurisdictions the distinction has not been clearly stated in the decisions between cases of sole beneficiary and cases of debtor and creditor. Most of the cases have been of the latter sort, and it has generally been laid down broadly as true of all cases that prior to the assent or acting upon the promise by

Masonic Mutual Benefit v. Burkhart, 110 Ind. 189, 194-195, 10 N. W. 79, 11 N. W. 449; *Carpenter v. Knapp*, 101 Iowa, 712, 70 N. W. 764, 38 L. R. A. 128; *Titsworth v. Titsworth*, 40 Kan. 571, 20 Pac. 213; *Marsh v. American Legion of Honor*, 149 Mass. 512, 21 N. E. 1070, 4 L. R. A. 382; *Schoenau v. Grand Lodge A. O. U. W.*, 85 Minn. 349, 88 N. W. 999; *Carson v. Vicksburg Bank*, 75 Miss. 167, 22 So. 1, 37 L. R. A. 559, 65 Am. St. Rep. 596; *Masonic Benevolent Assoc. v. Bunch*, 109 Mo. 560, 19 S. W. 25; *Knights of Maccabees v. Sackett*, 34 Mont. 357, 363, 86 Pac. 423, 115 Am. St. Rep. 532; *Ogden v. Sovereign Camp, W. O. W.*, 78 Neb. 804, 111 N. W. 797; *Barton v. Provident Mutual Relief Assoc.*, 63 N. H. 535, 3 Atl. 627; *Spengler v. Spengler*, 65 N. J. Eq. 176, 55 Atl. 285; *Lahey v. Lahey*, 174 N. Y. 146, 66 N. E. 670, 61 L. R. A. 791, 95 Am. St. Rep. 554; *Pollock v. Household of Ruth*, 150 N. C. 211, 63 S. E. 940; *Lents, Ex'r, v. Fritter*, 92 Ohio St. 186, 110 N. E. 637; *Noble v. Police Beneficiary*

Assoc., 224 Pa. 298, 73 Atl. 336, 132 Am. St. Rep. 783; *Catholic Knights of America v. Morrison*, 16 R. I. 468, 17 Atl. 57; *Christenson v. El Riad Temple*, 37 S. D. 68, 71, 156 N. W. 581; *Alfsen v. Crouch*, 115 Tenn. 352, 89 S. W. 329; *Byrne v. Casey*, 70 Tex. 247, 8 S. W. 38; *Cade v. Head Camp, W. O. W.*, 27 Wash. 218, 67 Pac. 603; *Supreme Conclave, Royal Adelpia v. Cappella (C. C.)*, 41 Fed. 1.

¹¹ Citing *Pittinger v. Pittinger*, 28 Colo. 308, 64 Pac. 195, 89 Am. St. Rep. 193.

¹² Citing *Grimbley v. Harrold*, 125 Cal. 24, 57 Pac. 558, 73 Am. St. Rep. 19; *McGrew v. McGrew*, 190 Ill. 604, 60 N. E. 861; *In re Reid's Estate*, 170 Mich. 476, 136 N. W. 476; *Catholic Benevolent Legion v. Murphy*, 65 N. J. Eq. 60, 55 Atl. 497; *Stronge v. Knights of Pythias*, 189 N. Y. 346, 82 N. E. 433, 12 L. R. A. (N. S.), 1206, 121 Am. St. Rep. 902, 12 Ann. Cas. 941; *Supreme Lodge Knights and Ladies of Honor v. Ulanowsky*, 246 Pa. 591, 92 Atl. 711.

the third party but not afterwards, a rescission or release is operative.¹³

§ 397. Rescission or release. Debtor and creditor cases.

In theory, however, in a case of debtor and creditor the situation is very different from that arising where the third person is a sole beneficiary. The creditor's right is purely derivative, and if the debtor no longer has a right against the promisor the creditor can have none. On one ground only has the creditor any right to object to a rescission or release. The promise to the debtor to pay the debt is a valuable right belonging to the debtor. Like his other property the debtor has no right to give it away if he thereby deprives himself of sufficient

¹³ *Biddel v. Brizzolara*, 64 Cal. 354, 30 Pac. 609; *Merrick v. Giddings*, 1 Mackey (D. C.), 394; *Durham v. Bischof*, 47 Ind. 211; *Carnahan v. Tousey*, 93 Ind. 561; *Smith v. Flack*, 95 Ind. 116, 120; *Gilbert v. Sanderson*, 56 Ia. 349, 9 N. W. 293, 41 Am. Rep. 103; *Cohrt v. Kock*, 56 Ia. 658, 10 N. W. 230; *Seiffert Lumber Co. v. Hartwell*, 94 Ia. 576, 582, 63 N. W. 333, 58 Am. St. Rep. 413; *Dodge's Adm. v. Moss*, 82 Ky. 441; *Mitchell v. Cooley*, 5 Rob. 240; *Cucullu v. Walker*, 16 La. Ann. 198; *Garnsey v. Rogers*, 47 N. Y. 233, 242, 7 Am. Rep. 440; *Gifford v. Corrigan*, 117 N. Y. 257, 22 N. E. 756, 6 L. R. A. 610; *Seaman v. Hasbrouck*, 35 Barb. 151; *May v. National Bank*, 9 Hun, 108, *affd.* 73 N. Y. 509; *Wilson v. Stilwell*, 14 Ohio St. 467, 75 Am. Dec. 477; *Trimble v. Strother*, 25 Ohio St. 378; *Brewer v. Maurer*, 38 Ohio St. 543, 43 Am. Rep. 436; *Emmitt v. Brophy*, 42 Ohio St. 82; *McCown v. Schrimpf*, 21 Tex. 22, 73 Am. Dec. 221. *Huffman v. Western Mortgage Co.*, 13 Tex. Civ. App. 169, 36 S. W. 306; *Clark v. Fisk*, 9 Utah, 94, 33 Pac. 248; *Bassett v. Hughes*, 43 Wis. 319; *Stephens v. Casbacker*, 8 Hun, 116, *is contra*. See also *Hartley v. Harrison*, 24 N. Y. 170.

What is required in the way of assent or acting upon the promise is not defined. Doubtless in many jurisdictions if the third person had knowledge of the promise and made no objection he would be regarded as assenting. But in *Crowell v. Currier*, 27 N. J. Eq. 152 (s. c. on appeal *sub nom.* *Crowell v. Hospital*, 27 N. J. Eq. 650), it was held that rescission was permissible because the third party had not altered his position, the court apparently requiring something like an estoppel to prevent a rescission; and in *Wood v. Moriarty*, 16 R. I. 201, 14 Atl. 855, a release by the promisee was held effectual, though the creditors had made a demand upon the promisor for the money, because the creditors "did not do or say anything inconsistent with their continuing to look to T (the original debtor) for the debt." In California (Civ. Code, § 1559) and Oklahoma [Rev. L. (1910), Sec. 895] it is declared by statute: "A contract made expressly for the benefit of a third party may be enforced at any time before the parties thereto rescind." See *J. F. Hall Martin Co. v. Hughes*, 18 Cal. App. 513, 123 Pac. 617; *Hines v. Washita Valley Bank* (Okl.), 152 Pac. 112.

means to pay his debts. Even though insolvent, however, he has a right to change the form of his assets. Consequently to a rescission or release for adequate consideration paid to the debtor, the creditor should never have a right to object. A release or rescission by an insolvent debtor, without any consideration, or without adequate consideration, however, is a fraudulent conveyance. It is a gift of property by one whose circumstances do not justify giving, and the creditor may disregard the gift. Here, too, the knowledge of the promise by the third person or his assent thereto should make no difference. A promise to a debtor to pay his debt is a valuable asset whether the creditor knows of it or not, and the debtor, if insolvent, has no right to dispose of it without receiving an adequate price for it.¹⁴ Where the contract to pay the debt is executory on both sides there can be no objection on this theory to mutual rescission.¹⁵

§ 398. Statute of Limitations.

The nature of a creditor's right against one who has promised the debtor to pay the debt is also involved in determining when the Statute of Limitations bars the creditor's action. On principle the creditor must have a claim that has not been barred against the original debtor, and the latter must also have such a claim against the promisor. But courts which allow a direct right to the creditor against the promisor hold that though the creditor's original claim is barred he may nevertheless enforce a claim against the promisor if the statutory period has not run since the debt was assumed.¹⁶

¹⁴ This analysis finds some support in the cases of *Trustees v. Anderson*, 30 N. J. Eq. 366; *Youngs v. Trustees*, 31 N. J. Eq. 290, and *Willard v. Worsham*, 76 Va. 392, where the validity of a release by the mortgagor of one who had purchased the equity of redemption from him and assumed the mortgage was made to depend on the solvency of the mortgagor.

¹⁵ This was so held in *Hartman v. Pistorius*, 248 Ill. 568, 94 N. E. 131, the court saying (248 Ill. at p. 573):

"They were as free to cancel and abandon their contract as they had been to enter into it." The case is sound, but it cannot be supported if the theory is accepted that a contract to pay another's debt gives the creditor an irrevocable right either immediately or as soon as he knows of the promise.

¹⁶ *Daniels v. Johnson*, 129 Cal. 415, 61 Pac. 1107, 79 Am. St. Rep. 123; *Kuhl v. Chicago & N. W. Ry. Co.*, 101 Wis. 42, 77 N. W. 155. See also *Roberts v. Fitzallen*, 120 Cal. 482, 52 Pac.

§ 399. Invalidity of debt assumed.

Another kind of defence to a promise to pay a debt has given rise to considerable litigation. May the promisor set up that the debtor did not owe the debt or that it was an illegal debt? The answer to this question depends upon the true meaning in fact of the promise rather than upon any rule of law. If the promisor's agreement is to be construed as a promise to discharge whatever liability the promisee is under, the promisee must certainly be allowed to show that the promise was under no liability.¹⁷ Thus one who in return for an assignment of property assumed all the grantor's debts would certainly be allowed to dispute the validity of any debt.¹⁸ On the other hand, if the promise means that the promisor agrees to pay a sum of money to A, to whom the promisee says he is indebted, it is immaterial whether the promisee is actually indebted for that amount or at all. The promisee has decided that question for himself. Where the promise is to pay a specific debt, for example to assume a specific mortgage, especially if the amount of it is deducted from the consideration paid by the promisor for the mortgaged property, this construction will generally be the true one.¹⁹ Most of the cases accordingly refuse to allow one who has assumed a specific debt to set up usury

818; *Robertson v. Stuhlmiller*, 93 Ia. 326, 61 N. W. 986.

¹⁷ *Paul v. Vancouver*, 89 Wash. 331, 154 Pac. 453, and see cases in the following note.

¹⁸ See *Gate City Nat. Bank v. Chick*, 170 Mo. App. 343, 156 S. W. 743; *Crowe v. Malba Land Co.*, 76 N. Y. Misc. 676, 135 N. Y. S. 454.

¹⁹ If the debt in fact was not due the promise will be to pay a sole beneficiary; if, however, the debt was due, the promisee will be of the debtor and creditor type. It seems immaterial that the parties are ignorant, when they contract, to which class the promise belongs.

²⁰ *Millington v. Hill*, 47 Ark. 301, 1 S. W. 547; *People's Bank v. Collins*, 27 Conn. 142; *Key West Coal Co. v. Porter*, 63 Fla. 448, 58 So. 599; *Hen-*

derson v. Bellew, 45 Ill. 322; *Valentine v. Fish*, 45 Ill. 462; *Easley v. Sloan*, 1 Ill. App. 63; *Flanders v. Doyle*, 1 Ill. App. 508; *Cleaver v. Burcky*, 1 Ill. App. 92; *Stephen v. Muir*, 8 Ind. 352, 65 Am. Dec. 764; *Spinney v. Miller*, 114 Ia. 210, 86 N. W. 31; *Williams v. Eagle Bank*, 172 Ky. 54, 189 S. W. 883; *Hough v. Horsey*, 3 Md. 181; *Log Cabin Assoc. v. Gross*, 7 Md. 456, 18 Atl. 896; *Scanlan v. Grimmer*, 71 Minn. 351, 74 N. W. 146, 7 Am. St. Rep. 326; *Cramer v. Lepper*, 26 Ohio St. 59, 20 Am. Rep. 75; *Jones v. Insurance Co.*, 40 Ohio St. 58; *Spaulding v. Davis*, 51 Vt. 77; *Conover v. Hobart*, 24 N. J. Eq. 120; *Post v. Dart*, 8 Paige, 639; *Cole v. Savage*, 1 Paige, 583; *Root v. Wright*, 21 Hun. 344; *Sands v. Church*, 6 N. Y. 34; *Hartley v. Harrison*, 24 N. Y. 170.

or other defences,²¹ of which the debtor might have availed himself.

§ 400. All parties should be joined.

In dealing with any of these defences it is obvious that all three parties should have an opportunity of litigating the question since all are interested in it, and it is desirable to have all concluded by the judgment. If a creditor who sues the promisor and is met by the defence of fraud or mistake in the contract nevertheless prevails, but being unable to collect his judgment sues the original debtor, as he would be allowed to do in many jurisdictions, clearly the debtor cannot be concluded

Ritter v. Phillips, 53 N. Y. 586 (payment). But see *Mollohan v. Masters*, 45 App. D. C. 414; *Knickerbocker Life Ins. Co. v. Nelson*, 78 N. Y. 137. The same result has been reached even though the purchaser of the equity of redemption does not assume the mortgage provided the amount of the mortgage is deducted from the purchase price. *Scull v. Idler*, 79 N. J. Eq. 466, 81 Atl. 746; *Higbee v. Aetna Building & Loan Assn.*, 26 Okla. 327, 109 Pac. 236. But if the amount of the mortgage is not thus deducted, nor payment of the mortgage assumed, the purchaser may set up usury. *First Nat. Bank v. Drew*, 226 Ill. 622, 80 N. E. 1082, 117 Am. St. Rep. 271, 10 L. R. A. (N. S.) 857; *Grove v. Great Northern Loan Co.*, 17 N. Dak. 352, 116 N. W. 345, 138 Am. St. 707. See also *Ford v. Washington Nat. Building, etc., Co.*, 10 Idaho, 30, 76 Pac. 1010, 109 Am. St. Rep. 192.

²¹ *Pope v. Porter*, 33 Fed. 7 (informal execution); *Santa Cruz v. Wykes*, 202 Fed. 357, 120 C. C. A. 485; *Kennedy v. Brown*, 61 Ala. 296 (coverture); *Davis v. Davis*, 19 Cal. App. 797, 127 Pac. 1051 (statute of limitations); *Key West Coal Co. v. Porter*, 63 Fla. 448, 58 So. 599 (failure of consideration); *Mackey v. Ballou*, 112 Ind. 198, 13 N.E. 715; *Gowans v. Pierce*, 57 Kan. 180, 45 Pac.

586 (unauthorized signature to note); *Cox v. Hoxie*, 115 Mass. 120 (erroneous amount); *Comstock v. Smith*, 26 Mich. 306 (coverture); *Miller v. Thompson*, 34 Mich. 10 (invalid execution); *Crawford v. Edwards*, 33 Mich. 354 (failure of consideration); *Lee v. Newman*, 55 Miss. 365 (invalidity); *Johnson v. Parmely*, 14 Hun, 398 (payment); *Ferris v. Crawford*, 2 Denio, 595 (payment); *Horton v. Davis*, 26 N. Y. 495 (want of record); *Freeman v. Auld*, 44 N. Y. 50 (failure of consideration); *Parkinson v. Sherman*, 74 N. Y. 88, 30 Am. Rep. 268 (failure of consideration); *Bennett v. Bates*, 94 N. Y. 354, 370 (invalidity of mortgage); *Howard v. Robbins*, 67 N. Y. App. Div. 245, 73 N. Y. S. 172; *Newton v. Evers*, 143 N. Y. App. Div. 673, 128 N. Y. S. 327 (lack of title in mortgagor). As stated in *Oglesby v. South Georgia Grocery Co.*, 18 Ga. App. 401, 402, 89 S. E. 436:

"If one assumes to pay a definite amount of the indebtedness of another, it is none of his concern whether the debt thus assumed is greater or less than the actual indebtedness. *Bush v. Roberts*, 4 Ga. App. 531, 62 S. E. 92." But see *Goodman v. Randall*, 44 Conn. 321; *Bowser v. Patrick*, 23 Ky. L. Rep. 1578, 65 S. W. 824 (champerty).

by the judgment in the first case and the creditor must try the same question again and perhaps with a different result.²²

§ 401. Contracts under seal.

None of the earlier cases which allowed a right of action to one who was not a party to the contract related to contracts under seal, and where statutes have not taken away the importance of the distinction between sealed and parol contracts the rule that one who is not a party to a contract under seal cannot sue upon it is still applied to contracts to benefit or pay a debt to a third person.²³ But in some States the rules of the common law distinguishing contracts under seal from other written contracts have been abolished or diminished, so that it is not surprising that the distinction as to the right of a third person to sue has often been disregarded.²⁴

²² In *Green v. Stone*, 54 N. J. Eq. 387, 34 Atl. 1099, 55 Am. St. Rep. 577, the court held that the defence that the clause assuming payment of a mortgage was inserted in a deed by mistake must be asserted by a cross bill to which the promisee must be made a party.

²³ *Hendrick v. Lindsay*, 93 U. S. 143, 23 L. Ed. 855; *Willard v. Wood*, 135 U. S. 309, 10 S. Ct. 831, 34 L. Ed. 210, 311, 313; 164 U. S. 502, 17 S. Ct. 176, 41 L. Ed. 531; *Douglass v. Branch Bank*, 19 Ala. 659; *Hunter v. Wilson*, 21 Fla. 250, 252; *Gunter v. Mooney*, 72 Ga. 205; *Moore v. House*, 64 Ill. 162; *Gautzert v. Hoge*, 73 Ill. 30; *Harms v. McCormick*, 132 Ill. 104, 109, 22 N. E. 511 (now changed by statute); *Hinkley v. Fowler*, 15 Me. 285; *Farmington v. Hobart*, 74 Me. 416; *Seigman v. Hofacker*, 57 Md. 321; *Montague v. Smith*, 13 Mass. 396; *Millard v. Baldwin*, 3 Gray, 484; *Robb v. Mudge*, 14 Gray, 534, 538; *Flynn v. North American Life Ins. Co.*, 115 Mass. 449, 27 N. J. Eq. 152; *Joelin v. New Jersey Car Spring Co.*, 36 N. J. L. 141, 146; *Cocks v. Varney*, 45 N. J. Eq. 72, 17 Atl. 108; *Styles v. Long Co.*, 67 N. J. L. 413, 418,

51 Atl. 710 (but by Stat. of 1898 the rule was extended to sealed contracts. *ibid.*). *Lee v. Newman*, 55 Miss. 365, 374; *How v. How*, 1 N. H. 49; *Strohecker v. Grant*, 16 S. & R. 237; *De Bollé v. Pennsylvania Ins. Co.*, 4 Whart. 68, 33 Am. Dec. 38; *Mississippi R. R. Co. v. Southern Assoc.*, 8 Phila. 107; *McAlister v. Marberry*, 4 Humph. 426; *Fairchild v. North Eastern Assoc.*, 51 Vt. 613; *Jones v. Thomas*, 21 Gratt. 96, 101 (now changed by statute); *McCartney v. Wyoming Nat. Bank*, 1 Wyo. 382.

²⁴ *Central Trust Co. v. Berwind-White Co.*, 95 Fed. Rep. 391; *Starbird v. Cranston*, 24 Col. 20, 48 Pac. 652; *Webster v. Fleming*, 178 Ill. 140, 52 N. E. 975; *Tapscott v. McVey*, 83 N. J. L. 747, 85 Atl. 343; *Harts v. Emery*, 184 Ill. 560, 56 N. E. 865; *Hartman v. Pistorius*, 248 Ill. 568, 94 N. E. 131; *Robinson v. Holmes*, 75 Ill. App. 203; *American Splane Co. v. Barber*, 91 Ill. App. 359; *Torpe v. John*, 177 Ill. App. 85; *Jefferson v. Asch*, 53 Minn. 446, 55 N. W. 604, 25 L. R. A. 257, 39 Am. St. Rep. 618; *Rogers v. Gosnell*, 51 Mo. 466, 58 Mo. 589; *Van Schaick v. Railroad*, 38 N. Y. 346; *Coster v.*

§ 402. Person incidentally benefited.

It sometimes happens that a person who is neither the promisee of a contract nor the party to whom performance is to be rendered will derive a benefit from its performance. A typical case is where A promises B to pay him money for his expenses. A creditor of B is not generally allowed to sue A.²⁵ It is obvious that such a creditor's right can at most be only a derivative one.

So under a promise made in a building contract that there may be retained from payments due the contractor a sufficient sum to pay claims for labor and material, there can be no recovery by a creditor of the contractor for labor or material.²⁶

In Missouri and Nebraska, however, bonds for the erection of public buildings containing such a clause are intended for the protection of the creditors as well as of the public corpora-

Mayor of Albany, 43 N. Y. 399; Rior-
don v. First Church, 26 N. Y. S. 38, 6
N. Y. Misc. 84; Vulcan Iron Works v.
Pittsburg Eastern Co., 144 N. Y. App.
Div. 827, 129 N. Y. S. 676; Lockwood
v. Smith, 81 N. Y. Misc. 334, 143 N. Y.
S. 480; Emmitt v. Brophy, 42 Ohio St.
82; Hughes v. Oregon Ry. & N. Co., 11
Oreg. 437, 5 Pac. 206; McDowell v.
Laev, 35 Wis. 171; Bassett v. Hughes,
43 Wis. 319; Houghton v. Milburn,
54 Wis. 554, 12 N. E. 23, 11 N. E. 517;
Stites v. Thompson, 98 Wis. 329, 331,
73 N. W. 774. A third person was al-
lowed to enforce a promise under seal
also in the following cases, but the
point was not discussed: South Side
Assoc. v. Cutler Co., 64 Ind. 560; An-
thony v. Herman, 14 Kan. 494; Bren-
ner v. Luth, 28 Kan. 581. See also
Va. Code, § 2415; Newberry Land Co.
v. Newberry, 95 Va. 111, 27 S. E.
897.

²⁵ Cragin v. Lovell, 109 U. S. 194,
199, 3 S. Ct. 132, 27 L. Ed. 903;
Thomas Mfg. Co. v. Prather, 65 Ark.
27, 44 S. W. 218; Burton v. Larkin, 36
Kan. 246, 13 Pac. 398, 59 Am. Rep.
541. See also Jackson Iron Co. v.

Negaunee Concentrating Co., 65 Fed.
298, 31 U. S. App. 1, 12 C. C. A. 636;
Hill v. Omaha, etc., R. Co., 82 Mo.
App. 188; Lockwood v. Smith, 81 N. Y.
Misc. 334, 143 N. Y. S. 480; Fish &
Hunter Co. v. New England Home-
stake Co., 27 S. D. 221, 130 N. W. 841.
But see *contra* Rothwell v. Skinker, 84
Mo. App. 169; Rounsevel v. Osgood,
68 N. H. 418, 44 Atl. 535; Houghton
v. Milburn, 54 Wis. 554, 12 N. E. 23,
11 N. E. 517. And where an insurance
company had reinsured its risks, a
policy holder was allowed to sue the
reinsuring company directly in Glen v.
Hope Mut. Life Ins. Co., 56 N. Y. 379;
Fischer v. Hope Mut. Life Ins. Co., 69
N. Y. 161; Johannes v. Phenix Ins.
Co., 66 Wis. 50, 27 N. W. 414, 57 Am.
Rep. 249.

²⁶ Kellas v. Slack & Slack Co., 129
Md. 535, 99 Atl. 677; Grassmann v.
Bonn, 30 N. J. Eq. 490; United States
Fidelity, etc., Co. v. Newark, 79 N. J.
Eq. 584, 81 Atl. 758, 37 L. R. A. (N. S.)
575; Standard Gas Power Corp. v.
New England Casualty Co., 90 N. J. L.
570, 101 Atl. 281.

§ 403 CONTRACTS FOR THE BENEFIT OF THIRD PERSONS

tion erecting the building, and the creditors are allowed to on the promise.²⁷

§ 403. Further illustrations.

A mere promise to indemnify against damages must also be distinguished. Here the promisor's liability does not arise until the promisee has suffered loss or expense. Until then the promisee has no right of action, and consequently one claiming damages can assert no derivative right against the promisor, much less a direct right.²⁸ Nor can the promisee sue for benefit of persons claiming damages.²⁹

A third person's benefit under a contract may be still more incidental; for instance, where the failure of a grantee of land to keep his promise to the grantor to pay a mortgage, results in a loss to the plaintiff of an interest in the land when the mortgagee foreclosed the mortgage. The New York court rightly refused relief.³⁰ So a contractor cannot enforce a contract made by a lumber dealer for his own benefit with the owner of a house, which provided that the contractor should be employed to make the repairs for which the lumber dealer advanced money.³¹ The contract was not made even partially for the plaintiff's benefit, and as the promisee was under obligation to the plaintiff it is not possible to work out an indirect right.³² A Louisiana case³³ suggests another distinction

²⁷ See *supra*, § 395, n. 4.

²⁸ *Wilson v. Shea*, 29 Cal. App. 788, 157 Pac. 543; *Hill v. Omaha, etc., R. R. Co.*, 82 Mo. App. 188; *French v. Vix*, 143 N. Y. 90, 37 N. E. 612; *Embler v. Hartford Ins. Co.*, 158 N. Y. 431, 58 N. E. 212; *Mansfield v. Mayor of New York*, 165 N. Y. 208, 58 N. E. 889. An insured person was denied a right of action against a company reinsuring the insurer in *Vial v. Norwich Union F. Ins. Co.*, 257 Ill. 355, 100 N. E. 929, 44 L. R. A. (N. S.) 317, Ann. Cas. 1914 A. 1141. Cf. the cases cited therein where the reinsurer undertook to pay directly to the insured, instead of to the insurer, and where the

latter was allowed a direct action against the reinsurer.

²⁹ *New Haven v. New Haven & R. Co.*, 62 Conn. 252, 25 Atl. 18 L. R. A. 256.

³⁰ *Durnherr v. Rau*, 135 N. Y. 232, 32 N. E. 49. See also *Pearson Bailey*, 180 Mass. 229, 62 N. E. R. 265.

³¹ *Hollister v. Sweet*, 32 S. Dak. 142 N. W. 255.

³² See also *Constable v. National Steamship Co.*, 154 U. S. 51, 14 S. 1062, 38 L. Ed. 903; *Hennessy Bond*, 77 Fed. Rep. 403, 405, 48 U. App. 89, 23 C. C. A. 203.

³³ *New Orleans St. Joseph's Assn. v. Magnier*, 16 La. Ann. 338.

A number of hatters agreed to close their shops on Sundays, and for any breach it was agreed that the offender should pay \$100 to a specified charitable society. It was held that the society could not recover. The main object of the contract undoubtedly was not to benefit the plaintiff, but to enforce performance of a promise entered into by the parties solely for their own benefit by the imposition of a penalty, but on a certain contingency the promise to pay \$100 was performable. If this contingency happened, there was a clear intent that the plaintiff should have the sole benefit. There seems no difficulty in having in the same contract separate promises for the benefit of different persons. The plaintiff might well have been allowed to recover as sole beneficiary of the promise sued upon.³⁴ But nowhere would the mere fact that one not a party to a contract would be benefited by its performance give him a right.³⁵

³⁴ See *Sloss-Sheffield S. & I. Co. v. Gas Power Corp. v. New England Taylor* (Ala. App.), 77 So. 79. *Casualty Co.*, 90 N. J. L. 570, 101

³⁵ *Kenfield Publishing Co. v. Baumgartner*, 189 Ill. App. 413; *Standard* Atl. 28; *Hollister v. Sweet*, 32 S. Dak. 141, 142 N. W. 255.

CHAPTER XIV

ASSIGNMENT OF CONTRACTS

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§ 404. Meaning of assignment.

Much of the difficulty regarding assignment of contracts is due to different meanings which may be attached to the word assignment. A promissory note is assignable; so too is a horse. An assignment by a thief or finder of negotiable paper payable to bearer transfers a complete title to a purchaser for value in good faith. This is not true of the assignment of a horse. By the assignment of a horse, however, title to which was procured by fraud, a good title passes to such a purchaser. Even this is generally held not true of the assignment of a chose in action. If it is said then that a chose in action is assignable, probably what is generally understood is that the assignee acquires rights similar to those of the assignor, and is put in the same position as that in which the assignor stood. A trustee in bankruptcy is an assignee of whom this is true, but an ordinary assignee of a contract right is not even so completely protected as this. The rights of a trustee in bankruptcy are not subject to subsequent contingencies whereas the rights of an ordinary assignee of a chose in action are so subject. Thus, defences against the assignor, though arising subsequent to the assignment, if acquired before notice of it to the debtor are available. The assignment for value of an intangible contract right may be most accurately looked upon as creating an irrevocable legal power of attorney to enforce the assignor's right with authority to keep the proceeds when reduced to possession, coupled with an equitable ownership of the right prior to its collection.¹ It is impossible, however, to avoid use of the word assignment, and all that can be done to secure clearness of thought is to point out the meaning of the word in connection with choses in action and the possibility of confusion owing to the use of the same word in other connections, where it has a wider meaning.

¹ For definition of what is meant by this see *infra*, § 446a.

§ 405. Choses in action were not assignable in the early common law.

It is a familiar statement in the law books that choses in action are not assignable. This was carried so far in the early law that an assignee of a right in contract acquired absolutely no right as such.² Coke states as the reason of this principle that the "wisdom and policy of the sages and founders of our law" discouraged maintenance.³ But had this been the basis of the rule the courts would not have permitted suit by an attorney with power to retain the proceeds of the suit. The true reason for the non-assignability of choses in action in the English Law as well as in the Roman Law seems to have been that the relation between the original obligor and obligee was regarded as a vital part of the obligation which could no more be changed than any other term of the obligation.⁴

At any rate, in so far as maintenance ever was an objection to the assignment of choses in action, it has ceased to be so.⁵

² *Mowse v. Edney*, Rolle's Abr. 20, plac. 12; *Penson & Higbed's Case*, 4 Leon. 99.

³ *Lampet's Case*, 10 Coke, 46a, 48a. Blackstone gives substantially the same reason, 2 Bl. Com. 290.

⁴ *Ames' Lectures on Legal History*, 258. Professor Ames thus shows the inadequacy of the explanation of maintenance: "The wrong of maintenance lay in executing and exercising the power of attorney. The distinction was established at an early period, that the grant of a power of attorney to a creditor was not maintenance, while a similar grant to a purchaser or donee was maintenance. 34 Hen. VI, 30-15; 37 Hen. VI, 13-3; 15 Hen. VII, 2-3; *South v. Marsh* (1590), 3 Leon. 234; *Harvey v. Beekman* (1600), Noy, 52. As late as 1667-1672 the same distinction prevailed also in equity. 'The Lord Keeper Bridgman will not protect the assignment of any chose in action unless in satisfaction of some debt due to the assignee; but not when the debt or chose in action is assigned to one to

whom the assignor owes nothing precedent, so that the assignment is voluntary or for money then given.' *Freem. C. C.* 145. See *Chadwick v. Sprite*, Cro. El. 821. In *Penson v. Hickbed*, Cro. El. 170 (32 El.) an objection was made by counsel that 'this buying of bills of debt is maintenance.' But the court held otherwise, 'for it is usual amongst merchants to make exchange of money for bills of debt, *et c contra*. And Gawdy, J., said it is not maintenance to assign a debt with a letter of attorney to sue for it, except it be assigned to be recovered, and the party to have part of it.' See *S. C.* 4 Leon. 99. In *Barrow v. Gray*, Cro. El. 551 (39 El.) the Court held that 'the assignment of a debt or reconuissance to a stranger is an illegal and void consideration; but to assign it to the terre-tenant, by way of discharge of his land, is clearly lawful.' See *Michael v. Carden*, 1 Vin. Ab. 296, pl. 12; *Loder v. Chesleyn*, 1 Sid. 212, 1 Keb. 744."

⁵ *Clark v. Grosh*, 81 N. Y. Misc. 407, 142 N. Y. S. 966.

§ 406. Exceptions to the non-assignability of choses in action.

The law recognized from early times certain exceptions to the non-assignability of choses in action in the following cases:

1. The crown could make an assignment of a claim due to it, and an assignment to the crown was equally effective.⁶ This doctrine has been held applicable to assignments to the United States Government.⁷

2. Executors and administrators and in some cases heirs were permitted from very early period to enforce contractual rights due to the deceased persons whom they represented,⁸ and became subject to the liabilities of such persons to the extent of the assets received.

3. Assignees in bankruptcy were the creation of statute; and bankruptcy statutes have vested in such officers the contractual choses in action of the bankrupts whom they represent. These statutes make the assignee or trustee in bankruptcy the real owner of the chose of action, so that after the day fixed by statute for the transfer of the debtor's estate, a payment to him by one who owed him money would not discharge the debt even though the payment was made in good faith in ignorance of the bankruptcy.⁹ Liabilities due from the bankrupt become provable claims against his estate.¹⁰

4. By virtue of the Law Merchant, bills of exchange and (subsequently) promissory notes are negotiable prior to matu-

⁶ Com. Dig. Assignment, D; Allen's Case, Owen, 113; Lambert v. Taylor, 4 B. & C. 138.

⁷ United States v. Buford, 3 Pet. 12, 7 L. Ed. 266; United States v. White, 2 Hill, 59, 37 Am. Dec. 374.

⁸ Y. B. 20 & 21 Edw. I, 304, 374; Wheatley v. Lane, 1 Wms. Saund. 216a.

⁹ Howard v. Crompton, 14 Blatch. 328; Butler v. Mullen, 100 Mass. 453; Stevens v. Mechanics' Bank, 101 Mass. 109, 3 Am. Rep. 325; Bruce v. Anderson, 176 Mass. 161, 57 N. E. 354; Duffield v. Horton, 73 N. Y. 218. See also more generally on the title transferred by bankruptcy, Willis v. Freeman, 12 East, 656; Cole v.

Coles, 6 Hare, 517; *Re Calcott*, [1898] 2 Ch. 460; Conner v. Long, 104 U. S. 228, 232, 26 L. Ed. 723; Everett v. Judson, 228 U. S. 474, 33 S. Ct. 568, 57 L. Ed. 927; Bailey v. Baker Ice Mach. Co., 239 U. S. 268, 276, 36 S. Ct. 50, 60 L. Ed. 275; *Re Gregg*, 1 Hask. 173; *Re Lake*, 3 Biss. 204; *Sicard v. Buffalo, etc., Ry. Co.*, 15 Blatch. 525; *Rand v. Iowa Central Ry.*, 186 N. Y. 58, 78 N. E. 574, 116 Am. St. Rep. 530. In England an assignee in bankruptcy must give notice to the debtor of the assignment to him of the bankrupt's choses in action in order to protect his title against competing rights. See *infra*, § 435.

¹⁰ See *infra*, § 1983 *et seq.*

riety, and after maturity though they lose the attribute of negotiability they are still fully assignable.¹¹

5. Certain covenants in conveyances, including leases, are said to run with the land; that is,—ownership of the land may involve a right to enforce a covenant or an obligation to perform it.

“The test whether a covenant runs with the land or is merely personal is whether the covenant concerns the thing granted and the occupation or enjoyment of it, or is a collateral and personal covenant not immediately concerning the thing granted. If a covenant concerns the land and the enjoyment of it, its benefit or obligation passes with the ownership, but to have that effect the covenant must respect the thing granted or demised, and the act to be done or permitted must concern the land or estate conveyed.”¹²

The law upon this subject has grown up rather in connection with the law of real property and since it is ordinarily considered in that connection will not here be discussed, though analytically the subject belongs with contracts. It is then the assignment of contractual rights and duties not falling within these exceptional cases which will be considered in this chapter.

§ 407. Distinction between assignment of rights and assignment of duties.

A clear conception of the law governing assignment of contracts can only be obtained by sharply distinguishing between attempted assignments of rights and of liabilities. Where assignment of choses in action is spoken of, assignment of rights is properly to be understood; but as every bilateral contract involves not only rights but duties on each side, any attempted assignment of such a contract while both sides are still executory, requires consideration of its effect on both rights and duties. The discussion of the subject has been much confused and is made intrinsically more difficult by the fact that the common words, contract, debt, obligation, are used

¹¹ See *infra*, § 1135 *et seq.*

¹² *Purvis v. Shuman*, 273 Ill. 286, 112 N. E. 679, 682. See also *Wright v. Pfimmer*, 99 Neb. 447, 156 N. W. 1060,

L. R. A. 1917 A. 323; *Korn v. Campbell*, 192 N. Y. 490, 85 N. E. 687, 37 L. R. A. (N. S.) 1 (note on p. 12), 127 Am. St. 925, and notes thereto.

to express both the right of the obligor and also the duty of the obligee. If specific attention is directed to whether it is a contractual right or a duty or both to which a proposed transfer relates, the gain to clearness of thought is considerable. The problem of assignment of contractual rights was earliest considered by the law, and is properly here first considered.

§ 408. Enforcement of rights by power of attorney.

The way in which the common law, at least partially overcame the non-assignability of choses in action was by means of powers of attorney. Though the assignee could acquire no rights of his own, as such, the possibility was early recognized of giving a power of attorney to an assignee enabling him to sue in the name of the assignor, and it could further be agreed that what the assignee thus collected as attorney, he could keep for himself.¹³ The right of the assignee was still further assured by a covenant on the part of the assignor not to revoke the assignment. The next step taken by the law was to recognize that any assignment, though not expressly stating that the assignee should have power to collect or bring suit as the assignor's attorney, necessarily implied authority to do so, and an agreement not to revoke the power,

§ 409. Inadequacy of a power of attorney to protect the assignee.

A mere authority created by a power of attorney is not in all respects, however, an adequate protection for the assignee of a claim. Several difficulties may be enumerated.

1. In spite of a covenant not to do so, the assignor might attempt to revoke the power of attorney expressly, or, revocation might be effected by implication of law, as by death.

2. If the assignee still remains the owner of the claim, his

¹³ Pollock and Maitland find that this practice was recognized by the middle of the 18th century. 2 Hist. Eng. Law, 226. See also 1 Lilly's Abr. 103; Lilly's Practical Register, 48. The assignee has often been called the agent of the assignor, but it has been pointed out that the assignee is acting

on his own behalf and not for another. The criticism seems just, but it is merely verbal. The owner of property, tangible or intangible, may give another the power or authority to reduce the property to possession and, by so doing and not before, to become the owner of it.

bankruptcy by virtue of the bankruptcy statute might be expected to give title to his assignee in bankruptcy to the exclusion of an assignee claiming under a prior assignment if it is interpreted as giving a mere power of attorney,¹⁴ and attachment by garnishment of the debt by a creditor of the assignor might be expected to prevail over a prior assignment.

3. The assignor might, by other assignments, appoint other persons with authority to collect the claim, and either they or the assignor himself might collect the claim in fraud of the original assignee. These difficulties were partly met by the jurisdiction which equity assumed over assignments at an early date.

§ 410. Equitable protection of assignments.

Presumably, because of the difficulties enumerated in the preceding section, Courts of Equity undertook as a branch of their jurisdiction to give, so far as possible, the effect to an assignment which the parties intended.¹⁵ As will be seen, equity did not go so far as to treat the assignee as a true successor, like an assignee in bankruptcy, but they found it possible in effect to enforce specifically a covenant on the part of the assignor not to revoke the power given to the assignee and indeed without the aid of a covenant against revocation or of any power of attorney other than that necessarily implied from the assignment itself, to hold that the assignee had an irrevocable right, commensurate with that which the parties contemplated, in any controversy between the parties themselves or with those in similar position. Accordingly, Courts of Equity held that an assignee for value¹⁶ would be protect-

¹⁴ This was stated to be the law in 1669 in *Backwell v. Litcott*, 2 Keb. 331.

¹⁵ Probably the jurisdiction of equity to protect assignments of future interests in property not recognized as estates by the Common Law, as shown by *Warmstrey v. Tanfield*, 1 Rep. in Ch. 16 (1629); *Goring v. Bickerstaff*, 1 Cas. in Ch. 4, 8 (1663); led to the protection of assignments of choses in action, as in *Corderoy's Case*, *Free-*

man, 312 (1675); *Anonymous*, *Freeman's Ch.* 145 (1676); *Fashion*, *Atwood*, 2 Cas. in Ch. 36 (1680).

¹⁶ In *Corderoy's Case*, *Freeman*, 3 *Finch*, L. K., held that though a chose there in question "is not assignable at law, yet it is in equity, when there is valuable consideration;" and in *Anonymous*, *Freeman*, Ch. 145, it is said that *Bridgman*, L. K., would not protect a voluntary assignment of any chose

against any person except one who had in good faith and for value reduced to possession the chose in action. Therefore, equity preferred the assignee of a chose in action over a creditor of the assignor who subsequently garnished the debtor as a means of collecting his claim against the assignor.¹⁷ Equity also held that the assignee would be protected in his right as against an assignee in a subsequent bankruptcy of the assignor;¹⁸ and at the end of the eighteenth century the same decision was made by a court of law,¹⁹ which held that it would take notice of the doctrines of equity in regard to assignments and apply them. At the present time so fully have courts of law adopted the principle that assignment of choses in action will be protected, that where an absolute and total assignment of a chose in action is made, application to a court of chancery is not often necessary; and where the assignee has an adequate remedy at law, equity will not take jurisdiction to enforce his rights.²⁰ The power given to an assignee to collect and keep the proceeds of the claim assigned, being wholly for the interest of the assignee may be delegated by him to another, and a sub-assignment is protected as fully as the original assignment.²¹

action. Though this requirement of value seems originally to have been aimed at maintenance, see *supra*, § 405, it persisted in courts of equity after they had ceased to be troubled by the thought of maintenance.

¹⁷ *Corderoy's Case*, Freeman, 312.

¹⁸ *Peters v. Soame*, 2 Vernon, 428; *Row v. Dawson*, 1 Ves. Sr. 331.

¹⁹ *Winch v. Keeley*, 1 T. R. 619.

²⁰ *Cator v. Burke*, 1 Brown's Ch. Cas. 434; *Hayward v. Andrews*, 106 U. S. 672, 27 L. Ed. 271, 1 S. Ct. 544, aff'g 12 Fed. 786; *New York Guaranty, etc., Co. v. Memphis Water Co.*, 107 U. S. 205, 27 L. Ed. 484, 2 S. Ct. 279; *Glenn v. Marbury*, 145 U. S. 499, 36 L. Ed. 790, 12 S. Ct. 914; *Adair v. Winchester*, 7 G. & J. 114; *Walter v. Brooks*, 125 Mass. 241;

Ontario Bank v. Mumford, 2 Barb. Ch. 596; *Smiley v. Bell*, Mart. & Yerg. 378, 17 Am. Dec. 813; *Moseley v. Boush*, 4 Rand. 392.

²¹ *Sutherland v. Reeve*, 151 Ill. 384, 38 N. E. 130; *Dawes v. Boylston*, 9 Mass. 337, 346, 6 Am. Dec. 72; *Dexter v. Meigs*, 47 N. J. Eq. 488, 21 Atl. 114; *Bank of Spring City v. Rhea County (Tenn. Ch.)*, 59 S. W. 442. The results reached in the civil law are substantially the same as in the English and American law (see the German Civ. Code, §§ 398-413, and the new Swiss Code of Obligations) though as the division of rights into legal and equitable is peculiar to the Common Law, the qualified ownership of the assignee is not stated in the same way.

§ 411. Assignment of duties.

The duties under a contract are not assignable *inter vivos* in a true sense under any circumstances; that is, one who owes money or is bound to any performance whatever, cannot by any act of his own, or by any act in agreement with any other person, except his creditor, divest himself of liability and substitute another's liability.²² This is sufficiently obvious when attention is called to it, for otherwise obligors would find an easy practical way of escaping their obligations, and yet an apparent neglect to recognize the principle causes considerable confusion when assignment of bilateral obligations is in question. It is true that on the death of an obligor, the duty binds his personal representatives to the extent of the assets in their hands;²³ but the representatives by a legal fiction continue the person of the deceased; and as their liability is limited to the assets of the deceased, the fiction is justifiable because all his assets pass into their hands. Only an incomplete analogy, then, can be drawn between the transfer of duties on death and *inter vivos*,²⁴ ²⁵ though the analogy is closer between the rights which pass on the death of an obligee, and those which he can transfer while alive.²⁶ One who is subject to a duty though he cannot escape his obligation may delegate performance of it provided the duty is of such character that performance by an agent will be substantially the same thing as performance by the obligor himself. The performance in

²² "No one can assign his liabilities under a contract without the consent of the party to whom he is liable." *Eastern Advertising Co. v. McGaw*, 89 Md. 72, 86, 42 Atl. 923. "You have the right to the benefit you contemplate from the character, credit, and substance of the person with whom you contract." *Humble v. Hunter*, 12 Q. B. 310, 317. See also *Oak Grove Const. Co. v. Jefferson County*, 219 Fed. 858, 135 C. C. A. 528; *Gross v. Thomson's Est.*, 286 Ill. 185, 121 N. E. 600; *Nelson v. Reidelbach*, (Ind. App.), 119 N. E. 804; *Hambleton v. Jameson*, 162 Ia. 186, 143 N. W. 1010; *Tarr v. Veasey*, 125 Md.

199, 93 Atl. 428; *Pioneer, etc., Co. v. Cowden*, 128 Minn. 307, 150 N. W. 903, and cases in the following section. Thus the original lessee in spite of assignment of his lease and acceptance by the landlord of rent from the assignee, remains liable on his covenant to pay rent. *Barnard v. Godscall*, Cro. Jac. 309; *Thursby v. Plant*, 1 Wms. Saund. 237, 240; *Taylor v. DeBus*, 31 Ohio St. 468.

²³ See *supra*, § 310.

²⁴ ²⁵ As was attempted in *Columbia Water Power Co. v. Columbia*, 5 S. Car. 225, 234.

²⁶ *King v. West Coast Grocery Co.*, 72 Wash. 132, 129 Pac. 1081.

such a case is indeed in legal contemplation rendered by the original obligor, who is still the party liable if the performance is in any respect incorrect. In considering whether the duty of an obligor can be performed by another, the same question arises when the obligor dies as when he attempts an assignment in his life time. Death discharges personal obligations because in their nature they are incapable of fulfillment by an executor.²⁷ So under an attempted assignment *inter vivos* delegation of the performance of such obligations is ineffectual. Any obligation either of a master or servant where the work involves a personal relation, is of this character.²⁸ And so it is where one contracts to give a home and support to a relative,²⁹ or where work of any kind for which a contractor is bound is of a sort requiring peculiar personal skill,³⁰ or where professional services are contracted for.³¹ Nor can one who has undertaken to carry on a farm for another on shares,³² or who has undertaken to select public land for purchase on shares,³³ or who has contracted to sell successive crops of hemp of his own raising,³⁴ or to plant and care for an orchard,³⁵ or who in

²⁷ See *infra*, § 1940.

²⁸ See cases of such contracts where one party or the other has died, *infra*, §§ 1940 *et seq.* See also cases in the following section.

²⁹ *Rollins v. Riley*, 44 N. H. 9; *Epperson v. Epperson*, 108 Va. 471, 62 S. E. 344. See also *People's Trust Co. v. Weidinger*, 73 N. J. L. 433, 64 Atl. 179; *In re Shearn's Est.*, 38 Utah, 492, 114 Pac. 131, 33 L. R. A. (N. S.) 347.

³⁰ Where a promisor engaged with one who bought his abstract business to turn over to him all future orders for abstracts and the buyer afterwards sold out the business to a corporation, the latter could not require that orders for abstracts received by the original owner of the business should be turned over to it. *Linn County Abstract Co. v. Beechley*, 124 Ia. 146, 99 N. W. 702. So where a contract for part of a building requires professional or artistic taste, the duty cannot be delegated.

Swarts v. Narragansett Elec., etc., Co., 26 R. I. 388, 436, 59 Atl. 77; *Johnson v. Vickers*, 139 Wis. 145, 120 N. W. 837, 131 Am. St. Rep. 1046, 21 L. R. A. (N. S.) 359.

³¹ *Taylor v. Black Diamond Min. Co.*, 86 Cal. 589, 25 Pac. 51; *Sloan v. Williams*, 138 Ill. 43, 27 N. E. 531; *Hilton v. Crooker*, 30 Neb. 707, 47 N. W. 3; *Deaton v. Lawson*, 40 Wash. 486, 82 Pac. 879, 2 L. R. A. (N. S.) 392, 111 Am. St. Rep. 922; *Poling v. Condon-Lake, etc., Co.*, 55 W. Va. 529, 47 S. E. 279.

³² *Fitch v. Brockmon*, 3 Cal. 348; *Randall v. Chubb*, 46 Mich. 311, 9 N. W. 429, 41 Am. Rep. 165; *Lewis v. Sheldon*, 103 Mich. 102, 61 N. W. 269.

³³ *Hudson v. Farris*, 30 Tex. 574.

³⁴ *Shultz v. Johnson*, 5 B. Mon. 497. Compare *La Rue v. Groesinger*, 84 Cal. 281, 24 Pac. 42.

³⁵ *Edison v. Babka*, 111 Mich. 235, 69 N. W. 499.

return for a promised commission has undertaken to assist the sale of land,³⁶ or who is a party to a contract which provides for the carrying on by the parties of their respective mercantile business in conjunction,³⁷ delegate the performance of [duty]. The duty to make a warranty deed,³⁸ or a promissory note,³⁹ cannot be performed by any one but the contractor nor the duties involved in a contract for the exclusive agent to sell certain goods,⁴⁰ or in a contract to place advertising and supervise the advertising matter "as to style and contents," or to do the printing for a county,⁴² or to manufacture a special class of goods of high quality—especially when the manufacturer's obligations limit his right to manufacture for other dealers,⁴³ or to act as a depository of funds of the other party and use them in certain ways,⁴⁴ or to perform other duties personal in their character.⁴⁵

If the reason why a right may not be assigned or due

³⁶ *McGuire v. Brown*, 114 Va. 235, 76 S. E. 295.

³⁷ *Moore v. Thompson*, 93 Mo. App. 336, 67 S. W. 680. See also: *Nassau Hotel Co. v. Barnett & Barse Corp.*, 162 N. Y. App. D. 381, 147 N. Y. S. 283.

³⁸ *Steiner v. Zwick*, 41 Minn. 448, 43 N. W. 376; *Smith v. Pitts*, 57 Tex. Civ. App. 97, 122 S. W. 46.

³⁹ *Rappleye v. Racine Seeder Co.*, 79 Ia. 220, 44 N. W. 363, 7 L. R. A. 139.

⁴⁰ *Bancroft v. Scribner*, 72 Fed. 988, 21 C. C. A. 352, 44 U. S. App. 480; *Central Brass & Stamping Co. v. Stuber*, 220 Fed. 909, 136 C. C. A. 475; *Rappleye v. Racine Seeder Co.*, 79 Ia. 220, 44 N. W. 363, 7 L. R. A. 139; *Detroit Postage Stamp Service Co. v. Schermack*, 179 Mich. 266, 146 N. W. 144, Ann. Cas. 1915 D. 287; *Standard Sewing Mach. Co. v. Smith*, 51 Mont. 245, 152 Pac. 38; *Lord v. Wapato Irrig. Co.*, 81 Wash. 501, 142 Pac. 1172.

⁴¹ *Eastern Advertising Company v. McGaw*, 89 Md. 72, 42 Atl. 923.

⁴² *Campbell v. Board of Commis-*

sioners, 64 Kans. 376, 67 Pac. 866. (*Browne v. Jno P. Sharkey Co.*, Ore. 480, 115 Pac. 156, where a contract to "print and furnish" advertising booklets was held assignable by the printer.

⁴³ *Dr. Jaeger's Co. v. Walker*, 1 L. T. (N. S.) 180; *Schlessinger Forest Products Co.*, 78 N. J. L. 63, 76 Atl. 1024, 30 L. R. A. (N. S.) 34, 138 Am. St. Rep. 627. See also *Walker Electric Co. v. New York Shipbuilding Co.*, 241 Fed. 569, 154 C. C. A. 34. But even in such a case the contractor is not necessarily bound to manufacture all parts of the goods. *Whitcomb v. Shultz*, 215 Fed. 75, 131 C. C. A. 383.

⁴⁴ *Marquette v. Wilkinson*, 119 Mich. 413, 78 N. W. 474, 43 L. R. A. 84. See also *New York Bank Note Co. v. Hamilton, etc., Printing Co.*, 180 N. Y. 280, 73 N. E. 48.

⁴⁵ Thus in *Arkansas Valley Smelting Co. v. Belden Mining Co.*, 127 U. S. 379, 8 S. Ct. 1309, 32 L. Ed. 246, the assignor had undertaken to receive and assay the ore which was subject to the contract.

delegated is not one of public policy, assent to the assignment by the other party to the contract is sufficient to make the assignment or delegation effectual.⁴⁶ Such assent is often called waiver, but it is rather the acceptance of an offer to form a novation, discharging the original contract and substituting a new one in its place.⁴⁷ A duty which is in its nature personal cannot be delegated by an assignment even to a corporation or partnership with changed membership which carries on a business substantially in the same way in which it was carried on previously.⁴⁸

§ 412. Assignment of bilateral contracts.

Every bilateral contract while still executory on both sides involves both rights and duties for each party. As has been seen in the preceding section, duties under a contract cannot in any true sense be assigned. It follows therefore that no bilateral contract still executory on both sides can be assigned in such a sense as to substitute fully the assignee in the place of the assignor. What can be done is: (1) A novation may be made eliminating one of the parties to the original contract and substituting another in his stead; but this requires the assent of all three parties to the transaction.⁴⁹ (2) Either party to the contract, without the assent of the other, may assign such rights as have accrued to him or are expected to accrue to him under the contract, unless they are personal or the assignment is forbidden by the contract or by public policy. An assignment of this sort is in effect an assignment of a unilateral right.⁵⁰ Thus assignment of money to become due

⁴⁶ *Cleveland, etc., R. Co. v. Wood*, 189 Ill. 352, 354, 59 N. E. 619; *Weather-shogg v. Commissioners*, 158 Ind. 14, 62 N. E. 477; *Moffitt v. Phenix Ins. Co.*, 11 Ind. App. 233, 38 N. E. 835; *Pulaski Stave Co. v. Miller's Creek Lumber Co.*, 138 Ky. 372, 128 S. W. 96; *Hoag v. Reichert*, 142 Ky. 298, 134 S. W. 191; *Detroit Postage Stamp Service Co. v. Schermack*, 179 Mich. 266, 146 N. W. 144; *Harlow v. Oregonian Pub. Co.*, 53 Ore. 272, 100 Pac. 7; *National Mutual Aid Soc. v. Lupold*, 101 Pa. 111.

⁴⁷ *Hoag v. Reichert*, 142 Ky. 298, 134 S. W. 191; *Detroit Postage Stamp Service Co. v. Schermack*, 179 Mich. 266, 146 N. W. 144.

⁴⁸ *Kemp v. Baerselman*, [1906] 2 K. B. 604; *Moore v. Thompson*, 93 Mo. App. 336, 67 S. W. 680; *New York Bank Note Co. v. Hamilton, etc., Printing Co.*, 180 N. Y. 280, 73 N. E. 48; and see *supra*, § 316.

⁴⁹ As to how far assent of all parties is necessary in novations, see *infra*, §§ 1870, 1871.

⁵⁰ See *infra*, § 413. "And assign-

under a building contract is frequently made.⁵¹ (3) Either party may make such an assignment of rights and also contract with the assignee that the latter shall perform the duties under the contract which bind the assignor, if they are of a kind which can be delegated. It is no doubt bargains of this last character which are commonly called assignments of bilateral contracts, and perhaps no better single word can be found though so far as it implies that the original obligor is freed from his liability, it is misleading. There is an assignment of rights, but a mere delegation of duties; and inquiry must be separately made as to whether the right may be assigned, and whether performance of the duties may be delegated. The assignor remains bound to perform the duties,⁵² and the

ment of money due or to become due under an executory contract is not an assignment of the contract, and the assignee is not bound to perform it." *Lunt v. Lorscheider*, 285 Ill. 589, 121 N. E. 237, 239.

⁵¹ *Butler v. San Francisco Gas & Elec. Co.*, 168 Cal. 32, 141 Pac. 818; *Daugherty v. Gouff*, 23 Neb. 105, 36 N. W. 351; *Stott v. Franey*, 20 Ore. 410, 26 Pac. 271; *Philadelphia v. Lockhardt*, 73 Pa. 211; *Smith v. Hubbard*, 85 Tenn. 306, 2 S. W. 569; *Jaeger v. Bossieux*, 15 Gratt. 83, 76 Am. Dec. 189; *Rockwell v. Daniels*, 4 Wis. 432. So in a contract for the publication of an advertisement. *American Lithographic Co. v. Ziegler*, 216 Mass. 287, 103 N. E. 909. See also *Leonard v. Farrington*, 124 Minn. 160, 144 N. W. 763.

⁵² The assignor's "attitude is that of a contracting party who called on and enlisted the services of others, viz. his assignees to aid him in performing the contract." *Pulaski Stave Co. v. Miller's Creek Lumber Co.*, 138 Ky. 372, 128 S. W. 96. In *Rochester Lantern Company v. Stiles & Parker Press Company*, 135 N. Y. 209, 31 N. E. 1018, one Kelly had entered into a contract with the defendant by which the latter agreed

to make and deliver to the former, for a specified price, certain dies to be used in the manufacture of lanterns. Kelly subsequently assigned the contract to the plaintiff corporation, which brought action to recover damages for the failure of the defendants to furnish the dies. Earle, C. J., in delivering the opinion of the court said (at page 216): "After the assignment Kelly had no interest in the contract, and the defendant owed him no duty and could come under no obligation to him for damages on account of a breach of the contract by it. There is no doubt that Kelly could assign this contract as he could have assigned any other chose in action, and by the assignment the assignee became entitled to all the benefits of the contract. *Devlin v. Mayor*, 63 N. Y. 8, 17. The contract was not purely personal in the sense that Kelly was bound to perform in person, as his only obligation was to pay for the dies when delivered, and that obligation could be discharged by any one. He could not, however, by the assignment absolve himself from all obligations under the contract. The obligations of the contract still rested upon him, and resort could still be made to him for the payment of the dies in

assignee is under no liability to the other party to the contract.⁵³ If performance is not only delegated to the assignee, but a promise exacted from him that he will perform the delegated duties, the right of the other party to the contract to take advantage of this promise involves substantially the same question as any case where an obligation of a promisee to a third person is assumed by a promisor.⁵⁴ But even in jurisdictions where it has not as yet been broadly held that such an assumption of an obligation gives a creditor a direct right against the assuming party, it seems probable that in equity the obligation undertaken by the assignee of the contract may be enforced by the non-assigning party to the original contract.⁵⁵ If the assignee does not expressly assume the obligations of the assignor it becomes a question of construction whether he impliedly promises to perform the delegated duties. It is doubtless possible for a party to a bilateral contract to assign only the rights that will accrue to him under the contract without delegating the duties. If he clearly

case the assignee did not pay for them when tendered to it. After the assignment of the contract to the plaintiff the defendant's obligation to perform still remained, and that obligation was due to the plaintiff." So in *Clement v. Philadelphia*, 137 Pa. 328, 334, 20 Atl. 1000, 21 Am. St. Rep. 876, the court said that in spite of an assignment by the contractor C, "the city could require C to complete the work according to his contract." See also as illustrating the continuing liability of the assignor, *Oak Grove Const. Co. v. Jefferson County*, 219 Fed. 858, 135 C. C. A. 528; *Anderson v. DeUrioste*, 96 Cal. 404, 31 Pac. 266; *Crane v. Kildorf*, 91 Ill. 567; *Brassel v. Troxel*, 68 Ill. App. 131; *Hofman v. Chicago League Ball Club*, 195 Ill. App. 249; *Martin v. Orndorff*, 22 Ia. 504; *Pike v. Waltham*, 168 Mass. 581, 47 N. E. 437; *Pioneer Loan & Land Co. v. Cowden*, 128 Minn. 307, 150 N. W. 903; *Currier v. Taylor*, 19 N. H. 189; *Liberty Wall Paper Co. v. Stoner Wall*

Paper Mfg. Co., 59 N. Y. App. D. 353, 69 N. Y. S. 355, aff'd 170 N. Y. 582, 63 N. E. 1119; *Breakstone v. Buffalo Foundry Co.*, 167 N. Y. App. D. 62, 152 N. Y. S. 394, and see cases in the preceding section.

⁵³ *Gross v. Thomson's Est.*, 286 Ill. 185, 121 N. E. 600; *A. S. Cameron Steam Pump Works v. Lubbock, etc., Co.* (Tex. Civ. App.), 167 S. W. 256.

⁵⁴ See *supra*, §§ 361, 381.

⁵⁵ This has been so held in England: *Mangles v. Dixon*, 3 H. L. C. 702. In the United States, also, the law allows recovery. *Smith v. Rogers*, 14 Ind. 224; *Smith v. Flack*, 95 Ind. 116; *Wiggins Ferry Co. v. Chicago & A. R. Co.*, 73 Mo. 389, 39 Am. Rep. 519; *Bach v. Boston, etc., Mining Co.*, 16 Mont. 467, 41 Pac. 75; *Union Pac. R. Co. v. Douglas County Bank*, 42 Neb. 469, 60 N. W. 886; *Atlantic, etc., R. Co. v. Atlantic, etc., Co.*, 147 N. C. 368, 61 S. E. 185, 23 L. R. A. (N. S.) 223, 125 Am. St. Rep. 550.

delegates the duties as well as assigns the rights it seems a reasonable construction of the bargain that the assignee impliedly undertakes the performance of the duties.^{56, 57}

§ 413. What contractual rights may be assigned.

Not all rights under contracts may be assigned. The difficulty standing in the way may be either: (1) that the nature of the right is defined or limited by the personality of the original promisee or, (2), that public policy forbids assignment of the right. The first difficulty is illustrated by rights to have services rendered to the promisee which would vary in character if performance were rendered to any one else. A promise to serve B as a valet can only be performed to B. If B were allowed to assign his right to C, and C, whether called the agent of B or not, were permitted to demand that A should serve him, a new obligation would be created differing in substance from that which the obligor undertook. And the same is true of every contract of service involving a personal relation.⁵⁸ So the promisee under a contract to support him for life, cannot effectively assign his right.⁵⁹ Nor can one who has a right to free tuition at a school or college.⁶⁰ A contract by a painter to paint a portrait of A cannot be assigned by A to B so as to change the obligation to one binding the painter to paint B; though it would be possible for A to assign to B the right to have the picture of A when painted by the artist. The question of assigning rights of a personal character *inter vivos* is entirely similar to the question presented when the

^{56, 57} See cases cited in the preceding note, also *Columbia Water Power Co. v. Columbia*, 5 S. C. 225, 234. In *Bimrose v. Matthews*, 78 Wash. 32, 138 Pac. 319, an assignee of the vendor was held not to assume the vendor's obligations to convey a perfect title, etc., though the contract of sale provided that it should bind the assigns of the parties and the assignment set over all of the vendor's "right, title, and interest in and to" the contract.

⁵⁸ *Bothick's Adm. v. Purdy*, 3 Mo.

82 (reprint, p. 60), *American Smelting, etc., Co. v. Bunker Hill, etc., Co.*, 248 Fed. 172, 184; *Board of Education v. State Board*, 81 N. J. L. 211, 81 Atl. 163; *Glazer v. Borough of Flemington*, 85 N. J. L. 384, 91 Atl. 1068. See also *infra*, § 421.

⁵⁹ *Merchants' Nat. Bank v. Crist*, 140 Ia. 308, 316, 118 N. W. 394, 23 L. R. A. (N. S.) 526, 132 Am. St. Rep. 267.

⁶⁰ *Butts v. McMurry*, 74 Mo. App. 526.

assignment is due to operation of law on the death of the obligor.⁶¹ By the terms of a contract also the duration of a right may be limited to the period of its exercise by the original promisee.⁶² But to preclude the assignment of contractual rights not so limited, it must appear that a personal relation is involved in the nature of the rights themselves.⁶³ The commonest type of right subject to assignment is one for the payment of money;⁶⁴ and such an assignment is permissible not only as against a principal debtor, but as against a guarantor.⁶⁵ A right to buy goods,⁶⁶ or land,⁶⁷ or the privilege

⁶¹ *King v. West Coast Grocery Co.*, 72 Wash. 132, 129 Pac. 1081. See *infra*, §§ 1940 *et seq.*

⁶² Thus the contract of a railroad to deliver coal on a switch as long as the purchaser continued in business is not assignable by him. *Frankfort, etc., Ry. Co. v. Jackson*, 153 Ky. 534, 156 S. W. 103.

⁶³ *Horst v. Roehm*, 84 Fed. 565; *Roehm v. Horst*, 91 Fed. 345, 33 C. C. A. 550, 178 U. S. 1, 44 L. Ed. 953, 20 S. Ct. 780.

⁶⁴ *Campbell v. Equitable Life Ass. Soc.*, 130 Fed. 786; *Busch v. Stromberg-Carlson Tel. Mfg. Co.*, 217 Fed. 328, 133 C. C. A. 244; *Culver v. Newhart*, 18 Cal. App. 615, 123 Pac. 975; *Chicago, etc., R. Co. v. Provolt*, 42 Col. 103, 93 Pac. 1126; *Western Union Telegraph Co. v. Ryan*, 126 Ga. 191, 55 S. E. 21; *Timmons v. Citizens' Bank*, 11 Ga. App. 69, 74 S. E. 798; *Cleary v. Fawcett*, 19 Ga. App. 184, 91 S. E. 227; *Wabash R. Co. v. Smith*, 134 Ill. App. 574; *William Gilligan Co. v. Casey*, 205 Mass. 26, 91 N. E. 124; *Rodgers v. Torrent*, 111 Mich. 680, 70 N. W. 335; *Ebel v. Piehl*, 134 Mich. 64, 95 N. W. 1004; *Quigley v. Welter*, 95

Minn. 383, 104 N. W. 236; *Alden v. George W. Frank Imp. Co.*, 57 Neb. 67, 77 N. W. 369; *Provencher v. Brooks*, 64 N. H. 479, 13 Atl. 641; *Hofferberth v. Duckett*, 175 N. Y. App. D. 480, 162 N. Y. S. 167; *Anniston Nat. Bank v. Durham School Comm.*, 121 N. C. 107, 28 S. E. 134; *Browne v. Jno. P. Sharkey Co.*, 58 Ore. 480, 115 Pac. 156; *Galey v. Mellon*, 172 Pa. 443, 33 Atl. 560; *Robinson v. McKenna*, 21 R. I. 117, 42 Atl. 510, 79 Am. St. Rep. 793; *Parsons v. Baltimore Building Assoc.*, 44 W. Va. 335, 29 S. E. 999, 67 Am. St. Rep. 769. Many other cases might be cited.

⁶⁵ *Reios v. Mardis*, 18 Cal. App. 276, 122 Pac. 1091; *Rogers v. Harvey*, 143 Ky. 88, 136 S. W. 128.

⁶⁶ *Tolhurst v. Associated Mfrs.*, [1903] A. C. 414; *In re Niagara Radiator Co.*, 164 Fed. 102; *Martin-Alexander Lumber Co. v. Johnson*, 70 Ark. 215, 66 S. W. 924; *Roberts Cotton Oil Co. v. Morse*, 97 Ark. 513, 135 S. W. 334; *Pulaski Stave Co. v. Miller's Creek Lumber Co.*, 138 Ky. 372, 128 S. W. 96; *Northwestern Lumber Co. v. Byers*, 133 Mich. 534, 95 N. W. 529;

⁶⁷ *Torkington v. Magee*, [1902] 2 K. B. 427; *Latimer v. Capay Valley Land Co.*, 137 Cal. 286, 70 Pac. 82; *Moore v. Gariglietti*, 228 Ill. 143, 81 N. E. 826; *Anse La Butte, etc., Co. v. Babb*, 122 La. 415, 47 So. 754; *Anders-*

son v. American Suburban Corporation, 155 N. C. 131, 71 S. E. 221, 36 L. R. A. (N. S.) 896; *Strasser v. Steck*, 216 Pa. 577, 66 Atl. 87; *Royce v. Carpenter*, 80 Vt. 37, 66 Atl. 888; and see case cited *infra*, § 415.

of drawing water from a spring,⁶⁸ may likewise be assigned. So a right to the performance of any work not of a personal character,⁶⁹ or a contract to refrain from competition, expressed or implied on the sale of a business or good will⁷⁰ may be enforced by an assignee,⁷¹ as may the right of a land company to have a street railway company operate its line to a tract of land in question.⁷² A right to damages for breach of contract is also assignable,⁷³ and a contract right which was too personal for assignment may on its breach give rise to an assignable action for damages.⁷³

Sears v. Conover, 34 Barb. 330, 3 Keyes, 113; *Rochester Lantern Co. v. Stiles, etc.*, Press Co., 135 N. Y. 209, 31 N. E. 1018; *Liberty Wall Paper Co. v. Stoner Wall Paper Mfg. Co.*, 59 N. Y. App. Div. 353, 69 N. Y. Supp. 355, aff'd, 170 N. Y. 582, 63 N. E. 1119; *Smith v. Craig*, 211 N. Y. 456, 105 N. E. 798; *Schaffer v. Vandewater*, 160 N. Y. App. D. 803, 145 N. Y. S. 769; *Atlantic, etc., R. Co. v. Atlantic Co.*, 147 N. C. 368, 61 S. E. 185, 23 L. R. A. (N. S.) 223; *Poling v. Condon-Lane, etc., Co.*, 55 W. Va. 529, 47 S. E. 279. The right to have trading stamps redeemed in goods according to the promise on the stamp may thus be assigned; *Sperry & Hutchinson Co. v. Weber*, 161 Fed. 219, 22 Harv. L. Rev. 50 (see also *Pond Creek Coal Co. v. Lester*, 171 Ky. 811, 188 S. W. 907), even though the assignor was given by the terms of the original contract a right to select the goods. *Groot v. Story*, 41 Vt. 533.

⁶⁸ *Houston, etc., R. Co. v. Cluck*, 31 Tex. Civ. App. 211, 72 S. W. 83.

⁶⁹ *British Waggon Co. v. Lea*, 5 Q. B. D. 149; *American Smelting, etc., Co. v. Bunker Hill, etc., Co.*, 248 Fed. 172; *Haskell v. Blair*, 3 Cush. 534; *Voigt v. Murphy Heating Co.*, 164 Mich. 539, 129 N. W. 701; *Rochester Lantern Co. v. Stiles, etc.*, Press Co., 135 N. Y. 209, 31 N. E. 1018; *Hand v. Brooks*, 21 N. Y. App. Div. 489, 47

N. Y. S. 583; *Merritt v. Booklovers' Library*, 89 N. Y. App. Div. 454, 85 N. Y. S. 797; *Hudson River Water Power Co. v. Glens Falls, etc., Co.*, 107 N. Y. App. Div. 548, 95 N. Y. S. 421, 109 N. Y. App. Div. 919, 95 N. Y. S. 1137.

⁷⁰ See *infra*, § 1640.

⁷¹ *Johnston v. Blanchard*, 16 Cal. App. 321; and see cases in the following note.

⁷² *Lakeview Land Co. v. San Antonio Traction Co.*, 95 Tex. 252, 66 S. W. 766.

⁷³ *Devine v. Warner*, 76 Conn. 229, 56 Atl. 562; *Hyland v. Crofut*, 87 Conn. 49, 86 Atl. 753; *Lynah v. Citizens' & Southern Bank*, 136 Ga. 344, 71 S. E. 469; *Enterprise Mfg. Co. v. Taulbee*, 152 Ky. 783, 154 S. W. 27; *Simons v. Diamond Match Co.*, 159 Mich. 241, 123 N. W. 1132; *Semper v. Coates*, 93 Minn. 76, 100 N. W. 662; *Howe v. Smeeth Copper Co. (N. J. L.)*, 48 Atl. 24; *Epstein v. United States Fidelity, etc., Co.*, 29 N. Y. Misc. 295, 60 N. Y. S. 527; *Johnson v. Shuey*, 40 Wash. 22, 82 Pac. 123; *McConaughy v. Bennett's Ex'rs*, 50 W. Va. 172, 40 S. E. 540.

⁷³ Thus damages for breach of a contract to support were held assignable in *Bryne v. Dorey*, 221 Mass. 399. See also *Merchants' Nat. Bank v. Crist*, 140 Ia. 308, 118 N. W. 394, 23 L. R. A. (N. S.) 526, 132 Am. St. Rep. 267; *Baseball Players' Fraternity v.*

Where it is possible courts are disposed to hold that a valuable contract right is not only assignable, but is not confined in its scope to the person of the assignee. A contract by one who has sold a business that he will not compete with the purchaser if strictly construed would not even though assignable, forbid competition with an assignee of the purchaser, but it is rather construed unless a contrary intention is expressed, as a promise not to compete with the business in question, whether conducted by the promisee or by one who succeeds to his ownership. Accordingly the promisor is liable to an assignee for competing with him.⁷⁴ A right which may be assigned by the original obligee may be again assigned by the assignee.⁷⁵ One of several joint obligees may assign his interest in a chose in action though the assignee can enforce his right only by joining the other joint obligees either in a bill in equity or under code procedure;⁷⁶ and one joint obligee may assign his interest to his co-obligees,⁷⁷ though even here the obligation cannot without statute be enforced by the latter at law.⁷⁸ An assignment of money need not specify the amount assigned, if it indicates a method of determining it. Thus, the assignor may assign "such amounts as may be due him" from a specified debtor.⁷⁹

Boston &c. Club, 166 N. Y. App. D. 484, 151 N. Y. S. 557.

⁷⁴ Knowles v. Jones, 182 Ala. 187, 62 So. 514; California Steam Navigation Co. v. Wright, 6 Cal. 258, 65 Am. Dec. 511; Graca v. Rodrigues (Calif.), 165 Pac. 1012; Johnston v. Blanchard, 16 Cal. App. 321; Hedge-Elliott Co. v. Lowe, 47 Ia. 137; Swanson v. Kirby, 98 Ga. 586, 26 S. E. 71; Bauwens v. Goethals, 187 Ill. App. 563; Bennett v. Carmichael Produce Co. (Ind. App.), 115 N. E. 793; Up River Ice Co. v. Denler, 114 Mich. 296, 72 N. W. 157, 68 Am. St. Rep. 480; Haugen v. Sundseth, 106 Minn. 129, 118 N. W. 666; Hickey v. Brinkley, 88 Neb. 356, 129 N. W. 553; Webster v. Buss, 61 N. H. 40, 60 Am. Rep. 317; Fleckenstein Bros. Co. v. Fleckenstein, 66 N. J. Eq. 252, 53 Atl. 1043; 57 Atl. 1025; Trowbridge v. Denning, 80 N.

J. L. 236, 77 Atl. 1068; Francisco v. Smith, 143 N. Y. 488, 38 N. E. 980; Anders v. Gardner, 151 N. C. 604, 66 S. E. 665; Gompers v. Rochester, 56 Pa. 194; Public Opinion &c. Co. v. Ransom, 34 S. Dak. 381, 148 N. W. 838, Ann. Cas. 1917 A. 1010. But see *contra* Hillman v. Shannahan, 4 Oreg. 163, 18 Am. Rep. 281.

⁷⁵ Dawes v. Boylston, 9 Mass. 337, 346, 6 Am. Dec. 72; Bank of Spring City v. Rhea County (Tenn. Ch.), 59 S. W. 442, and see *supra*, § 410 *ad fin.*

⁷⁶ Groves v. Ruby, 24 Ind. 418; State v. Styner, 154 Ind. 131, 135, 56 N. E. 98; McPike v. McPherson, 41 Mo. 521. See also Chapman v. Plummer, 36 Wis. 262.

⁷⁷ Smith v. Gregory, 75 Mo. 121.

⁷⁸ Haworth v. Fisher, 3 Blackf. 249.

⁷⁹ People v. Westchester County, 57 N. Y. App. D. 135, 67 N. Y. S. 981.

§ 414. Assignment of future rights.

In many of the cases involving assignments of money yet due, the analogy is suggested of contracts to sell *ch* property which the grantor has not yet acquired.⁷⁹ The analogy between choses in action and chattels is, however, not so perfect as seems to be assumed by the decisions. Legal title to existing chattels can be presently transferred, the legal title to chattels subsequently to be acquired can be transferred without further action of the parties. This is what gives the court of equity its opportunity. Apart from statute, however, a complete legal title even in existing *ch* in action cannot be transferred.⁸⁰ The practical effect of assignment of such property is produced whether the *par* so state or not, by the legal authority or power of attorney which the owner of the claim gives to the assignee to collect it and keep the proceeds, and what may be called an equitable ownership as hereafter defined. The same kind of effect can easily be given if desirable to an assignment of a future claim. It is possible to assign a claim the performance of which is yet due, and apart from considerations of public policy there seems no limit to this principle. An agent may be appointed to collect all money which shall be due in the future, not only under existing contracts but under future contracts, as regards as to collect what is due at the present time. There is no doubt that agents may be and frequently are appointed with power to deal in matters of interest to the principal's business which have not yet arisen. There seems also no technical difficulty

⁷⁹ As to such contracts, see 19 Harv. L. Rev. 557; and see the following cases where the same doctrine was applied to choses in action. *Tailby v. Official Receiver*, 13 A. C. 523; *Burdon, etc., v. Sugar Ref'g Co. v. Ferris Sugar Mfg. Co.*, 78 Fed. 417, *s. c. sub nom. Burdon, etc., v. Sugar Ref'g Co. v. Payne*, 81 Fed. 663, 26 C. C. A. 552, 167 U. S. 127, 17 S. Ct. 754, 42 L. Ed. 105; *Pullan v. Cincinnati, etc., R. Co.*, 5 Biss. (U. S. C. C.) 237. *Re Marine Construction & Drydock Co.*, 14 Am. Bankr. Rep. 466; *Jessup v. Bridge*, 11

Ia. 572, 79 Am. Dec. 513; *Sanderson Mfg. Co. v. Robinson*, 83 Ia. 567, 10 N. W. 1031; *Riddle v. Dow*, 98 Ia. 66, 66 N. W. 1066, 32 L. R. A. 811; *Wards v. Peterson*, 80 Me. 367, 14 Me. 936, 6 Am. St. Rep. 207; *Schubert v. Herzberg*, 65 Mo. App. 578; *Willison v. New Jersey Southern, etc.*, 26 N. J. Eq. 398; *Clay v. East Tennessee R. Co.*, 6 Heisk. 421. See also *L. R. A. 338, n. Taylor v. Barnard Child Co.*, 228 Mass. 126, 117 N. E. 43.

⁸⁰ See *supra*, § 447.

in a covenant on the part of the principal in such a case not to revoke the power given to the agent and to allow the latter to keep for his own benefit what may be collected under the power. The only question is how far courts will give the protection to such powers and covenants which has been given to assignments of existing choses in action. It is obviously opposed to public policy to permit a man by means of any legal machinery to deprive himself of all rights which he may ever have in the future. Some limit must be set. Accordingly, though an assignment of a debt not yet due and which may never become due is valid if it appears that there is an existing contract or employment out of which the debt may arise,⁸¹ it is generally held that an assignment of a right expected to arise under a contract not yet formed, or employment not yet existing, is invalid.⁸² This, however, is an arbitrary limit and

⁸¹ *Cox v. Hughes*, 10 Cal. App. 553, 102 Pac. 956; *Union Collection Co. v. Oliver*, 23 Cal. App. 318, 137 Pac. 1082; *Chicago, etc., R. Co. v. Provolt*, 42 Colo. 103, 93 Pac. 1126, 16 L. R. A. (N. S.) 587; *Harrop v. Landers, etc., Co.*, 45 Conn. 561; *Berlin Iron Bridge Co. v. Connecticut River Banking Co.*, 76 Conn. 477, 57 Atl. 275; *Walton v. Horkan*, 112 Ga. 814, 38 S. E. 105, 61 Am. St. Rep. 77; *Ison Co. v. Atlantic &c. R. Co.*, 17 Ga. App. 459, 87 S. E. 754; *Mallin v. Wenham*, 209 Ill. 252, 70 N. E. 564, 101 Am. St. Rep. 233, 65 L. R. A. 602; *Monarch Discount Co. v. Chesapeake & Ohio Ry. Co.*, 285 Ill. 233, 120 N. E. 743; *Metcalf v. Kincaid*, 87 Ia. 443, 54 N. W. 867; *Peterson v. Ball*, 121 Ia. 544, 97 N. W. 79; *Manly v. Bitzer*, 91 Ky. 596, 16 S. W. 464, 34 Am. St. Rep. 242; *Farrar v. Smith*, 64 Me. 74; *Emerson v. European, etc., Ry. Co.*, 67 Me. 387, 24 Am. Rep. 39; *Knevals v. Blauvelt*, 82 Me. 458, 19 Atl. 818; *Shaffer v. Union Mining Co.*, 55 Md. 74; *Lannan v. Smith*, 7 Gray, 150; *Allen v. Chicago Pneumatic Tool Co.*, 205 Mass. 569, 91 N. E. 887; *Taylor v. Barton-Child Co.*, 228 Mass. 126, 117 N. E. 43; *Kane v. Clough*, 36 Mich.

436, 24 Am. Rep. 599; *Weinberg v. Stratton*, 163 Mich. 408, 128 N. W. 926; *Schilling v. Mullen*, 55 Minn. 122, 56 N. W. 586; *Quigley v. Welter*, 95 Minn. 383, 104 N. W. 236; *Leonard v. Farrington*, 124 Minn. 160, 144 N. W. 763; *Bell v. Mulholland*, 90 Mo. App. 612; *Cloes v. Independent Gravel Co.*, 156 Mo. App. 411, 138 S. W. 81; *Cornell v. Mutual Life Ins. Co.*, 179 Mo. App. 420, 165 S. W. 858; *Garland v. Harrington*, 51 N. H. 409; *Runnells v. Bosquet*, 60 N. H. 38; *Provencher v. Brooks*, 64 N. H. 479, 13 Atl. 641; *Brindze v. Atlantic City Assoc.*, 75 N. J. Eq. 405, 72 Atl. 435, 77 N. J. Eq. 272, 79 Atl. 686; *Rodijkeit v. Andrews*, 74 Oh. St. 104, 77 N. E. 747, 5 L. R. A. (N. S.) 564; *Tiernay v. McGarity*, 14 R. I. 231; *Kennedy v. Tierney*, 14 R. I. 528; *Chase v. Duby*, 20 R. I. 463, 40 Atl. 100; *Dolan v. Hughes*, 20 R. I. 513, 40 Atl. 344, 40 L. R. A. 735; *Carter v. Nichols*, 58 Vt. 553, 5 Atl. 197; *Hawes v. Wm. R. Trigg Co.*, 110 Va. 165, 65 S. E. 538; *State Bank v. Hastings*, 15 Wis. 75; *Porte v. Chicago &c. R. Co.*, 162 Wis. 446, 156 N. W. 469.

⁸² *Shackleford v. Kiser Co.*, 131 Ala. 224, 31 So. 77. See also *Clanton Bank*

the rule is not universally followed. There are decisions holding an assignment of all future book debts of a business and assignments for value of rights under contracts not made, but expected to be made, have been upheld by courts in the United States.⁸⁴ In any event it would seem that every court would admit that authority given to an assignee to collect a claim arising under a future contract is valid until revoked either in fact or by operation of law, at the death of the assignor. The effect of an assignment of claims now seems in most jurisdictions analogous to that produced by an assignment of a present claim under the law existing prior to the protection by courts of equity of assignments. It is to be observed that the limit generally placed by policy to the effectiveness of an assignment of a chose

v. Robinson, 195 Ala. 194, 70 So. 270; *Cox v. Hughes*, 10 Cal. App. 553, 102 Pac. 956; *Green v. Consolidated Wagon, etc., Co.*, 30 Ida. 359, 164 Pac. 1016; *Stromberg v. Hill*, 170 Ill. App. 323; *Richards v. Inter-Ocean Newspaper Co.*, 181 Ill. App. 515; *Ætna Trust & Sav. Co. v. Nackenhorst (Ind.)*, 122 N. E. 421; *Farnsworth v. Jackson*, 32 Me. 419; *Lightbody v. Smith*, 125 Mass. 51; *Herbert v. Bronson*, 125 Mass. 475; *Eagan v. Luby*, 133 Mass. 543; *Taylor v. Barton-Child Co.*, 228 Mass. 126, 117 N. E. 43; *Raulins v. Levi*, 232 Mass. 42, 121 N. E. 500; *Neumann v. Mining Co.*, 57 Mich. 97, 33 N. W. 600; *Heller v. Lutz*, 254 Mo. 704, 164 S. W. 123, L. R. A. 1915 B. 191; *Bell v. Mulholland*, 90 Mo. App. 612; *Thompson v. Gimbel*, 71 N. Y. Misc. 126, 128 N. Y. S. 210; *Rodijkiteit v. Andrews*, 74 Oh. St. 104, 77 N. E. 747, 5 L. R. A. (N. S.) 564; *Lehigh Railroad Co. v. Woodring*, 116 Pa. 513, 9 Atl. 58; *Porte v. Chicago &c. R. Co.*, 162 Wis. 446, 156 N. W. 469. An assignment after the contract has been made or the employment has begun made by an attorney in fact whose authority was given him prior to the existence of the contract or employment is equally invalid. *Ellis v. Saline*

County Coal Co., 199 Ill. App. 124; *In O'Niel v. William B. L. Ker*, 124 Wis. 234, 102 N. W. 573 (s. nom. *O'Niel v. Helmke et al.*, 70 L. 338), it was held that an assignment of the proceeds of milk thereafter sold to a person to whom the assignor regularly sold milk, but with whom he had no contract was ineffectual. Compare cases in preceding note upon assignments of future earnings by a person having an existing employment by an executory contract.

⁸³ *Tailby v. Official Receiver*, 13 Cas. 523; *Preston Nat. Bank v. G. T. Smith Co.*, 84 Mich. 364, 47 N. W. 502. See also *Bissell v. Hill*, 10 App. 593. Since the Judiciary Act of 1793 is operative only as an equitable assignment, but an assignment of a future chose in action is still operative only as an equitable assignment, but an assignment of existing rights is given the name at least of a legal assignment. *Hamb v. Brown*, [1917] 2 K. B. 93. See also *infra*, § 446.

⁸⁴ *Edwards v. Peterson*, 80 Me. 14 Atl. 936, 6 Am. St. Rep. 207; *Independent Gravel Co.*, 156 App. 411, 138 S. W. 81. See also *dall v. United States*, 7 Wall. 111 L. Ed. 85; *Metcalf v. Kincaid*, 8443, 54 N. W. 867.

action not yet due is not the same as that applicable to chattel property. Where an attempted transfer of chattel property is protected by equity, the only requirement is that the property intended shall be described with sufficient exactness;⁸⁵ but as has been seen, it is not the exactness of the description but the present existence of the contract or employment out of which a chose in action arises that is generally held important.

A present assignment of a future debt must be distinguished from a contract to assign in the future or to pay out of a fund to be collected. In a transaction of the latter sort further action by the assignor is contemplated. The precise words used by the parties are not important, except as aiding an inquiry whether the transaction between assignor and assignee was understood to be complete, and to require no further action by the assignor.

The question whether an attempted assignment in any form of future earnings even under an existing employment is invalidated by the bankruptcy of the assignor as to wages earned subsequent to the assignment has been somewhat disputed. It is generally true that property transferred as security without fraud or illegal preference may be enforced by the creditor of a bankrupt even though the personal liability of the debtor is discharged.⁸⁶ On the other hand, a debt founded upon a contract, express or implied, is provable in bankruptcy and not enforceable against a discharged bankrupt thereafter.⁸⁷

As has been seen the assignment of future earnings cannot be regarded as an immediate transfer of any property, but the assignee has an authority or power to collect, and an implied agreement on the assignor's part not to revoke this power. Furthermore, unless the equity of the situation shall induce the court to change its ordinary principles the assignor's right to wages when they have been earned will be regarded as vested in the assignee so far as a right in the chose in action can be transferred. It seems impossible to find anything here which can be called a provable claim, and a discharge in bankruptcy

⁸⁵ See 19 Harv. L. Rev. 557.

⁸⁶ *Shaw v. Silloway*, 145 Mass. 503, 506, 14 N. E. 783. See also U. S. Bankruptcy Act, Sec. 67 d.

⁸⁷ U. S. Bankruptcy Act, Sec. 63 a

(4). "Debt" by the statute, Sec. 1, is defined as including "any debt, demand or claim provable in bankruptcy." And see *infra*, §§ 1980 et seq.

is only applicable to provable claims. Even the implied contract not to revoke the authority of the assignee does not seem such a contract right as is provable in bankruptcy. Accordingly no valid technical reason can be found for denying the right of the assignee to earnings after bankruptcy.⁸⁸ But the hardship of the case has induced many courts to hold the assignment invalid as to such earnings.⁸⁹

Corporate mortgages frequently assign in terms future earnings. Such a mortgage involves an attempted assignment of future choses in action as well as tangible property, and is generally held not good against creditors until the mortgagee takes possession.⁹⁰

It has been said by the Supreme Court of the United States: "We apprehend that the doctrine has never been held, that a claim of no fixed amount, nor time, or mode of payment; a claim which has never received the assent of the person against whom it is asserted, and which remains to be settled by negotiations or suit at law, can be so assigned as to give the assignor an equitable right to prevent the original parties from compromising or adjusting the claim on any terms that may suit them."⁹¹ but if these words can be regarded as including a contract right, the accuracy of the statement is open to question. There seems no doubt that so long as a claim is sufficiently defined by an assignment so that it can be identified,

⁸⁸ The assignee was protected in *Mallin v. Wenham*, 209 Ill. 252, 70 N. E. 564, 65 L. R. A. 602, 101 Am. St. Rep. 233; *Monarch Discount Co. v. Chesapeake & Ohio Ry. Co.*, 285 Ill. 233, 120 N. E. 743; *Citizens' Loan Assoc. v. Boston & Maine Railroad*, 196 Mass. 528, 82 N. E. 696, 14 L. R. A. (N. S.) 1025, 124 Am. St. 584, 13 Am. Cas. 365. See also *Raulins v. Levi*, 232 Mass. 42, 121 N. E. 500.

⁸⁹ *Re West*, 128 Fed. 205; *Re Home Discount Company*, 147 Fed. 538; *Re Karns*, 148 Fed. 143; *Re Lineberry*, 183 Fed. 338; *Levi v. Loevenhart*, 138 Ky. 133, 127 S. W. 748, 30 L. R. A. (N. S.) 375, 137 Am. St. Rep. 377; *Leitch v. Northern Pac. Ry. Co.*, 95 Minn. 35, 103 N. W. 704.

⁹⁰ *Galveston Railroad v. Cowdrey*, 11 Wall. 459, 20 L. Ed. 199; *Gilman v. Illinois & M. Tel. Co.*, 91 U. S. 603, 23 L. Ed. 405; *American Bridge Co. v. Heidelberg*, 94 U. S. 798, 24 L. Ed. 144; *Sage v. Memphis, etc., R. Co.*, 125 U. S. 361, 8 S. Ct. 887, 31 L. Ed. 694; *United States Trust Co. v. Wabash Western Ry. Co.*, 150 U. S. 287, 307, 14 S. Ct. 86, 37 L. Ed. 1085; *Mississippi Valley, etc., Ry. Co. v. United States Ex. Co.*, 81 Ill. 534; *Ellis v. Boston, etc., R. Co.*, 107 Mass. 1; *DeGraff v. Thompson*, 24 Minn. 452; *New York Security Co. v. Saratoga Gas Co.*, 159 N. Y. 137, 53 N. E. 758, 45 L. R. A. 132.

⁹¹ *Kendall v. United States*, 7 Wall. 113, 116, 19 L. Ed. 85.

and it arises out of an existing contract the assignment is none the less valid because the amount payable is subject to contingency or dispute;⁹² and if the assignment is valid it should be protected against destruction by the action of the assignor and the debtor.⁹³ Limitations have sometimes been set by statute to the right to assign future salary or wages,⁹⁴ and these statutes have been held a valid exercise of the police power.⁹⁵

§ 415. A contract of option is assignable.

Some question has arisen of the right of one who holds an option to assign his right to another. An option if given for consideration or under seal is a contract;⁹⁶ and the right of the promisee might be supposed to be as assignable as any other contractual right. But such an option is also an offer to enter into a further relation; namely, that of seller and buyer. And it is a general rule that an offer can only be accepted by the person to whom it is made.⁹⁷ It seems reasonable where a contract right of value is concerned (and an option often is of value) and the performance of the offeree can be as effectively rendered by any one as by him, that the rule generally applicable to offers should yield, and it is accordingly generally held that an irrevocable option (that is one which is a contract) may

⁹² In *In re Wright*, 157 Fed. 544, 85 C. C. A. 206; *Greene v. Bartholomew*, 34 Ind. 235, and *Knevals v. Blauvelt*, 82 Me. 458, 19 Atl. 818, an insurance agent assigned his right to renewal commissions, the amount of which was wholly uncertain. The assignment was sustained. So other contract rights, the value of which depended upon uncertain future events have been sustained. *Bank of Yolo v. Bank of Woodland*, 3 Cal. App. 561, 86 Pac. 820; *Augur v. Couture*, 68 Me. 427; *Johnson v. Donohue*, 113 Tenn. 446, 83 S. W. 360; and see other cases of assignment of future claims cited in this section.

⁹³ See *infra*, § 444.

⁹⁴ See *Bowen v. King*, 14 Ga. App.

319, 80 S. E. 696. See *Hall v. Boston Glass Co.*, 207 Mass. 328, 93 N. E. 640; *Fay v. Bankers' Surety Co.*, 125 Minn. 211, 146 N. W. 359; *Berlin Mills Co. v. Poole*, 62 N. H. 439; *Garland v. Linskey*, 19 R. I. 713, 36 Atl. 837, and cases in the following note. Also 5 L. R. A. (N. S.) 564 and note, L. R. A. 1916 D. 367 n.

⁹⁶ *Mutual Loan Co. v. Martell*, 222 U. S. 225, 32 S. Ct. 74, 56 L. Ed. 175; affg., s. c. 200 Mass. 482, 86 N. E. 916; *Fay v. Bankers' Surety Co.*, 125 Minn. 211, 146 N. W. 359; *Heller v. Lutz*, 254 Mo. 704, 164 S. W. 123, L. R. A. 1915 B. 191; *Thompson v. Erie R. Co.*, 207 N. Y. 171, 100 N. E. 791.

⁹⁷ See *supra*, § 61.

⁹⁸ See *supra*, § 80.

be enforced by an assignee.⁹⁸ And especially this has been held where an option is contained in a lease.⁹⁹ A few cases, however, have held that an irrevocable offer partakes of the same character as a revocable offer in permitting acceptance only by the offeree.¹ Whether one holding an option thereby acquires an interest in land is sometimes discussed as if it affected the question, but it may well be admitted that no interest in land is given by an option and yet asserted that a contract right exists which may be as valuable as an interest in land and which should partake of an ordinary incident of property, like assignability; though doubtless by the express terms of the option the right may be made personal to the one to whom it is given.²

§ 416. Assignability of right to subscribe to stock.

The right of one who has contracted to subscribe to the stock of a corporation to assign this right has been called in question,³ on the ground that a corporation in disposing of its

⁹⁸ *Wilkins v. Hardaway*, 159 Ala. 565, 48 So. 678; *Chesbrough v. Vizard Inv. Co.*, 156 Ky. 149, 160 S. W. 725; *Anse La Butte Oil Co. v. Babb*, 122 La. 415, 47 So. 754; *Strasser v. Steck*, 216 Pa. 577, 66 Atl. 87; *Ringling v. Smith River Development Co.*, 48 Mont. 467, 138 Pac. 1098; *Big Bend Land Co. v. Hutchings*, 71 Wash. 345, 128 Pac. 652; *Kreutzer v. Lynch*, 122 Wis. 474, 100 N. W. 887. See also *Cameron v. Shumway*, 149 Mich. 634, 113 N. W. 287; *Winslow v. Dundom*, 46 Mont. 71, 125 Pac. 136; *Winslow v. Wm. Richards Co.*, 3 N. B. Eq. Rep. 481; *Oland v. McNeill*, 32 Can. S. C. 23. So a covenant not to sell property without first offering it to the covenantee has been held assignable by the latter. *H. J. Lewis Oyster Co. v. West (Conn.)*, 107 Atl. 138.

⁹⁹ *Woodall v. Clifton*, [1905] 2 Ch. 257; *Friary &c. Breweries v. Singleton*, [1899] 2 Ch. 261; *Hitchcock v. Page*, 14 Cal. 440; *Robinson v. Perry*, 21 Ga. 183, 68 Am. Dec. 455; *Perry v.*

Paschal, 103 Ga. 134, 29 S. E. 703; *House v. Jackson*, 24 Or. 89, 32 Pac. 1027; *Kerr v. Day*, 15 Pa. 112, 53 Am. Dec. 526; *Napier v. Darlington*, 70 Pa. 64; *Hagar v. Buck*, 44 Vt. 285, 8 Am. Rep. 368; *Albert Brick &c. Co. v. Nelson*, 27 N. B. 276.

¹ *Wheeling Creek Co. v. Elder*, 170 Fed. 215; *Newton v. Newton*, 11 R. I. 390, 23 Am. Rep. 476; *Rease v. Kittle*, 56 W. Va. 269, 49 S. E. 150; *Vanderlip v. Peterson*, 16 Manitoba L. R. 341. See also *Myers v. Stone*, 128 Ia. 10, 102 N. W. 507, 111 Am. St. Rep. 180 (where the promise was to the original promisee and to "no other person") commented on in *Blank v. Independent Ice Co.*, 152 Ia. 241, 133 N. W. 344, 43 L. R. A. (N. S.) 115.

² *Myers v. Stone*, 128 Iowa, 10, 102 N. W. 507, 111 Am. St. Rep. 180; *Andrew v. Meyerdirck*, 87 Md. 511, 40 Atl. 173; *Fulton v. Messenger*, 61 W. Va. 477, 56 S. E. 830. See also cases cited *supra*, § 411, *ad fin.*

³ *Holyoke v. Millmann*, 151 Wis.

stock has an interest in the persons who become stockholders. But unless by the terms of the charter the corporation has power to refuse to register as a stockholder any one who may purchase stock after it has been once issued, there seems no reason for denying the right to assign a contract to issue stock in the first place, and it is generally permitted.⁴

§ 417. Other assignments of rights which are opposed to public policy.

Certain assignments may be specifically forbidden by statute. Thus claims against the United States cannot be assigned until they have been allowed and a warrant issued for them.⁵ Assignments by Indians of royalties due under oil leases of their lands are invalid unless approved by the Secretary of the Interior.⁶ Without the prohibition of a statute, the salary or pay of a public officer not yet due, cannot be assigned. This principle has been applied to assignments by legal officers, as prosecuting attorneys,⁷ a master to whom a case had been referred,⁸ a clerk

551, 139 N. W. 392. See also *Coleman v. Spencer*, 5 Blackf. 197.

⁴ *McGue v. Rommel*, 148 Cal. 539, 83 Pac. 100; *Baltimore, etc., R. Co. v. Sewell*, 35 Md. 238, 6 Am. Rep. 402; *Brigham v. Mead*, 10 Allen, 245; *Valentine v. Berrien Springs Water-Power Co.*, 128 Mich. 280, 87 N. W. 370; *Manchester Street Ry. v. Williams*, 71 N. H. 312, 52 Atl. 461; *Rio Grande Cattle Co. v. Burns*, 82 Tex. 50, 56, 17 S. W. 1043; *Lipscomb's Adm. v. Condon*, 56 W. Va. 416, 49 S. E. 392, 67 L. R. A. 670, 107 Am. St. Rep. 938. See also *Hastings Lumber Co. v. Evans*, 188 Mass. 587, 75 N. E. 57.

⁵ See *National Bank of Commerce v. Downie*, 218 U. S. 345, 31 S. Ct. 89, 54 L. Ed. 1065; *St. Paul, etc., R. Co. v. United States*, 112 U. S. 733, 5 S. Ct. 366, 28 L. R. A. 861. The object of this statute is, however, to protect the government, not the assignor, and if it chooses to recognize a forbidden assignment, the assignor cannot complain, and the disposition of the courts

seems to be to protect the assignee as far as possible. *Price v. Forrest*, 173 U. S. 410, 19 S. Ct. 434, 43 L. Ed. 749; *Dulaney v. Scudder*, 94 Fed. 6, 36 C. C. A. 52; *York v. Conde*, 147 N. Y. 486, 42 N. E. 193. And assignments by operation of law, as to executors or trustees in bankruptcy, are not included in the prohibition of the statute. *Goodman v. Niblack*, 102 U. S. 556, 26 L. Ed. 229; *National Bank of Commerce v. Downie*, 218 U. S. 345, 31 S. Ct. 89, 54 L. Ed. 1065.

⁶ *United States v. Noble*, 237 U. S. 74, 35 S. Ct. 532, 59 L. Ed. 844; *Day v. Charlton (Okl.)*, 160 Pac. 606.

⁷ *Holt v. Thurman*, 111 Ky. 84, 63 S. W. 280, 98 Am. St. Rep. 399; *Anderson v. Branstrom*, 173 Mich. 157, 139 N. W. 40, 43 L. R. A. (N. S.) 422; *Cooley Credit Co. v. Townsend*, 132 Mo. App. 390, 111 S. W. 894; *First Nat. Bank v. State*, 68 Neb. 482, 94 N. W. 633; *State v. Barnes*, 10 S. Dak. 306, 73 N. W. 80.

⁸ *Shannon v. Bruner*, 36 Fed. 147.

of court,⁹ a sheriff,¹⁰ a police officer,¹¹ a fireman,¹² and to political officers like a county treasurer.¹³ It is equally applicable to minor public officials, like clerks and copyists,¹⁴ to assessors,¹⁵ to a retired army officer,¹⁶ and generally to all public employees.¹⁷ A few early cases to the contrary¹⁸ would probably not be followed.

In Minnesota even accrued salary of such an official can probably not be assigned. It has at least been held that it cannot be seized by creditors.¹⁹ But generally Buller's statement would probably be accepted "If the question had been whether or not the pay which was actually due might be assigned, I should have thought it like any other debt assignable."²⁰ It has been said that there is no legal objection to an assignment of unearned salary or fees of a public officer becoming effective as soon as the salary or fees have been earned and

⁹ *Field v. Chipley*, 79 Ky. 260, 42 Am. Rep. 215.

¹⁰ *Bowery Nat. Bank v. Wilson*, 122 N. Y. 478, 25 N. E. 855, 9 L. R. A. 706, 19 Am. St. Rep. 507.

¹¹ *Chicago v. People*, 98 Ill. App. 517.

¹² *Schmitt v. Dooling*, 145 Ky. 240, 140 S. W. 197, 36 L. R. A. (N. S.) 881.

¹³ *Roesch v. W. B. Worthen Co.*, 95 Ark. 482, 130 S. W. 551, 31 L. R. A. (N. S.) 374.

¹⁴ *Bangs v. Dunn*, 66 Cal. 72, 4 Pac. 963; *Bliss v. Lawrence*, 58 N. Y. 442, 17 Am. Rep. 273.

¹⁵ *Stewart v. Sample*, 168 Ala. 270, 53 So. 182; *Ex parte Stewart*, 185 Ala. 216, 64 So. 36; *Stevenson v. Kyle*, 42 W. Va. 229, 24 S. E. 886, 57 Am. St. Rep. 854 [Cp. *American Nat. Bank v. Petry* (Tex. Civ. App.), 141 S. W. 1040].

¹⁶ *Lidderdale v. Montrose*, 4 T. R. 248; *Schwenk v. Wyckoff*, 46 N. J. Eq. 560, 20, Atl. 259, 9 L. R. A. 221, 19 Am. St. Rep. 438.

¹⁷ *Arbuckle v. Cowtan*, 3 B. & P. 321, 328; *Wells v. Foster*, 8 M. & W. 149; *King v. Hawkins*, 2 Ariz. 358, 16 Pac. 434; *Schmitt v. Dooling*, 145 Ky. 240, 140 S. W. 197, 36 L. R. A. (N. S.)

881; *Dickinson v. Johnson*, 110 Ky. 236, 61 S. W. 267, 54 L. R. A. 566, 96 Am. St. Rep. 434; *Granger v. French*, 152 Mich. 356, 116 N. W. 181, 125 Am. St. Rep. 416; *Dunkley v. Marquette*, 157 Mich. 359, 122 N. W. 126; *State v. Williamson*, 118 Mo. 146, 23 S. W. 1054, 21 L. R. A. 827, 19 Am. St. Rep. 358; *Bliss v. Lawrence*, 58 N. Y. 442, 17 Am. Rep. 273; *Walker v. New York*, 72 N. Y. Misc. 97, 129 N. Y. S. 1059; *Tribune Reporter Printing Co. v. Cadwell Transit Co.* (Utah) 169 Pac. 170.

¹⁸ *Brackett v. Blake & Trustee*, 7 Metc. 335; *State Bank v. Hastings*, 15 Wis. 75. See also *National Bank v. Fink*, 86 Tex. 303, 24 S. W. 256, 40 Am. St. Rep. 833.

¹⁹ *Roeller v. Ames*, 33 Minn. 132, 22 N. W. 177; *Sandwich Mfg. Co. v. Krake*, 66 Minn. 110, 68 N. W. 606, 61 Am. St. Rep. 395.

²⁰ *Flarty v. Odum*, 3 T. R. 681; *Ex parte Stewart*, 185 Ala. 216, 64 So. 36; *Roesch v. W. B. Worthen Co.*, 95 Ark. 482, 130 S. W. 551, 31 L. R. A. (N. S.) 374; *Birkbeck v. Stafford*, 14 Abb. Pr. 285; *Thompson v. Cullers*, (Tex. Civ. App.), 35 S. W. 412.

are payable;²¹ but this seems inadmissible.²² If, however, the assignee has actually collected and reduced to possession the proceeds of the claim, he cannot be deprived of them.²³ As has been seen²⁴ an agreement that the owner of a claim will make a certain disposition of its proceeds, when collected by him, is not an assignment, and public policy does not invalidate such an agreement in regard to official pay.²⁵ A claim for alimony cannot be assigned voluntarily or subjected to involuntary alienation for the payment of debts.²⁶ Nor is the right to it lost by the discharge in bankruptcy of a husband bound for its payment.²⁷ In many States as previously observed limitations are imposed by statute on the right to assign wages.²⁸

Whether a right is assignable voluntarily involves in the main the same question as whether it will pass under an assignment in bankruptcy. A pension solely for past services will pass to an assignee or trustee in bankruptcy, but not a pension in consideration of continuing future services.²⁹ The matter of government pensions is now largely regulated by stat-

²¹ *Roesch v. W. B. Worthen Co.*, 95 Ark. 482, 130 S. W. 551, 31 L. R. A. (N. S.) 374, citing, *Bliss v. Lawrence*, 58 N. Y. 442, 17 Am. Rep. 273; *Stephenson v. Walden*, 24 Ia. 84, which, however, do not support the proposition.

²² *In re Wilkes*, 8 Cal. App. 659, 97 Pac. 677; and see cases cited *supra*, n.7-16.

²³ *Roesch v. W. B. Worthen Co.*, 95 Ark. 482, 130 S. W. 551, 31 L. R. A. (N. S.) 374; *Johnson v. Pace*, 78 Ill. 143; *Stephenson v. Walden*, 24 Ia. 84; *Oberdorfer v. Louisville School Board*, 120 Ky. 112, 85 S. W. 696; *Carnegie Trust Co. v. Battery Place Realty Co.*, 67 N. Y. Misc. 452, 122 N. Y. S. 697.

²⁴ *Supra*, § 414.

²⁵ *McGregor v. McGregor*, 130 Mich. 505, 90 N. W. 284, 97 Am. St. Rep. 492; *Thurston v. Fairman*, 9 Hun, 584.

²⁶ *Paquine v. Snary*, [1909] 1 K. B.

688; *Romaine v. Chauncey*, 129 N. Y. 566, 29 N. E. 826, 14 L. R. A. 712, 26 Am. St. Rep. 544.

²⁷ *Audubon v. Shufeldt*, 181 U. S. 575, 21 S. Ct. 735, 45 L. Ed. 1009.

²⁸ See *supra*, § 414 *ad fin.* In New York assignment of a contract for the performance of labor or furnishing materials for the improvement of real estate is invalid unless the assignment is filed. *Williams Engineering, etc., Co. v. New York*, 175 N. Y. App. D. 571, 162 N. Y. S. 381.

²⁹ *Spooner v. Payne*, 1 De G. M. & G. 383; *Wells v. Foster*, 8 M. & W. 149; *Ex parte Huggins*, 21 Ch. D. 85. See also *Oliver v. Emsonne*, *Dyer* 1b; *York v. Twine*, *Cro. Jac.* 78; *Heald v. Hay*, 3 Giff. 467; *Carew v. Cooper*, 4 Giff. 619; *Ellis v. Earl Grey*, 6 Sim. 214; *Tunstall v. Boothby*, 10 Sim. 542; *Knight v. Bulkeley*, 5 Jur. (N. S.) 817; *Ex parte Webber*, 18 Q. B. D. 111; *McCarthy v. Goold*, 1 Ball & Beatty (Ir. Ch.), 387.

ute.²⁹ In the United States the pensions of soldiers and sailors cannot be assigned.³⁰

§ 418. Assignable bilateral contracts.

✓If the duties to be performed by a party to an executory bilateral contract are not of such a personal character that their performance cannot be delegated, and if his rights are assignable in their nature³¹ he may assign the contract, so far as bilateral contracts are ever assignable; and when a bilateral contract still executory on both sides is spoken of as assignable it can mean no more than that performance of the duties can be delegated and that the rights can be assigned.³² Difficulty more frequently arises in regard to the possibility of delegating the performance of duties than in regard to the assignability of the rights under a contract. The duty of one who contracts to do certain building or engineering work, unless it requires peculiar skill, may be delegated, and therefore one who contracts to do such work may assign his contract, with the effect just defined.³³ It has sometimes been suggested that a contract for public work stands on a different footing from contracts for private work, presumably by analogy to cases where the salary of public officials has been held non-assignable;³⁴ but this distinction seems untenable on principle and opposed to authority.³⁵ An assignment of the right to

²⁹ The English Act of 1883, § 53 (2), provides that the court may "make such order as it thinks just, for the payment of . . . half-pay or pension, or of any part thereof, to the trustee."

³⁰ U. S. Comp. Stat., § 9077.

³¹ See *supra*, § 413.

³² See *supra*, § 412.

³³ *Anderson v. De Urioste*, 96 Cal. 404, 31 Pac. 266; *Pike v. Waltham*, 168 Mass. 581, 47 N. E. 437; *St. Louis v. Clemens*, 42 Mo. 69; *Devlin v. Mayor*, 63 N. Y. 8, 17; *New England Iron Co. v. Gilbert Elev. R. Co.*, 91 N. Y. 153; *Janvey v. Loketz*, 122 N. Y. App. D. 411, 106 N. Y. S. 690; *Ernst v. Kunkle*, 5 Oh. St. 520; *Minnetonka*

Oil Co. v. Cleveland Vitrified Brick Co., 27 Okl. 180, 111 Pac. 326; *Galey v. Mellon*, 172 Pa. 443, 33 Atl. 560; *Columbia Water Power Co. v. Columbia*, 5 S. C. 225.

³⁴ This is suggested in *Delaware County v. Diebold Safe & Lock Co.*, 133 U. S. 473, 10 S. Ct. 399, 33 L. Ed. 674; *Appeals of the City of Philadelphia*, 86 Pa. 179. As to contracts with the United States, see *supra*, § 417.

³⁵ *Anderson v. De Urioste*, 96 Cal. 404, 31 Pac. 266; *Carlyle v. Carlyle Water Co.*, 140 Ill. 445, 29 N. E. 556; *Pike v. Waltham*, 168 Mass. 581, 47 N. E. 437; *St. Louis v. Clemens*, 42 Mo. 69; *Ernst v. Kunkle*, 5 Oh. St.

have construction work performed may also be made by the employer.³⁶ A contract for the production and sale of goods may similarly be assigned by the seller if the work of production did not demand peculiar personal skill.³⁷ Other illustrations of assignable bilateral contracts may be found in the note.³⁸ Even if a promise in a bilateral contract provides for performance involving such personal confidence or skill as to make them incapable of delegation, the rights under the contract may be assigned by the promisor, if he himself performs those duties which cannot be delegated.³⁹

§ 419. Personal responsibility in bilateral contracts as preventing assignment.

Not infrequently it is given as a reason for holding a bilateral contract non-assignable that the personal liability of the assignor to perform on his part, undertaken by him in the original contract in exchange for the right given him therein and now assigned, was a vital element in the contract.⁴⁰ The

520; *Columbia Water Power Co. v. Columbia*, 5 S. Car. 225.

³⁶ In *American Bonding Co. v. Baltimore, etc., R. Co.*, 124 Fed. 866, 60 C. C. A. 52, it was held that a contract for construction work by the receivers of a railroad company might be enforced by a new railroad company to which the receivers had assigned their rights when the old company was reorganized.

³⁷ *LaRue v. Groesinger*, 84 Cal. 281, 24 Pac. 42, 18 Am. St. Rep. 179. (A contract to buy and sell all grapes to be grown on certain vines for ten years, assignable by the seller); *Strong v. Moore*, 75 Kans. 437, 89 Pac. 895. (A contract to buy and sell 600 young peach trees assignable by the nursery company, the seller.) In these cases, it seems that if the circumstances had shown special reliance on the seller's skill, the assignments could not have been upheld.

³⁸ *American Smelting, etc., Co. v. Bunker Hill, etc., Co.*, 248 Fed. 172;

Dorr v. Alford, 111 Ia. 278, 82 N. W. 789; *Northwestern Cooperage, etc., Co. v. Byers*, 133 Mich. 534, 95 N. W. 529; *Missouri, K. & T. R. Co. v. Carter*, 95 Tex. 461, 68 S. W. 159; *Poling v. Condon-Lane, etc., Co.*, 55 W. Va. 529, 47 S. E. 279.

³⁹ *Sloan v. Williams*, 138 Ill. 43, 27 N. E. 531, 12 L. R. A. 496; *American Lithographic Co. v. Ziegler*, 216 Mass. 287, 103 N. E. 909; *Houssels v. Jacobs*, 178 Mo. 579, 77 S. W. 857; *Harlow v. Oregonian Pub. Co.*, 53 Or. 272, 100 Pac. 7.

⁴⁰ *Robson v. Drummond*, 2 B. & Ad. 303; *Arkansas Valley Smelting Co. v. Belden Mining Co.*, 127 U. S. 379, 8 S. Ct. 1308, 32 L. Ed. 246; *Sims v. Cordele Ice Co.*, 119 Ga. 597, 46 S. E. 841; *Macon Auto Co. v. Heard*, 142 Ga. 264, 82 S. E. 658; *Nelson v. Reidelbach* (Ind. App.), 119 N. E. 804; *Stockstill v. Byrd*, 132 La. 404, 61 So. 446; *Lansden v. McCarthy*, 45 Mo. 106; *D. C. Hardy Implement Co. v. Iron Works*, 129 Mo. 222, 31 S. W.

argument is made that if the performances in a bilateral contract are intended to be concurrent, or if the performance by the assignor is to precede the performance of the other party to the contract, no injustice is done by upholding the assignment; but if performance on the part of the assignor, by the terms of the original contract is to follow the performance on the other side the assignment cannot be permitted since the credit given to the assignor was personal to himself, and justice requires that the other party to the contract should not be compelled to perform and trust to the credit of the assignee.⁴¹ This argument assumes that an assignment of a bilateral contract involves a true assignment of duties; that is, the substitution of a new duty on the part of the assignee, instead of the original duty assumed by the assignor to the other party to the contract. It cannot be admitted that this is the true meaning of assignment. Novation is the word appropriate to such a changed relation, and as appears from the next section an attempt by one party to force a novation on the other party to a contract will excuse the latter, but unless the assignor repudiates a continuance of his liability on the contract after the assignment, it does not seem a valid objection that the performance of the assignor is not due until after the performance of the other party to the contract.⁴² If it were in-

599; *Standard Sewing Mach. Co. v. Smith*, 51 Mont. 245, 152 Pac. 38; *Rice v. Gibbs*, 40 Neb. 264, 58 N. W. 724; *Rosenthal Paper Co. v. National, etc., Paper Co.*, 175 N. Y. App. D. 606, 162 N. Y. S. 814; *Menger v. Ward*, 87 Tex. 622, 30 S. W. 853. See also *Snow v. Nelson*, 113 Fed. 353, and *Swarts v. Narragansett Electric Lighting Co.*, 26 R. I. 388, 436, 59 Atl. 77, 111.

⁴¹ If the assignee waives the period of credit, provided for by the contract and tenders performance concurrently, the objection cannot be made. *In re Niagara Radiator Co.*, 164 Fed. 162.

⁴² Therefore in *British Waggon Co. v. Lea*, 5 Q. B. D. 149, the court held the contract assignable; saying,—that as long as the assignor continued

to exist, and through the assignee to fulfil its obligations under the contract, the other party to the original contract had no defence. See also cases cited *supra*, § 412.

Assignments of rights, for which payment was to be made on credit were also upheld in *Tolhurst v. Portland Cement Mfrs.*, [1903] A. C. 414; *Hofman v. Chicago League Ball Club*, 195 Ill. App. 249; *Voigt v. Murphy Heating Co.*, 164 Mich. 539, 129 N. W. 701; *Liberty Wall Paper Co. v. Stoner Wall Paper Mfg. Co.*, 59 N. Y. App. Div. 353, 69 N. Y. 355, *affd.* 170 N. Y. 582, 63 N. E. 1119; *Minnetonka Oil Co. v. Cleveland Vitrified Brick Co.*, 27 Okl. 180, 111 Pac. 326; though objection to the assignments on this ground does not seem to have been

deed true that the assignor was discharged of his duties, and the assignee substituted in his place, few bilateral contracts even though performances were by their terms to be concurrent would be assignable. It is sometimes assumed that in such a case the non-assigning party runs no risk because he does not have to perform until performance on the other side is tendered to him, and he is not injured if such performance is tendered by an assignee. But the non-assigning party is entitled from the moment when the contract is entered into to the personal responsibility of the assignor in such a case as well as in cases where the assignor's performance was by the terms of the contract to be postponed until after his own performance. To wait until the time for performance may involve serious detriment if there is no responsible person answerable if counter performance is not then made in exchange for the performance tendered. Moreover, the concurrent performance when accepted does not necessarily discharge the liability of the assignor.⁴³ Acceptance of such performance is an election to continue performance, in spite of any justification for refusing to do so, but it is not a discharge of contractual liability for a defect in the performance, especially if the defect is latent. Accordingly unless the assignor still remained liable for any defects even in concurrent performances, the assignment could not be permitted.

A further argument may be made in support of the non-assignability of a right to the transfer of property where the assignor's duty to pay, by the terms of the original contract, was to be postponed till a date later than that at which performance of the assigned right was due; namely, that the assignor even though remaining liable is less entitled to credit if performance by the other party to the contract must be rendered to the assignee, than he would have been if the performance were rendered directly to himself, as was originally contemplated. To this it may be answered that if the assignor had received performance under the original contract, he might have made an immediate transfer of what he received, and there seems no difference in substance in allowing him to assign the taken. See also cases cited *supra*,⁴⁴ See *infra*, § 700.
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performance immediately after he receives it and allowing him to assign the right to the performance immediately before its transfer is due. In either case the assignor if insolvent will be subject to the rules forbidding fraudulent conveyances. Moreover, the obligation of the assignee to the assignor to hold the latter harmless is an asset of the assignor which can be made available in equity in favor of the other party to the original contract.⁴⁴ (Personal responsibility may indeed in some cases prevent a bilateral contract from being assignable even in the limited sense in which that word is properly used—that is, it may prevent either the duty under the contract from being delegated, or the right under it from being assigned, but this will only be where either the right is so personal that it cannot be transferred,⁴⁵ or the duty so personal that performance of it cannot be delegated to an agent, even though the original obligor still remains liable.⁴⁶)

§ 420. What is called an assignment may be an offer of novation.

The apparent misunderstanding of some courts as to the meaning of assignment in a bilateral contract, to which attention is called in the preceding section, is in many cases probably merely a reflection of a similar misunderstanding of the parties themselves. Doubtless parties to bilateral contracts frequently attempt to effect the substitution of the liability of a new party for that of one of the original parties, and frequently call such an attempted transaction an assignment. By whatever name the parties may call the transaction, if it is made clear that the so-called assignor intends by the transaction to be free from all further liability, it seems that acceptance by the other party to the contract of any subsequent performance from the so-called assignee, would amount to assent to a proposed novation, and the so-called assignor would be discharged from further lia-

⁴⁴ *Mangles v. Dixon*, 3 H. L. C. 702. See also *supra*, §§ 361-363.

⁴⁵ See *supra*, §§ 4, 13. *E. g.*, where the assignor was to be entrusted as bailee with property of the other. See *Arkansas Valley Smelting Co. v. Belden Mining Co.*, 127 U. S. 379, 8

S. Ct. 1308, 32 L. Ed. 246; *Stockstill v. Byrd*, 132 La. 404, 61 So. 446.

⁴⁶ *Eastern Advertising Co. v. McGaw*, 89 Md. 72, 42 Atl. 923; *Tarr v. Veasey*, 125 Md. 199, 93 Atl. 428. See *supra*, § 411.

bility.⁴⁷ Such an offer may always be refused, and if the so-called assignor in effect has indicated that he will not thereafter be responsible for the performance of his promise, and that the other party to the contract must look solely to the so-called assignee, there is a repudiation of contract by the assignor which justifies the injured party in refusing altogether to continue performance. Repudiation is none the less an excuse to the other party to the contract when accompanied by the statement that the obligations of the repudiator have been assumed and will be fulfilled by another person.⁴⁸ The question of diffi-

⁴⁷ See *Fleming v. Law*, 163 Cal. 227, 124 Pac. 1018, and *infra*, § 1875.

⁴⁸ This is clearly brought out in *Pike v. Watham*, 168 Mass. 581, 47 N. E. 437. See also *Rosenthal Paper Co. v. National, etc., Paper Co.*, 175 N. Y. App. D. 606, 162 N. Y. S. 814. It is on this ground that the decision in *Arkansas Valley Smelting Co. v. Belden Mining Co.*, 127 U. S. 379, 8 S. Ct. 1308, 32 L. Ed. 246, should be rested. So in *Robson v. Drummond*, 2 B. & Ad. 303, a coach-maker contracted to furnish the defendant the use of a carriage for five years at an annual payable price in advance. After three years the coachmaker "assigned" the contract to his secret partner. The defendant refused to continue performance of the contract with the assignee and was held justified in so doing. The case is undoubtedly sound, but the objection is not that the price was payable in advance and therefore personal credit was involved. If the original coachmaker had continued ready, willing and able to carry out his obligation, he could have authorized an assignee to collect the payment in advance and keep it as his own. The real ground for relieving the defendant from liability is that the coachmaker repudiated his obligation. He showed by assigning his business and otherwise that he no longer intended to fulfil his obligations. Such repudiation was an excuse to the defendant

(see *infra*, §§ 875, 1315), whether the coachmaker's obligation was personal in character or not, and whether or not it was accompanied by an offer to substitute another's liability for his. So in *Lansden v. McCarthy*, 45 Mo. 106, the defendant was held not bound to continue to deliver meat on credit according to the terms of a written contract with the plaintiff's assignors. The court well says: "The contract imposed no obligation upon the defendant to accept as his debtors any other parties than those with whom he contracted;" but the question should at least have been touched upon, whether he was asked to; whether the assignors did not continue to be responsible for the meat delivered after the assignment, precisely as before. See *British Waggon Co. v. Lea*, 5 Q. B. D. 149. If indeed the facts warranted the conclusion that the assignor disclaimed liability for future deliveries of meat, the case is well decided. So, where a contract was made to sell land on credit to two jointly, the vendor was not obliged to carry out the contract when one of the vendees repudiated his obligations, though he assigned his rights to his co-vendee. *Hambleton v. Jameson*, 162 Ia. 186, 143 N. W. 1010. So in *Johnson v. Vickers*, 139 Wis. 145, 120 N. W. 837, 21 L. R. A. (N. S.) 359, a building contractor assigned his contract "without recourse." Such words necessarily

culty is one of construction. In a particular case when a party to a bilateral contract purports to assign it, does he mean to disclaim further liability and in effect to propose a novation? It is submitted that on these bare facts this is not the proper construction. It should rather be assumed in the absence of countervailing circumstances that the word assignment is used in its proper sense, meaning a transfer of rights but only a delegation of the performance of duties.⁴⁹

Assignment for the benefit of creditors or in bankruptcy of a party to a bilateral contract still partially unperformed by the assignor excuses the other party to the contract from giving credit,⁵⁰ for the same reason that insolvency without an assignment would do so.⁵¹

§ 421. Non-assignable bilateral contracts.

No bilateral contract for personal service can be assigned by either party to it.⁵² Nor can the duty of one who was to execute a mortgage on certain land be delegated to any assignee of the land.⁵³

The duty of a publisher under a contract with an author involves a personal relation and therefore since the performance cannot be delegated, the publisher cannot assign the contract;⁵⁴

indicate a repudiation of further liability. See also as to the meaning of the words "without recourse" in assignment of non-negotiable contract, *Binswanger v. Hewitt*, 79 N. Y. Misc. 425, 140 N. Y. S. 143.

⁴⁹ See cases cited *supra*, § 412. In *Detroit Postage Stamp Service Co. v. Schermack*, 179 Mich. 266, 146 N. W. 144, the defendants contracted with the plaintiff's assignor for the sale of stamp-vending machines. Proof that the defendants performed the contract by furnishing machines to the plaintiff's assignor, and accepting in payment the plaintiff's check, will not establish a novation, because not establishing their assent to the assignment.

⁵⁰ *Rappleye v. Racine Seeder Co.*, 79 Ia. 220, 44 N. W. 363, 7 L. R. A. 139.

⁵¹ See *infra*, § 880.

⁵² See *supra*, § 413; *Hall v. Gardner*, 1 Mass. 172; *Davis v. Coburn*, 8 Mass. 299; *Streeter v. Sumner*, 31 N. H. 542.

⁵³ *Nelson v. Reidelbach* (Ind. App.), 119 N. E. 804.

⁵⁴ *Reade v. Bentley*, 3 K. & J. 271; *Stevens v. Benning*, 1 K. & J. 168, 6 DeG. M. & G. 223; *Hole v. Bradbury*, 12 Ch. Div. 886; *Griffith v. Tower Publishing Co.*, [1897] 1 Ch. 21; *American Lithographic Co. v. Ziegler*, 216 Mass. 287, 103 N. E. 909. Cf. *Sunday Mirror Co. v. Galvin*, 55 Mo. App. 412. This was held to be true even though the contract with the publisher provided that the publishing corporation "its representatives and assigns," should keep the promises contained in the contract. *Wooster v. Crane*, 73 N. J. Eq. 22, 66 Atl. 1093.

and generally the assignability of a bilateral contract must be tested by considering separately whether performance of its obligation can be delegated and whether its rights can be assigned.⁵⁵ Sometimes a party to a bilateral contract without attempting to delegate performance of his duties, assigns his rights under the contract. In such a case the question is the same as if the promisee in a unilateral contract attempted to assign similar rights. In an English decision,⁵⁶ an owner of chalk quarries contracted to supply a certain cement company with as much chalk as that company should require for the whole of their manufacture of Portland cement upon their land near the quarries. The manufacturers assigned their business, including this contract, to a larger company. The House of Lords held, though with divided opinions, that the benefit of the contract might be assigned although the word assigns was not contained in the promise of the owner of the chalk quarries. The case must be rested on a construction of the contract making the test of the amount of chalk to be furnished not the personal needs of the original promisee, but the capacity of that promisee's land and the machinery thereon.⁵⁷ But in a later decision the English Court of Appeal held that where a cake manufacturer contracted for a supply of all the eggs that he should "require for manufacturing purposes for one year," promising, himself, not to purchase eggs from any other merchant during the year, the duty of the manufacturer could not be delegated and that when he transferred his business to a company the seller was freed from all further obligations.⁵⁸ And

This decision was by a single judge, and it seems that too little effect was given to the use of the word "assigns."

⁵⁵ See §§ 411, 413.

⁵⁶ *Tolhurst v. Portland Cement Mfrs. Co.*, [1903] A. C. 414.

⁵⁷ See *Kemp v. Bærseleman*, [1906] 2 K. B. 604, 606, *arguendo*.

⁵⁸ *Kemp v. Bærseleman*, [1906] 2 K. B. 604. The court laid stress on the fact that the manufacturer covenanted not to purchase eggs elsewhere. After the manufacturer had conveyed away his business, this covenant could not bind the transferee of the business, and

even though it still bound the original manufacturer, his refraining from buying eggs elsewhere was not a contemplated consideration for selling eggs to any one except the manufacturer himself. In a Georgia case a railroad company had contracted to build a side line, and haul the entire output of lumber of the other party to the contract which on its part agreed to ship its entire output by the railroad. It was held that the right to compel performance by the railroad company could not be assigned by the other party. *Tifton, etc., Railroad Co. v.*

even though the assignee is a corporation formed by the assignor and controlled by him, the result is the same.⁵⁹

§ 422. Express prohibition of assignment.

As rights in contract are based on the expressed intention of the parties, such rights by agreement may be limited to the original promisee. It may also be agreed that a contractual duty shall not be delegated.⁶⁰ Thus, in an agreement to convey real estate it is not unusual to provide that the vendee shall not assign his right to a conveyance.⁶¹ The obligation of a carrier to deliver goods is sometimes limited by making the bill of lading not assignable.⁶² In obligations for the payment of money it is not common to forbid assignment where the money is absolutely due. In insurance policies, however, it is common to prohibit assignment before loss, and in such a contract the provision is natural, for insurance is a contract of indemnity, and the risk run may well be altered if the money payable under the policy is assigned before liability on it has arisen,⁶³ though except for such a prohibition in the policy it

Bedgood, 116 Ga. 945, 43 S. E. 257. See also *Sargent Glass Co. v. Matthews Land Co.*, 35 Ind. App. 45, 72 N. E. 474.

⁵⁹ In *Nassau Hotel Co. v. Barnett & Barse Corp.*, 162 N. Y. App. D. 381, 147 N. Y. S. 283, the owner of a hotel contracted with Barnett & Barse that they should manage it for a number of years. Barnett & Barse formed the defendant corporation and assigned the contract to it. The court held the other party to the contract entitled to withdraw from it.

⁶⁰ Ordinances or statutes may likewise so provide as to particular contracts. *Williams Engineering, etc., Co. v. New York*, 175 N. Y. App. D. 571, 162 N. Y. S. 381.

⁶¹ *Lockerby v. Amon*, 64 Wash. 24, 116 Pac. 463, 35 L. R. A. (N. S.) 1064; *Andrew v. Meyerdirck*, 87 Md. 511, 40 Atl. 173. Cf. *Cheney v. Bilby*, 74 Fed. 52, 20 C. C. A. 291, 36 U. S. App. 720; *Johnson v. Eklund*, 72 Minn. 195, 75

N. W. 14; *Wagner v. Cheney*, 16 Neb. 202, 20 N. W. 222; and see *Thomassen v. DeGoey*, 133 Ia. 278, 110 N. W. 581; 119 Am. St. Rep. 605. Cf. *Cowart v. Singletary*, 140 Ga. 435, 79 S. E. 196.

⁶² *Bonds-Foster Lumber Co. v. Northern Pac. R. Co.*, 53 Wash. 302, 101 Pac. 877. See also *Williston on Sales*, § 412.

⁶³ If such a provision, therefore, is contained in an insurance policy the policy is invalidated if an assignment is made before loss. *Spare v. Home Mut. Ins. Co.*, 17 Fed. 568, 571; *Prudential Ins. Co. v. Ritchey (Ind.)*, 119 N. E. 369; *Moise v. Mutual Reserve Fund Life Assoc.*, 45 La. Ann. 736, 13 So. 170 (life policy); *National Mutual Aid Society v. Lupold*, 101 Pa. 111 (life policy). In *Lynde v. Newark Ins. Co.*, 139 Mass. 57, 29 N. E. 222, an assent to an absolute transfer only of a fire policy was held not to protect an assignment absolute in form, but in fact intended as collateral security.

may be assigned before maturity.⁶⁴ But if such a construction of a policy is possible, an assignment of a right which has already accrued under the policy is held not to be within prohibition against assignment;⁶⁵ and even though the policy clearly forbids assignment after as well as before loss, it has been held that the provision is void,⁶⁶ and the same decision has been made in regard to the assignment of other money claims.⁶⁷ It can hardly be admitted, however, that public policy forbids a contract to pay money to the promisee and to the promisee only without the intervention of an agent, or a contract to pay money, only if the beneficial interest in the claim still is in the promisee.⁶⁸ "A covenantor is not to be held beyond his undertaking, and he may make that as narrow as he likes;"⁶⁹ though doubtless clear language should be required to lead to such a construction.⁷⁰ The right of redemption

⁶⁴ *Miller v. Campbell*, 140 N. Y. 457, 462, 35 N. E. 651 (life policy).

⁶⁵ *Moffitt v. Phenix Ins. Co.*, 11 Ind. App. 233, 38 N. E. 835 (fire policy); *Morley v. Liverpool, etc., Ins. Co.*, 76 Minn. 285, 79 N. W. 103 (fire policy); *Mellen v. Hamilton Fire Ins. Co.*, 17 N. Y. 609, 615 (fire policy); *Pennebaker v. Tomlinson*, 1 Tenn. Ch. 598, 601; *Bentley v. Standard Fire Ins. Co.*, 40 W. Va. 729, 23 S. E. 584 (fire policy). See also *Lazarus v. Commonwealth Ins. Co.*, 5 Pick. 76 (marine policy).

⁶⁶ *Spare v. Home Mutual Ins. Co.*, 17 Fed. 568; *Pennebaker v. Tomlinson*, 1 Tenn. Ch. 598, 601; *Nease v. Aetna Ins. Co.*, 32 W. Va. 283, 9 S. E. 233 (fire policy). See also *Hobbs v. McLean*, 117 U. S. 567, 6 S. Ct. 870, 29 L. Ed. 940 (this case involved a statutory provision against assignment); *Fortunato v. Patten*, 147 N. Y. 277, 41 N. E. 572.

⁶⁷ *In Bank of United States v. Public Bank*, 88 N. Y. Misc. 568, 151 N. Y. S. 26, there was a rule of the bank which required the depositor to appear *in person* to withdraw his account. The depositor assigned his account to the plaintiff, who sought to recover

from the bank. The court held that the rule was a reasonable one as regards the depositor, but that it would not justify the bank's refusal to pay the assignee for the reason that the bank is a debtor and "cannot make rules and regulations which will limit the right to assign the debt."

⁶⁸ *In Bonds-Foster Lumber Co. v. Northern Pac. R. Co.*, 53 Wash. 302, 307, 101 Pac. 877, the court said: "One who accepts an assignment of a contract, which by express terms is made non-assignable acquires only a cause of action against the assignor."

⁶⁹ *Holmes, J.*, in *Portuguese-American Bank v. Welles*, 242 U. S. 7, 37 S. Ct. Rep. 3, 61 L. Ed. 116.

⁷⁰ *In Tabler v. Sheffield Land Co.*, 79 Ala. 377, 58 Am. Rep. 593, and *Barringer v. Bes Line Construction Co.*, 23 Okla. 131, 99 Pac. 775, 21 L. R. A. (N. S.) 597, it was provided that certain time checks should be payable only when receipted in person by the payee. It was held that an assignee had no right against the debtor. See also *Burck v. Taylor*, 152 U. S. 634, 38 L. Ed. 578, 14 S. Ct. 696; *La Rue v. Grzesinger*, 84 Cal. 281, 24 Pac. 42,

evidenced by trading stamps, though ordinarily assignable,⁷¹ may by express terms of the contract be confined to assignees answering a particular description.⁷² So a duty which might ordinarily be performable by an agent may by the express terms of the contract be made a personal duty, or oversight of the performance may be made a personal duty. Thus an obligation to build a house may by its terms forbid assignment. This provision would not involve the conclusion that any agent over whom the contractor exercised supervision as a master might not be employed, but it would forbid the delegation of the duty of supervision. Where a bilateral contract in terms forbids assignment, it becomes a matter of construction what is meant. Is it intended that a duty under the contract shall not be delegated, or is it intended that a right shall not be assigned, or are both prohibitions intended? When a contract for building or other work for instance forbids assignment, does it mean only that the builder shall not delegate his duties, or not only this but also that he shall not assign his right to the payments to which he is entitled? It is probable that on a fair construction the prohibition will generally be found to relate only to the delegation of his duty by the builder.⁷³ But

18 Am. St. Rep. 179; *Mueller v. Northwestern Univ.*, 195 Ill. 236, 63 N. E. 110, 88 Am. St. Rep. 194; *State v. Kent*, 98 Mo. App. 281, 71 S. W. 1066; *Devlin v. Mayor*, 63 N. Y. 14, 17. But see *Bewick Lumber Co. v. Hall*, 94 Ga. 539, 21 S. E. 154; *Weber v. Rosenheim*, 37 Ill. App. 72; *Herrick v. Edwards*, 106 Mo. App. 633, 81 S. W. 466; *Aldridge Lumber Co. v. Graves* (Tex. Civ. App.), 131 S. W. 846.

⁷¹ *Sperry & Hutchinson Co. v. Hertzberg*, 69 N. J. Eq. 264, 60 Atl. 368.

⁷² *Sperry & Hutchinson Co. v. Weber*, 161 Fed. 219, 22 Harv. L. Rev. 50.

⁷³ *Bank of Harlem v. Bayonne*, 48 N. J. Eq. 246, 21 Atl. 478. See for other instances of such contracts, *Staples v. Somerville*, 176 Mass. 237, 57 N. E. 380; *Wakefield v. American Surety Co.*, 209 Mass. 173; *Barringer*

v. Bes Line Construction Co., 23 Okla. 131, 99 Pac. 775, 21 L. R. A. (N. S.) 597; *Bonds-Foster Lumber Co. v. Northern Pacific R. Co.*, 53 Wash. 302, 101 Pac. 877. See also *De Vita v. Loprete*, 77 N. J. Eq. 533, 77 Atl. 536, Ann. Cas. 1912 A. 362; *Fortunato v. Patten*, 147 N. Y. 277, 41 N. E. 572. In *Omaha v. Standard Oil Co.*, 55 Neb. 337, 75 N. W. 859, however, a provision in a contract for the lighting of streets that the contract should not be assignable was held to invalidate an assignment of certain instalments of the payment which had become due. It may be questioned whether this decision is sound. The court said that the assignment would compel "the city to deal with strangers and to determine at its peril which of the contesting claimants were entitled to the fund. This may have been one

it may be so clearly stated to be applicable to the right as well as the duty as to forbid another construction.⁷⁴

And in contracts of other kinds assignment may be prohibited, or allowed effect only on certain conditions.⁷⁵ But a provision in a contract of service that an assignment of wages would subject an employee to immediate dismissal does not make an assignment ineffectual.⁷⁶

A prohibition of assignment or a condition restricting performance of the debtor's obligation to the original promisee is intended for the benefit of the debtor and cannot affect the equitable rights of the assignor and assignee as between themselves.⁷⁷ Accordingly if the assignor should collect the assigned claim he would be bound to pay what he had collected to the assignee. The debtor also, though entitled to object, may waive his objection to the prohibition;⁷⁸ and tacit permission, after notice of the assignment, that the assignee may continue performance, amounts to a waiver.⁷⁹ Nor can a junior assignee

of the very contingencies contemplated by the city and against which it sought to provide by making the contract non-assignable. Their object in view may have been to prevent the company from losing interest in the performance of the contract by divesting itself of all beneficial interests therein." While it seems clear that by plain language the right to the payments might be confined to the original contractor only, it does not seem that the possibilities suggested are such as to require the meaning which the court gave to the prohibition against assignment. See also *Murphy v. Plattsmouth*, 78 Neb. 163, 110 N. W. 749.

⁷⁴ *E.g.*, in *Portuguese-American Bank v. Welles*, 242 U. S. 7, 37 S. C. Rep. 3, 61 L. Ed. 116.

⁷⁵ *Zetterlund v. Texas Land Co.*, 55 Neb. 355, 75 N. W. 860. But see *Bewick Lumber Co. v. Hall*, 94 Ga. 539, 21 S. E. 154, in which it was held that a statutory provision making choses in action assignable, overrode

the provision of the obligation assigned. See also the provision of the Iowa statute making the assignment of "an instrument" effective in spite of a prohibition contained in it but subject to any defence or counterclaim, which the maker might have prior to suit brought. *Wing v. Page*, 62 Ia. 87, 11 N. W. 639, 17 N. W. 181.

⁷⁶ *Wabash R. Co. v. Smith*, 134 Ill. App. 574.

⁷⁷ *In re Turcan*, 40 Ch. D. 5; *Portuguese-American Bank v. Welles*, 242 U. S. 7, 37 Sup. Ct. Rep. 3.

⁷⁸ *Union Collection Co. v. Oliver*, 23 Cal. App. 318, 137 Pac. 1082; *Todd v. Guffin*, 55 Ind. App. 605, 104 N. E. 519; *Grigg v. Landis*, 21 N. J. Eq. 494; *Hackett v. Campbell*, 10 N. Y. App. Div. 523, 42 N. Y. S. 47; *Brewster v. Hornellsville*, 35 N. Y. App. Div. 161, 54 N. Y. S. 904; *Sharp v. Edgar*, 3 Sanford, 381.

⁷⁹ *Staples v. Somerville*, 176 Mass. 237, 57 N. E. 390, and see cases cited in the preceding note.

object to the priority of a senior assignment on the ground of a prohibition in the contract against such an assignment, if the debtor waives the objection.⁸⁰

§ 423. Express permission of assignment.

Rights which would not otherwise be capable of assignment because too personal in their character, and duties the performance of which for a similar reason could not be delegated, may be assigned or delegated if the contract so provides.⁸¹ It is not infrequent for promises in contracts to be made to the promisee or his assigns. The addition of the word "*assigns*" does not make the promise negotiable, nor does it even allow the assignee to sue in his own name, except when statutes allow the assignee of any assignable contract to sue in this way. The insertion of the word or its equivalent, however, does indicate a willingness on the part of the obligor to render performance to an assignee if so desired. Thus where an option expressly states that the right is given to the promisee or his assigns, it may clearly be enforced by an assignee.⁸²

⁸⁰ In *Fortunato v. Patten*, 147 N. Y. 277, 41 N. E. 572, a contract with a city prohibited assignment without consent of the city. Two assignments were made, the first without the consent of the city, the second with its consent, but on being sued, the city paid money into court to be distributed as equity required; the first assignee was held entitled to priority. See further as to waiver of the objection, *Wilson v. Reuter*, 29 Ia. 176; *Burnett v. Jersey City*, 31 N. J. Eq. 341.

⁸¹ Thus the contracts of professional ball players often contain provisions enabling a club which has employed a player to assign to another club, the right to his services. See *Griffin v. Brooklyn Ball Club*, 68 N. Y. App. D. 566, 73 N. Y. S. 864, *affd.* 174 N. Y. 535, 66 N. E. 1109; *Baseball Players' Fraternity v. Boston, etc., Club*, 166 N. Y. App. D. 484, 151 N. Y. S. 557.

⁸² *Wheeling Creek Gas, Coal, etc. Co.,*

v. Elder, 170 Fed. 215; *Wilson v. Seybold*, 216 Fed. 975; *Laffan v. Naglee*, 9 Cal. 662, 70 Am. Dec. 678; *Blakeman v. Miller*, 136 Cal. 138, 68 Pac. 587, 89 Am. St. Rep. 120; *Simmons v. Zimmerman*, 144 Cal. 256, 79 Pac. 451; *Gustin v. Union School District*, 94 Mich. 502, 54 N. W. 156, 34 Am. St. Rep. 361. Even without the word assigns, the same result should be reached. See *supra*, §§ 415. See further as to the effect of the word "*assigns*" *Ladd v. Union Mut. L. Ins. Co.*, 116 Fed. 878; *American Smelting & Co., v. Bunker Hill, etc., Co.*, 248 Fed. 172; *Sanborn v. First Natl. Bank*, 9 Colo. App. 245, 47 Pac. 660; *Chattanooga R. & C. R. Co. v. Warthen*, 98 Ga. 599, 25 S. E. 988; *Torrence v. Shedd*, 156 Ill. 194, 41 N. E. 95, 42 N. E. 171; *Northwestern Cooperage Co. v. Byers*, 133 Mich. 534, 95 N. W. 529; *Alden v. George W. Frank Imp. Co.*, 57 Neb. 67, 77 N. W. 369; *Rice v. Gibbs*, 33 Neb. 460, 50 N. W. 436; *Hudson River Water*

Notwithstanding the use of such words, however, the intention of the parties must be gathered from a consideration of all the terms and of the entire tenor of the contract, construed in the light of surrounding circumstances, and taking everything into consideration it may appear that assignment was not to be permitted without the assent of the other contracting party.⁸³

§ 424. What amounts to assignment.

No words of art are required to constitute an assignment; any words which fairly indicate an intention to make the assignee owner of a claim are sufficient,⁸⁴ and the same construction should be given the words whether they are oral or written.⁸⁵ An unaccepted offer to assign a claim is not itself

Power Co. v. Glens Falls Gas, etc., Co., 90 N. Y. App. Div. 513, 85 N. Y. S. 577; *Douglas v. Hennessy*, 15 R. I. 272, 3 Atl. 213; *Hale v. Schults*, 3 McCord, 218; *Columbia Water Power Co. v. Columbia*, 5 S. Car. 225, 234; *Puffer v. Welch*, 144 Wis. 506, 129 N. W. 525.

⁸³ In *Lockerby v. Amon*, 64 Wash. 24, 116 Pac. 463, 35 L. R. A. (N. S.) 1064, a contract for the sale of land provided that no assignment of the vendee's right should be made without the vendor's assent, yet the vendor's promise was to the vendee or his assigns. It was held that "assigns" meant only such assignees as had been accepted by the vendor. See also *Central Brass & Stamping Co. v. Stuber*, 220 Fed. 909, 136 C. C. A. 475; *Montgomery v. DePicot*, 153 Cal. 509, 96 Pac. 305, 126 Am. St. Rep. 84; *Wooster v. Crane*, 73 N. J. Eq. 22, 66 Atl. 1093; *Jetter v. Scollan*, 48 N. Y. Misc. 546, 96 N. Y. S. 274; *Nassau Hotel Co. v. Barnett & Barse Corp.*, 162 N. Y. App. D. 381, 147 N. Y. S. 283; *Swarts v. Narragansett Elec. Lighting Co.*, 26 R. I. 436, 59 Atl. 111.

⁸⁴ *Christmas v. Russell*, 14 Wall. 69, 84, 20 L. Ed. 762; *Clark v. Sigua Iron Co.*, 81 Fed. 310, 312, 39 U. S. App.

753, 26 C. C. A. 423; *United States Guaranty Co. v. United States*, 189 Fed. 339, 111 C. C. A. 71; *Southern Mut. Life Assoc. v. Durdin*, 132 Ga. 495, 64 S. E. 264; *Kretzer v. Lorschbaugh*, 117 Md. 562, 83 Atl. 1027; *Barry v. Curley*, 202 Mass. 42, 88 N. E. 437; *Macklin v. Kinealy*, 141 Mo. 113, 41 S. W. 893; *Holmes v. Evans*, 129 N. Y. 140, 145, 29 N. E. 233, 234; *Levins v. Stark*, 57 Ore. 189, 110 Pac. 980; *Tatum v. Ballard*, 94 Va. 370, 26 S. E. 871. In *Goldman v. Murray*, 164 Cal. 419, 129 Pac. 462, one who had a claim against a corporation, received its notes therefor, and indorsed them to another. The notes were invalid but the indorsee was held to be the assignee of the indorser's original claim against the corporation. In *Kellas v. Slack & Slack Co.*, 129 Md. 535, 99 Atl. 677, a contractor was given a voucher check which indicated that the maker reserved part of what was due with which to pay certain debts of the contractor. The indorsement of the check by the latter was held to amount to an assignment by the contractor to their creditors specified in the check of the balance due him.

⁸⁵ See *infra*, § 430.

an assignment;⁸⁶ nor is a general suggestion that the debtor pay the so-called assignee;⁸⁷ nor an agreement which reserves to the original owner of the claim a right of revocation.⁸⁸

It is sometimes stated that acceptance by the assignee is necessary to the validity of an assignment; but unless the assignment is offered in return for some proposed act or promise by the assignee, no formal acceptance seems necessary. If the assignment is by deed, the requisites for making a deed, including delivery, must be observed; and in a jurisdiction where acceptance of a deed is necessary for its inception, it would be necessary in case of a deed of assignment.⁸⁹ But under the fiction of a presumed acceptance, the requirement would doubtless be generally held to involve no more than this, that the assignor must make a clear expression to the assignee, or to some one on his behalf, of an intention to make a present assignment.⁹⁰

§ 425. Orders upon a debtor, unless directing payment on account of a particular debt, are not assignments.

Whether orders, drafts, and checks constitute assignments, total or partial, of the funds upon which they are drawn, has been much litigated. A mere order to pay a sum of money if it involves no assertion express or implied that the money is owing to the drawer or if it requests payment irrespective of the existence of any debt, cannot amount to an assignment of a claim which in fact the drawer has against the drawee. And it is of the essence of a negotiable bill of exchange that it shall not be made payable out of a particular fund. Therefore, a bill of exchange is not an assignment, nor is any order which, like a bill of exchange, requests payment to be made irrespective of any fund due to the drawer.⁹¹ If, however, an order which

⁸⁶ *Commercial Bank v. Rufe*, 92 Fed. 789; *Lamb v. Council Bluffs Ins. Co.*, 70 Ia. 238, 30 N. W. 497.

⁸⁷ *Watson v. Wellington*, 1 Russ. & M. 602.

⁸⁸ *Christmas v. Russell*, 14 Wall. 69, 70, 20 L. Ed. 762; *In re Wood's Est.*, 243 Pa. 211, 89 Atl. 975.

⁸⁹ See *supra*, § 213.

⁹⁰ See *Randolph Bank v. Armstrong*,

11 Ia. 515; *Kellas v. Slack & Slack Co.*, 129 Md. 535, 99 Atl. 677.

⁹¹ *Rodick v. Gandell*, 12 Beav. 325; *Percival v. Dunn*, 29 Ch. D. 128; *Laclede Bank v. Schuler*, 120 U. S. 511, 7 S. Ct. 644, 30 L. Ed. 704; *Bosworth v. Jacksonville Nat. Bank*, 64 Fed. 615, 24 U. S. App. 413, 12 C. C. A. 331; *Anderson v. Jones*, 102 Ala. 537, 14 So. 871; *Lee v. Wimberly*, 102 Ala. 539,

specifically requests payment of all or part of a particular fund or claim to which the drawer is entitled, is delivered to the payee, the order is construed as an assignment.²² If such an

15 So. 444; *Cashman v. Harrison*, 90 Cal. 297, 27 Pac. 283; *Meldrum v. Henderson*, 7 Colo. App. 256, 43 Pac. 148; *Windsor Cement Co. v. Thompson*, 86 Conn. 511, 86 Atl. 1; *Talladega Mercantile Co. v. Robinson, etc., Co.*, 96 Ga. 815, 22 S. E. 1003; *Hall v. Flanders*, 83 Me. 242, 22 Atl. 158; *Exchange Bank v. Sutton Bank*, 78 Md. 577, 585, 28 Atl. 563, 23 L. R. A. 173; *Holbrook v. Payne*, 151 Mass. 383, 24 N. E. 210, 21 Am. St. Rep. 456; *Sunderlin v. Mecosta County Savings Bank*, 116 Mich. 281, 74 N. W. 478; *Bush v. Foote*, 58 Miss. 5, 38 Am. Rep. 310; *Bank of Commerce v. Bogy*, 44 Mo. 13, 100 Am. Dec. 247; *Jones v. Pacific Wood, etc., Co.*, 13 Nev. 359, 29 Am. Rep. 308; *Bradley-Currier Co. v. Bernz*, 55 N. J. Eq. 10, 35 Atl. 832; *Schmittler v. Simon*, 101 N. Y. 554, 5 N. E. 452, 54 Am. Rep. 737; *Muller v. Kling*, 149 N. Y. App. Div. 176, 133 N. Y. S. 614; *Marriner v. John L. Roper Lumber Co.*, 113 N. C. 52, 18 S. E. 94 (but see *Howell v. Boyd Mfg. Co.*, 116 N. C. 806, 22 S. E. 5); *First Nat. Bank v. School District*, 31 Okl. 139, 129 Pac. 614, 39 L. R. A. (N. S.) 655; *Commonwealth v. American L. I. Ins. Co.*, 162 Pa. 586, 29 Atl. 660, 42 Am. St. Rep. 844; *Harris County v. Campbell*, 68 Tex. 22, 3 S. W. 243, 2 Am. St. Rep. 467; *First Nat. Bank v. Texas Moline Plow Co. (Tex. Civ. App.)*, 168 S. W. 420; *Gardner v. Moore's Adm.*, 122 Va. 10; 94 S. E. 162. In *Sheets v. Coast Coal Co.*, 74 Wash. 327, 133 Pac. 433, the principle was stated, and applied, but the order being to pay "from my monthly pay," the holding of the court that the order was a bill of exchange was erroneous. See also *Commercial Nat. Bank v. Portland*, 37 Or. 33, 54 Pac. 814, 60 Pac. 563. But see *contra*, *Roberts v. Corbin*, 26

Ia. 315, 96 Am. Dec. 146; *DeLaval Separator Co. v. Sharpless*, 134 Ia. 28, 111 N. W. 438; *Columbia Nat. Bank v. German Nat. Bank*, 56 Neb. 803, 77 N. W. 346; *Conway v. Cutting*, 51 N. H. 407; *Pollard v. Pollard*, 68 N. H. 356, 39 Atl. 329; *Howell v. Boyd Mfg. Co.*, 116 N. C. 806, 22 S. W. 5. *Cf. McDaniel v. Maxwell*, 21 Oreg. 202, 27 Pac. 952, 28 Am. St. Rep. 740; *Skobis v. Ferge*, 102 Wis. 122, 78 N. W. 426; *Dillman v. Carlin*, 105 Wis. 14, 80 N. W. 932, 76 Am. St. Rep. 902.

²² *Israel v. Douglas*, 1 H. Bl. 239, 242; *Yeates v. Groves*, 1 Ves. Jr. 280; *Burn v. Carvalho*, 4 Mylne & C. 690; *Percival v. Dunn*, 29 Ch. D. 128; *Durham v. Robertson*, [1898] 1 Q. B. 765; *Christmas v. Russell*, 14 Wall. 69, 84, 20 L. Ed. 762; *In re Hanna*, 105 Fed. 587 (partial); *United States v. Ferguson*, 78 Fed. 103, 24 C. C. A. 1; *The Elmbank*, 72 Fed. 610 (partial); *Third Nat. Bank v. Atlantic City*, 130 Fed. 751, 65 C. C. A. 177; *Curtis v. Walpole Tire & Rubber Co.*, 218 Fed. 145, 134 C. C. A. 140; *Carroll v. Kelly*, 111 Ala. 661, 20 So. 456; *Samstag v. Orr*, 101 Ark. 582, 142 S. W. 1127; *Wheatley v. Strobe*, 12 Cal. 92, 73 Am. Dec. 522; *Goldman v. Murray*, 164 Cal. 419, 129 Pac. 462; *Puterbaugh v. McCray*, 25 Cal. App. 469, 144 Pac. 149; *Central Nat. Bank v. Spratlen*, 7 Col. App. 430, 43 Pac. 1048 (partial); *Walton v. Horkan*, 112 Ga. 814, 38 S. E. 105; *Lawson v. Lyon*, 136 Ga. 214, 71 S. E. 149 (partial); *Brown v. Southern R. Co.*, 140 Ga. 539, 79 S. E. 152; *Young v. Jones*, 180, Ill. 216 54 N. E. 235 (partial); *Metcalf v. Kincaid*, 87 Ia. 443, 54 N. W. 867, 43 Am. St. Rep. 391; *Fairbanks v. Tafel*, 159 Ky. 602, 167 S. W. 887; *Philadelphia, etc., Lumber Co. v. Garrison*, 160 Ky. 329, 169 S. W. 714; *Harlow v. Bartlett*, 96 Me. 294, 52 Atl.

order is intended to give a power of attorney to the payee to collect the sum named in the order and to keep it for him it may well be regarded as manifesting an intent to make the payee owner of the claim; so that it is true not only that the assignment implies an irrevocable power of attorney but also a power of attorney to collect with a right to keep, import and export the assignment.⁹³ And this may be true though the order is payable only upon a contingency.⁹⁴ It should be observed, however, that it is not only possible but common to give orders to agents or servants to receive money or goods on behalf of the owner. Such orders are not assignments. Under the facts of each case the court must ascertain the natural construction to be put upon the facts.⁹⁵ Whether a check operates as an assignment *pro tanto* of the account on which it is drawn is a matter which has involved a difference of opinion. Under an ordinary bill of exchange delivery of a check amounts to

638, 90 Am. St. Rep. 346; *Jenness v. Wharff*, 87 Me. 307, 32 Atl. 908; *Hartley v. Tapley*, 2 Gray, 565; *Andrews Electric Co. v. St. Alphonse, etc., Soc. (Mass.)*, 123 N. E. 103 (partial); *Bush v. Foote*, 58 Miss. 5, 38 Am. Rep. 310; *White v. Fernald-Woodward Co.*, 76 N. H. 83, 79 Atl. 641; *Bradley Currier Co. v. Berns*, 55 N. J. Eq. 10, 35 Atl. 832, *Morton v. Naylor*, 1 Hill, 583; *Brill v. Tuttle*, 81 N. Y. 454, 37 Am. Rep. 515 (partial); *Crouch v. Muller*, 141 N. Y. 495, 36 N. E. 394 (partial); *Robbins v. Klein*, 60 Oh. St. 199, 54 N. E. 94 (partial); *Gillette v. Murphy*, 7 Okla. 91, 54 Pac. 413; *Willard v. Bullen*, 41 Or. 25, 67 Pac. 924 (partial); *Bank v. Rhea County (Tenn. Ch.)*, 59 S. W. 442 (partial); *A. A. Fielder Lumber Co. v. Smith (Tex. Civ. App.)*, 151 S. W. 605; *Youngberg v. El Paso Brick Co. (Tex. Civ. App.)*, 155 S. W. 715 (partial); *Johnson v. Belanger*, 85 Vt. 249, 81 Atl. 621; *Chesapeake Building Ass. v. Coleman*, 94 Va. 433, 26 S. E. 843; *Hawes v. Wm. R. Trigg*, 110 Va. 165, 65 S. E. 538; *Dickerson v. Spokane*, 26 Wash. 292, 66 Pac. 381, 35 Wash.

414, 77 Pac. 730 (partial) (*cf. Nelson Bennett Co.*, 31 Wash. 71 Pac. 749); *Bank v. Gibson*, 21 613; *Quick v. Colchester South*, 30 645 (partial). See as to the similar effect of an order for delivery of goods *Horowitz v. David*, 145 N. Y. S. 96.

But the rule of the Federal Circuit is said to be otherwise in regard to an order for only part of a specific fund. *Bosworth v. Jacksonville Nat. Bank*, 64 Fed. 615, 12 C. C. A. 331, 24 U. S. App. 413; *Sheatz v. Markley*, 249 315, 161 C. C. A. 323; *Schmitt v. Strach*, 251 Fed. 874, 164 C. C. A. 628; *Andrews v. Frierson*, 134 Ala. 626 So. 6.

⁹³ Such a power of attorney amounts to an assignment. *Porter v. Hann*, 36 Ark. 591; *Cobb v. Champlin*, Miss. 406; *Keys' Estate*, 137 Pa. 20 Atl. 710, 21 Am. St. Rep. 896. *Hall v. Jackson*, 20 Pick. 194.

⁹⁴ *O'Connell v. Worcester*, 225 Mass. 159, 114 N. E. 201.

⁹⁵ *Ex parte Hall*, 10 Ch. D. 6; *White v. Coleman*, 130 Mass. 3. See also *Loughlin v. Larson*, 27 S. D. 376, 131 N. W. 304.

representation that the drawee has funds with which to pay the check and is bound to do so. It may be urged, therefore, that a check is an order to pay a specific claim or part of it.⁹⁶ The argument assumes, what is indeed sometimes stated, that the reason why a bill of exchange does not operate as an assignment is because "the purchaser of a draft is supposed to take it in reliance upon the responsibility of the drawer and he has no other reliance until it is accepted."⁹⁷ The answer to this argument, however, is that a check like any bill of exchange is an order to the drawee to pay the sum ordered irrespective of the condition of the drawer's account, and that this is the true reason why a bill of exchange is not an assignment. The drawer commits a fraud by drawing without funds to meet his check, but none the less he orders the bank to pay. Accordingly the prevailing view is that a check is not an assignment.⁹⁷ And

⁹⁶ In the following cases a check was held to operate as an assignment: *Niblack v. Park Nat. Bank*, 169 Ill. 517, 48 N. E. 438, 39 L. R. A. 159, 61 Am. St. Rep. 203; *Gage Hotel Co. v. Union Nat. Bank*, 171 Ill. 531, 49 N. E. 420, 39 L. R. A. 479, 63 Am. St. Rep. 270; *First Nat. Bank v. Keith*, 183 Ill. 475, 56 N. E. 179; *Findlay v. Corn Exchange Nat. Bank*, 166 Ill. App. 57; *Lester v. Given Jones & Co.*, 8 Bush, 357; *Gordon v. Mütchler*, 34 La. Ann. 604; *Wasgatt v. First Nat. Bank*, 117 Minn. 9, 134 N. W. 224, 43 L. R. A. (N. S.) 109; *Columbia Nat. Bank v. German Nat. Bank*, 56 Neb. 803, 77 N. W. 346; *Southern Cabinet Co. v. First Nat. Bank*, 87 S. Car. 79, 68 S. E. 962; *Doty v. Caldwell* (Tex. Civ. App.), 38 S. W. 1025 (but see *contra*, *House v. Kountze*, 17 Tex. Civ. App. 402, 43 S. W. 561); *Hulings v. Hulings Lumber Co.*, 38 W. Va. 351, 18 S. E. 620; *Pease v. Landauer*, 63 Wis. 20, 22 N. W. 847, 53 Am. Rep. 247; *Dillman v. Carlin*, 105 Wis. 14, 80 N. W. 932, 76 Am. St. Rep. 902; *Ræsser v. National Exchange Bank*, 112 Wis. 591, 88 N. W. 618, 56 L. R. A. 174, 88 Am. St. Rep. 979. In some of these

cases it is held or suggested that presentment to the bank makes a check an assignment though prior to such presentment it was not. This distinction is untenable. If the transaction between drawer and payee amounted to an assignment, it would be effective without notice to the bank, see *infra*, § 434. On the other hand, if the check was not in its nature an assignment when delivered, presentment to the bank of a paper which was not an assignment could not change its nature. In *Walters Nat. Bank v. Bantock*, 41 Okl. 153, 137 Pac. 717, the bank had received the check and written "in escrow" upon it pending completion of the transaction to which it related. This was held an assignment.

^{96a} *Moore v. Davis*, 57 Mich. 251, 255, 23 N. W. 800.

⁹⁷ *Wharton v. Walker*, 4 B. & C. 163; *Yates v. Bell*, 3 B. & Al. 643; *Schroeder v. Central Bank*, 34 L. T. Rep. 735; *Bank of Republic v. Millard*, 10 Wall. 152, 19 L. Ed. 897; *First Nat. Bank v. Whitman*, 94 U. S. 343, 24 L. Ed. 229; *Bien v. Robinson*, 208 U. S. 423, 28 S. Ct. 379, 52 L. Ed. 556; *Poland v. Love*, 164 Fed. 186, 91 C. C. A. 466;

this view has found expression in the Uniform Negotiable Instruments Law.⁹⁸

It is not always easy to determine whether an order directing the payment of a sum of money requests payment in any event or merely the discharge or partial discharge of a particular claim. It has for centuries been settled law that a bill of exchange is not rendered non-negotiable by the fact that payment according to the terms of the bill is to be charged to a certain account, or that the drawee is to reimburse himself in a particular way.⁹⁹ This is so provided in the Uniform Negotiable

Donohoe-Kelly Banking Co. v. Southern Pac. Co., 138 Cal. 183, 71 Pac. 93, 94 Am. St. Rep. 28; Le Breton v. Stanley Contracting Co., 15 Cal. App. 429, 114 Pac. 1028; John M. C. Marble Co. v. Merchants' Nat. Bank, 15 Cal. App. 347, 115 Pac. 59; Colorado Nat. Bank v. Boettcher, 5 Col. 185, 40 Am. Rep. 142; Reviere v. Chambliss, 120 Ga. 714, 48 S. E. 122; Harrison, Receiver, v. Wright, 100 Ind. 515; Clark v. Toronto Bank, 72 Kans. 1, 82 Pac. 582; Moses v. Franklin Bank, 34 Md. 574; Bullard v. Randall, 1 Gray, 605, 61 Am. Dec. 433; Carr v. Natl. Security Bank, 107 Mass. 45, 9 Am. Rep. 6; Second Bank v. Williams, 13 Mich. 282; McIntyre v. Farmers', etc., Bank, 115 Mich. 255, 73 N. W. 233; Creveling v. Bloomsbury Nat. Bank, 46 N. J. L. 255, 50 Am. Rep. 417; Duncan v. Berlin, 60 N. Y. 151; Risley v. Phoenix Bank, 83 N. Y. 318, 28 Am. Rep. 421, *affd.*, 111 U. S. 125, 4 S. Ct. 322, 28 L. Ed. 374; Chaffee v. Bank, 40 Oh. St. 1; First Nat. Bank v. Gish, 72 Pa. 13; First Nat. Bank of Northumberland v. McMichael, 106 Pa. 460; Imboden v. Perrie & Wife, 13 Lea, 504; Central Bank v. Davis (Tex. Civ. App.), 149 S. W. 290.

⁹⁸ Section 189. "A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder, unless and until it accepts or certifies the check."

Infra, § 1209. For decisions under this section, see *Kaesemeyer v. Smith*, 22 Idaho, 1, 123 Pac. 943; *Boswell v. Citizens' Savings Bank*, 123 Ky. 485, 96 S. W. 797; *First Nat. Bank v. Hargis & Co. Bank*, 170 Ky. 690, 186 S. W. 471; *Allen v. Puritan Trust Co.*, 211 Mass. 409, 97 N. E. 916; *Lonier v. State Savings Bank*, 149 Mich. 483, 112 N. W. 1119; *Superior Nat. Bank v. National Bank of Commerce*, 99 Neb. 833, 157 N. W. 1023; *Meuer v. Phenix Nat. Bank*, 94 N. Y. App. Div. 331, 88 N. Y. S. 83; *Schlesinger v. Kurzrok*, 47 Misc. 634, 94 N. Y. S. 442; *Anglo-South American Bank v. National City Bank*, 146 N. Y. S. 457, 161 N. Y. App. Div. 268. But see *Hove v. Stanhope State Bank*, 138 Ia. 39, 115 N. W. 476; *Findlay v. Corn Exchange Bank*, 166 Ill. App. 57. Also see the argument in 2 L. R. A. (N. S.) 86 n. that the Negotiable Instruments Law deprives the payee of a check of only one incident of an assignment—the right to maintain a direct action against the bank. In view of the words of Sec. 189, the argument seems untenable.

⁹⁹ *Macleed v. Sneec*, 2 Strange, 762; *Pierson v. Dunlop*, Cowp. 571; *Griffin v. Weatherby*, L. R. 3 Q. B. 753; *Banner v. Johnston*, L. R. 5 H. L. 157; *In re Boice*, 33 Ch. D. 612; *Defee v. Smith*, 43 Ark. 221; *Redman v. Adams*, 51 Me. 429; *Whitney v. Eliot Natl. Bank*, 137 Mass. 351, 50 Am. Rep. 316; *Schmittler v. Simon*, 101 N. Y. 554,

Instruments Law.¹ These authorities necessarily involve the conclusion that such an order is general and directs payment unconditionally irrespective of the existence or of the sufficiency of the fund referred to. If these decisions are sound, there seems little reason why the same construction should not be applied to non-negotiable orders of the same sort. The New York Court of Appeals so applied it in one case.² But this case seems to have been overruled;³ and in spite of the cases involving the negotiability of an instrument payable to order it is perhaps generally a more accurate interpretation of the intention of the drawer in such cases to suppose either that the payment was intended to be conditional on the existence of the indebtedness referred to, or that that indebtedness was intended to be security for the payment of the order. In each case whether the instrument in terms is or is not payable to order or bearer the essential question is whether a fund is referred to as merely a possible source of reimbursement for the drawee or whether the order is to be paid only from the fund.

§ 426. Whether an unconditional order or bill of exchange may ever be an assignment.

Whether it may be shown that an assignment of a particular fund or part of it was intended, though the order given to the intended assignee makes no mention of a particular fund, and in terms directs payment to be made unconditionally, is a question which has caused considerable difference of judicial opinion. Some courts hold that though a bill of exchange is not of itself an assignment, it is evidence tending to show one,

5 N. E. 452, 54 Am. Rep. 737; Curran v. Little, 40 Oh. St. 397; Coursin v. Ledlie's Adm'r, 31 Pa. 506; Corbett v. Clark, 45 Wis. 403, 30 Am. Rep. 763.

¹ Sec. 3, *infra*, § 1137. See for applications, First Nat. Bank v. Lightner, 74 Kans. 736, 738, 88 Pac. 59, 8 L. R. A. (N. S.) 231, 118 Am. St. Rep. 353; Shepard v. Abbott, 179 Mass. 300, 60 N. E. 782.

² Shaver v. Western Union Tele-

graph Co., 57 N. Y. 459. An order directing the payment of fifty dollars a month until three hundred dollars had been paid, and directing that the payments should be charged to the drawer's salary account, was held not to amount to an assignment.

³ Brill v. Tuttle, 81 N. Y. 454, 457, 37 Am. Rep. 515; Crouch v. Muller, 141 N. Y. 495, 36 N. E. 394. Cf. McDonald v. Ballston Spa, 34 N. Y. Misc. 496, 70 N. Y. S. 279.

and in connection with facts indicating that such was the intent of the drawer, will give the payee a right to the indebtedness of the drawee to the drawer.⁴ And the fact that a check or draft is for the exact balance of the account due from the drawee to the drawer has been held to show an intent to assign the fund.^{4a} It is obvious, however, that if evidence that the debtor owed only one sum is to be regarded as proof that the drawer of an order is requesting payment out of that sum exclusively, almost any check or bill of exchange might be shown to be an assignment. There seems no more reason to suppose that a check for the drawer's entire balance is an assignment of the whole balance than that a check for part of the balance is a partial assignment. For in the latter case as well as the former the inference is strong that the payment was expected to be made from a particular account, but that is not enough. In both cases the check directs the bank to pay the amount of the check irrespective of the debtor's balance,⁵ and the bank could pay and charge the drawer, though there was no balance. In opposition to the authorities which have been cited, other cases hold that a "written instrument which is plain in its terms, cannot be changed into something else by anything that the parties said at the time of making it."⁶ These cases seem sound in denying that an order plainly directing payment without reference to a fund can be construed to mean anything else. The parol evidence rule forbids it. Nor is such an order evidence of an assignment but rather the contrary. It tends to prove that the amount of it was to be

⁴ *First Nat. Bank v. Dubuque, etc.*, R. Co., 52 Ia. 378, 3 N. W. 395, 35 Am. Rep. 280; *Bank of Commerce v. Bogy*, 44 Mo. 13, 100 Am. Dec. 247; *Muth v. St. Louis Trust Co.*, 77 Mo. App. 493; *Central Bank v. Davis* (Tex. Civ. App.), 149 S. W. 290.

^{4a} *Jenness v. Wharff*, 87 Me. 307, 32 Atl. 908; *Muth v. St. Louis Trust Co.*, 77 Mo. App. 493; *Hawes v. Blackwell*, 107 N. C. 196, 12 S. E. 245, 22 Am. St. Rep. 870. See also *Moore v. Davis*, 57 Mich. 251, 23 N. W. 800; *Gardner v. The Nat. City Bank*, 39 Ohio St. 600.

⁵ Therefore, a letter stating that bills

of exchange had been drawn against a particular consignment of goods did not make the bills an assignment. *Cowperthwaite v. Sheffield*, 3 N. Y. 243.

⁶ *Lewis v. Traders' Bank*, 30 Minn. 134, 14 N. W. 587. To the same effect are, *Watson v. Duke of Wellington*, 1 Russ. & M. 602; *Baer v. English*, 84 Ga. 403, 11 S. E. 453, 20 Am. St. Rep. 372; *Hart's Assignees v. Dixon*, 5 Ky. L. Rep. 669; *Bush v. Foote*, 58 Miss. 5, 38 Am. Rep. 310; *Hutter v. Ellwanger*, 4 Lans. 8. Cf. *Reviere v. Chambliss*, 120 Ga. 714, 717, 48 S. E. 122.

paid regardless of the state of accounts between the drawer and drawee. But the discussion seems generally to have been confined to an inquiry whether the order itself could be shown to amount to an assignment. For the reasons given this seems impossible. The fact, however, that an absolute order, negotiable or otherwise, has been given does not preclude the possibility that an assignment of the fund also has been made to secure the payment of the order. There is nothing in the writing to contradict such an intention. If a written assignment were given in connection with a check or other absolute order, it seems difficult to suppose the written assignment would not be given proper effect;⁷ and since an assignment need not be in writing,⁸ except as required by statutes,⁹ it seems to follow that any intent manifested by the drawer of an absolute order that a specific fund shall be assigned to secure payment of the order, would be as operative as a writing. The weight of authority sustains the position that such an intent may be shown orally.¹⁰ It was laid down by Story,¹¹ that a bill of exchange or order which did not purport to be drawn on a particular fund became an assignment when accepted by the drawee and this statement is frequently repeated in the cases.¹² It is, however, not strictly accurate. The acceptance creates a novation which is more than a mere assignment. The payee of the order acquires a new and direct legal right against the acceptor, which could always have been enforced by an action by the payee in his own name, and which is not subject to any defence which might have been set up against

⁷ This was so held in *Hove v. Stanhope State Bank*, 138 Iowa, 39, 115 N. W. 476; although the Negotiable Instruments Law, in force in Iowa, provides that a check is not an assignment.

⁸ See *supra*, § 424, *infra*, § 430.

⁹ See *infra*, § 521.

¹⁰ *Fourth Nat. Bank v. Yardley*, 165 U. S. 634, 644, 41 L. Ed. 855, 17 S. Ct. 439; *Moore v. Lowrey*, 25 Iowa, 336, 95 Am. Dec. 790; *Risley v. Phoenix Bank*, 83 N. Y. 318, 38 Am. Rep. 421; *Throop Grain Cleaner Co. v. Smith*, 110 N. Y. 83, 88, 17 N. E. 671; *Mc-*

Daniel v. Maxwell, 12 Ore. 202, 27 Pac. 952, 28 Am. St. Rep. 740; *The First Nat. Bank of Wellsburg v. Kimberlands*, 16 W. Va. 555. Where a bank book was delivered simultaneously with a check, and the rules of the bank required that the book must be presented in order to secure payment, there was held to be a valid assignment. *Venturi v. Silvio* (Ala.), 73 So. 45.

¹¹ *Mandeville v. Welch*, 5 Wheat. 277, 5 L. Ed. 87.

¹² See cases cited in notes to the preceding section *passim*.

the drawer,¹³ unless the acceptance is conditional.¹⁴ A drawee who was indebted to the drawer for the sum named in the order for the same reason is by his acceptance discharged from further liability to the drawer of the order.¹⁵ An order by the creditor given directly to the debtor requesting him to pay a third person does not in the absence of notice to that person make him an assignee of the claim. The request is merely a revocable mandate.¹⁶ If, however, the creditor should make a contract with his debtor that the latter should pay a third person, the original obligation would thereby be discharged, and under the new contract the rights of the person to whom payment was to be made would be governed by the principle applicable to contracts for the benefit of a third person.¹⁷

§ 427. Orders on a drawee to pay when he has collected.

Sometimes an order is given upon a drawee who has not yet collected the claim to which the order refers. That such an order operates as an assignment of the drawer's claim against the drawee when the money is collected, is unquestionable,¹⁸

¹³ *Walker v. Rostron*, 9 M. & W. 411; *Delaware County Commissioners v. Diebold Safe & Lock Co.*, 133 U. S. 473, 486, 33 L. Ed. 674, 10 S. Ct. 399; *Barlow v. Lande*, 25 Cal. App. 424, 147 Pac. 231; *Page v. Danforth*, 53 Me. 174; *Burrows v. Glover*, 106 Mass. 324; *Thompson v. Emery*, 27 N. H. 269; *Hall v. Jones*, 151 N. C. 419, 66 S. E. 350; *Bentley v. Standard Fire Ins. Co.*, 40 W. Va. 729, 23 S. E. 584; *McEneaney v. Shevlin*, [1912] 1 Ir. Rep. 32. Cf. *Carozza v. Boxley*, 203 Fed. 673, 122 C. C. A. 69; *Curtis v. Walpole Fire Co.*, 218 Fed. 145, 134 C. C. A. 140. In *Getchell v. Maney*, 69 Me. 442, 443, the court said: "In such cases the rights of the plaintiff as assignee are simply the consideration for the new contract, and the new contract is the ground of action. The suit is upon the defendant's promise to the plaintiff, and not 'upon the assignment,' or upon any right derived from the assignment *ex vi facti*."

Similarly the New Jersey Court: "If, however, such an order had been given and accepted by [the debtor] the affair would have reached the stage of novation and [the debtor] would have been liable at law to [the assignee]." *Lanigan v. Bradley & Currier Co.*, 50 N. J. Eq. 201, 214, 24 Atl. 505.

¹⁴ *Hogan v. Globe Mut. & c. Assoc.*, 140 Cal. 610, 74 Pac. 153.

¹⁵ *Buttrick Lumber Co. v. Collins*, 202 Mass. 413, 418, 89 N. E. 138.

¹⁶ *Brockmeyer v. Washington Nat. Bank*, 40 Kans. 744, 21 Pac. 300; *Schreiber v. Keller Engraving Co.*, 57 N. Y. Misc. 644, 108 N. Y. S. 658; *Alvord v. Luckenbach*, 106 Wis. 537, 82 N. W. 535. See also *Glegg v. Rees*, L. R. 7 Ch. 71, 74.

¹⁷ See *McEneaney v. Shevlin*, [1912] 1 Ir. R. 32, 278; *Slaughter v. Bank of Texline* (Tex. Civ. App.), 164 S. W. 27.

¹⁸ See *supra*, § 414.

but whether it operates as an assignment of the claim before it is paid to the drawee, is not so clear. Some decisions hold that it is not an assignment and accordingly a garnishment of the ultimate debtor before he has paid to the drawee of the order is effective,¹⁹ and also a settlement may be made by the drawer with the ultimate debtor.²⁰ It seems, however, that such an order should operate as an assignment if the payee is intended to collect the claim and keep its proceeds. The drawer should hardly be allowed to act in derogation of the order. When he directs the drawee to pay what the latter collects, it is a natural inference that he impliedly undertakes that the drawee shall be allowed to collect without interference. If this implication is proper, the payee of the order has in effect a power which cannot be destroyed to collect the claim from the ultimate debtor through the drawee as an intermediary.²¹

§ 428. Promises to assign or to pay out of a particular fund are not assignments.

It is sometimes said that "every assignment of a chose in action is merely an executory contract which equity considers as executed, and which the law following equity regards as conferring certain rights which the assignor is bound to respect,"²² but there is a distinction between the enforcement by equity of an agreement which the parties intended to take effect as a

¹⁹ *White v. Coleman*, 130 Mass. 316; *In re Cleary*, 9 Wash. 605, 38 Pac. 79. But in *Muller v. Kling*, 209 N. Y. 239, 103 N. E. 138, a purchaser of a draft drawn on a foreign drawee secured by a draft in favor of the foreign drawee drawn on a debtor of the drawer was held entitled to the fund represented by the collateral draft as against an assignee for the benefit of creditors. And see *Nesmith v. Drum*, 8 W. & S. 9, 42 Am. Dec. 260.

²⁰ *Commonwealth v. Cummings*, 155 Pa. 30, 25 Atl. 996; *Lindsay v. Price*, 33 Tex. 280. See also *Clayton v. Fawcett's Adms.*, 2 Leigh, 19. In the case last cited the order had been

accepted by the immediate drawee but the drawer had himself collected from the debtor. The payee sued the acceptor. The court held the acceptance in effect was only to pay when the claim was collected. The decision seems correct, but the court said also that the drawer "had a perfect right in law to revoke" the order before the drawee collected it. This seems questionable.

²¹ This view finds support in *Spofford v. Kirk*, 97 U. S. 484, 24 L. Ed. 1032; *Nesmith v. Drum*, 8 W. & S. 9, 42 Am. Dec. 260.

²² *Williams v. Ingersoll*, 89 N. Y. 508, 519.

present transaction and an agreement which they intended to carry out in the future. It is of the essence of an assignment that the parties agree that the assignee shall immediately be the owner of the claim assigned, and shall have power to collect it without further action on the part of the assignor. Because such an agreement was not wholly effectual at law, equity gave effect to and in a sense specifically enforced the agreement of the parties, but such a case must not be confused with one where the parties make an executory agreement to assign in the future. Such an agreement is not in itself an assignment.²³ Nor is an agreement to pay out of a particular fund an assignment of the fund or of any part of it to the promisee.²⁴ "The test is, even of an equitable assignment, whether the debtor would be justified in paying the debt or the portion contracted about to the person claiming to be assignee."²⁵ The distinction to be drawn

²³ *In re Stiger*, 202 Fed. 791; *National City Bank v. Torrent*, 130 Mich. 259, 89 N. W. 938; *State v. Lindsay*, 73 Mo. App. 473; *Arents v. Long Island R. Co.*, 36 N. Y. App. Div. 379, 382, 55 N. Y. S. 401; *Lauerman Bros. Co. v. Riehl*, 156 Wis. 12, 145 N. W. 174. See also *Hale v. First Nat. Bank*, 50 Ia. 642.

²⁴ *Christmas v. Russell*, 14 Wall. 69, 20 L. Ed. 762; *Dillon v. Barnard*, 21 Wall. 430, 22 L. Ed. 673; *Trist v. Child*, 21 Wall. 441, 22 L. Ed. 623; *Removal Cases*, 100 U. S. 457, 25 L. Ed. 698; *Smedley v. Speckman*, 157 Fed. 815, 85 C. C. A. 179; *Maier v. Freeman*, 112 Cal. 8, 44 Pac. 357, 53 Am. St. Rep. 151; *De Winter v. Thomas*, 34 App. Cas. D. C. 80, 27 L. R. A. (N. S.) 634; *Kelley v. Newman*, 79 Ill. App. 285; *Stearns v. Quincy Mut. Fire Ins. Co.*, 124 Mass. 61, 63, 26 Am. Rep. 647; *Hale v. Dressen*, 76 Minn. 183, 78 N. W. 1045; *Fairbanks v. Welshans*, 55 Neb. 362, 75 N. W. 865; *Phillips v. Hogue*, 63 Neb. 192, 88 N. W. 180; *Lanigan v. Bradley and Currier Co.*, 50 N. J. Eq. 201, 205, 24 Atl. 505; *Williams v. Ingersoll*, 89 N. Y. 508, 518; *Addison v. Enoch*, 48 N. Y. App. Div.

111, 62 N. Y. S. 613, *affd.*, 168 N. Y. 658, 61 N. E. 1127; *Holmes v. Bell*, 139 N. Y. App. D. 455, 124 N. Y. S. 301, *affd.*, 200 N. Y. 586, 94 N. E. 1094; *Donovan v. Middlebrook*, 95 N. Y. App. Div. 365, 88 N. Y. S. 607; *Bank of New Hanover v. Williams*, 79 N. C. 129; *Christmas' Adm. v. Griswold*, 8 Oh. St. 558; *Davis v. State Nat. Bank* (Tex. Civ. App.), 156 S. W. 321, 327; *Hicks v. Roanoke Brick Co.*, 94 Va. 741, 27 S. E. 596; *Feamster v. Withrow*, 9 W. Va. 296; *Dirimple v. State Bank*, 91 Wis. 601, 65 N. W. 501. See also *Wylie's Appeal*, 92 Pa. 196; *Evans v. Rice*, 96 Va. 50, 30 S. E. 463. But see *Durham v. Robertson*, [1898] 1 Q. B. 765, 769.

²⁵ *Donovan v. Middlebrook*, 95 N. Y. App. Div. 365, 367, 88 N. Y. S. 607; citing *Fairbanks v. Sargent*, 117 N. Y. 320, 22 N. E. 1039, and see *Trist v. Child*, 21 Wall. 441, 444, 22 L. Ed. 623; *Randel v. Vanderbilt*, 75 N. Y. App. D. 313, 318, 78 N. Y. S. 124; *Davis v. State Nat. Bank* (Tex. Civ. App.), 156 S. W. 321. See also *Schubert v. Herzberg*, 65 Mo. App. 578, and cases cited in the two preceding notes. In *Hargett v. McCadden*, 107 Ga. 773,

is between a promise that the promisor will pay out of a particular fund and an agreement that the promisee may collect a particular fund, or part of it, and may pay himself when he has collected. Therefore a promise to an attorney that he shall have as his compensation a certain share or payment out of a fund in litigation creates a valid partial assignment if the attorney is to collect the claim and pay himself by retaining his fee.²⁶ Whereas if the fund is to come into the hands of the client, and he is to make the payment, there is only a contract right.²⁷

§ 429. Whether promises to assign or to pay out of a fund create equitable liens.

Where there is only a promise to collect and pay the promisee when the collection is made, or a promise to make an assignment in the future, a claim to the fund, if allowed, must be based on the theory of an equitable lien given by the specific enforcement of a contract rather than on that of a present assignment; and to make it possible to contend that such enforcement should be given, it must first be established not only that a promise was made, but that such consideration was given for it as to fulfil the ordinary requirements of the law. A

775, 33 S. E. 666, the court reached a contrary conclusion quoting from *Jones v. Glover*, 93 Ga. 484, 487, 21 S. E. 50. "In order to infer an equitable assignment, such facts or circumstances must appear as would not only raise an equity between the assignor and assignee, but show that the parties contemplated an immediate change of ownership with respect to the particular fund in question, not a change of ownership when the fund should be collected or realized, but at the time of the transaction relied upon to constitute the assignment." But the true test is whether an immediate power is given to collect the money when it is due. If an immediate change of ownership must necessarily have been contemplated, an assignment of a future claim would never

be possible unless the parties conceived themselves able to transfer immediately ownership to something not then existing. *Cf. Kingsbury v. Burrill*, 151 Mass. 199, 24 N. E. 36.

²⁶ *Wylie v. Cox*, 15 How. 415, 14 L. Ed. 753; *In re Paschal*, 10 Wall. 483, 19 L. Ed. 992; *Canty v. Latterner*, 31 Minn. 239, 17 N. W. 385; *Terney v. Wilson*, 45 N. J. L. 282; *Marshall v. Meech*, 51 N. Y. 140, 10 Am. Rep. 572; *Wright v. Wright*, 70 N. Y. 98; *Patten v. Wilson*, 34 Pa. St. 299; *Milmo Nat. Bank v. Convery*, 8 Tex. Civ. App. 181, 27 S. W. 828.

²⁷ *De Winter v. Thomas*, 34 App. Cas. D. C. 80, 27 L. R. A. (N. S.) 634. In *Ingersoll v. Coram*, 211 U. S. 335, 29 S. Ct. 92, 53 L. Ed. 208, however, it was held a lien was created though the payment was to be made by the

present assignment to secure or pay an antecedent debt is. No other consideration is needed, but a promise to make an assignment is not even a contract to assign, unless some requested promise or performance is given in exchange. Admitting, however, that sufficient consideration for the promise is given to create a contract, whether such a contract to make an assignment in the future or to pay a debt in the future on a particular fund should give rise to an equitable lien in the same question that arises wherever there is a contract to transfer in the future personal property not ordinarily the subject of specific performance. How far such a contract can give rise to equitable rights in the property is a question on which there is much conflict of authority.²⁸ It has been said that "The doctrine may be stated in its most general form: Every express executory agreement in writing, whereby the contracting party sufficiently indicates an intention to make a particular property, real or personal, or fund, therein described or identified, a security for a debt or other obligation, or where the party promises to convey or assign or transfer the property as security, creates an equitable lien upon the property so indicated, which is enforceable against the property in the hands not only of the original contractor, but of his heirs, administrators, executors, voluntary assignees and purchasers or encumbrancers with notice."²⁹ This statement certainly goes beyond the law of a number of American jurisdictions.³⁰ If specifically applied to promises to assign a fund in the future the statement would involve the consequence that an equitable lien upon the fund would be created by such a promise to assign in the future a claim as *security* for a debt though not by a promise to assign the claim in *payment* of the debt. In fact there are a few decisions where an executory promise has been held to create an immediate equitable right, but no distinction is taken in these cases between a promise to assign as security

original creditor when he acquired the fund. The decision seems inconsistent with *Christmas v. Russell*, 14 Wall. 69, 20 L. Ed. 762; and *Trist v. Child*, 21 Wall. 441, 22 L. Ed. 623.

²⁸ See Williston, *Sales*, § 138; 19 Harv. L. Rev. 557.

²⁹ 3 Pomeroy Eq. Jurisprudence § 1235, quoted with approval as authority for decision in *Walker v. Brown*, 10 U. S. 654, 655, 41 L. Ed. 865, 1 Ct. 453.

³⁰ See 19 Harv. L. Rev. 557.

and a promise to assign in discharge of an obligation.³¹ On the other hand must be set the cases previously cited³² which hold a promise to assign in the future does not amount to an assignment,³³ since these cases generally involve the question whether the promisee had a right to the fund in question without regard to whether that right should properly be described as the right of an assignee or of a lien holder. In these cases, however, there was not always present consideration for the promise, and the procedure may often not have been such as to permit the assertion of an equitable right. Further, if it is true that an equitable lien arises whenever an intention is indicated to make a particular fund "a security for a debt or other obligation," it would seem that any promise for consideration to pay out of a particular fund would create an equitable lien upon the fund, since a promise to a creditor not merely to pay when the promisor receives a specific fund but to pay out of that fund, manifests clearly an intention to dedicate the fund as security for the payment of the debt. Yet a great weight of authority sustains the view that a promise to pay out of a particular fund gives no equitable right in the fund to the promisee.³⁴

³¹ In *Thompson v. Erie Railroad*, 207 N. Y. 171, 100 N. E. 791, it became important to decide whether the date of an assignment was to be regarded as the date when a written assignment was delivered or a prior date when a contract to assign was made. The court said at page 180, "It may be reasonably assumed that an agreement to assign B's salary was made at the time H. & Co. purchased the note. Such firm thereby became the equitable owner of B's salary as of that day." In this case the promised assignment was for security, but the importance of that was not suggested by the court, and in *Dexter v. Gordon*, 11 App. Cas. D. C. 60, an agreement to assign a part of a claim in the future was held to give an equitable right to the promisee though the assignment was not to be as security but in payment of an obligation. See also *Greedy v. Dockendorff*, 231 U. S. 513, 34 S. Ct. 166, 58

L. Ed. 339; *Citizens' Loan Assoc. v. Boston & Maine R. Co.*, 196 Mass. 528, 530, 531, 82 N. E. 696, 14 L. R. A. (N. S.) 1025, 124 Am. St. Rep. 584; *Crumlish v. Central Imp. Co.*, 38 W. Va. 390, 18 S. E. 456, 23 L. R. A. 120, 45 Am. St. Rep. 872.

³² *Supra*, § 428.

³³ It was held in *Benford v. Sanner*, 40 Pa. 9, 80 American Dec. 545, that a promise to assign post-office warrants in the future gave no ownership in the warrants to the promisee.

³⁴ This is necessarily involved in those of the decisions cited *supra*, § 428, where there was present consideration for the promise in question, since those cases though generally stating merely that such a promise did not amount to a partial assignment involved the broad question whether the promisee had any right whatever in the fund. Moreover the New York Court of Appeals has held that—"Whatever

§ 430. Formalities requisite for assignment.

The common law recognized two kinds of property, tangible property of which delivery of possession or livery of seisin³⁵ might be made, and intangible property which in so far as transferable at all was appropriately transferred by deed. As has been seen, a chose in action was not assignable in a strict sense, and even by deed the best that could be done was to create at law an irrevocable power to collect and a right in equity to enforce the assignment so far as that could be done without injury to legal titles or prior equities. Authority to collect, however, can be given without the formality of a deed or even writ-

the law may be elsewhere, it must be regarded as the settled law of this State that an agreement, either by parol or in writing, to pay a debt out of a designated fund does not give an equitable lien upon the fund, or operate as an equitable assignment thereof." *Williams v. Ingersoll*, 89 N. Y. 508, 518, adding: "It was so decided in *Rogers v. Hosack's Executors*, 18 Wend. 319. That case was followed, and the same rule laid down in *Christmas v. Russell*, 14 Wall. 69, 20 L. Ed. 762, and *Trist v. Child*, 21 *id.* 441," 22 L. Ed. 623. To the same effect are *Randel v. Vanderbilt*, 75 N. Y. App. Div. 313, 319, 78 N. Y. S. 124, where the above language was quoted and applied, and *Wright v. Aero Corporation*, 128 N. Y. S. 726. *Dexter v. Gordon*, 11 App. Cas. D. C. 60, like the New York decisions, distinguishes between a promise to assign in the future and a promise to pay out of a particular fund, holding that the former gives a lien but the latter does not. See also *DeWinter v. Thomas*, 34 App. Cas. D. C. 80, 27 L. R. A. (N. S.) 634. The case of *Ingersoll v. Coram*, 211 U. S. 335, 29 S. Ct. 92, 53 L. Ed. 208, seems a solitary American decision allowing an equitable lien based on a promise to pay out of a particular fund. It may be, however, that this represents the English law. See *Dur-*

ham v. Robertson, [1898] 1 Q. B. 765, 769. In *Elmore v. Symonds*, 183 Mass. 321, 67 N. E. 314, the court said: "We are of the opinion that where nothing more appears than an agreement, whether oral or in writing, by the owner of real estate, to collect, either personally or by his agents, the rents that may accrue therefrom, and turn them over to his creditor in payment of a debt, even though the money represented by the debt has been used to increase the value of the property, equity will not, in the absence of a stipulation to that effect, or of language from which such an intention clearly appears, create a lien or charge upon the estate, or the rents arising therefrom, to secure the creditor." Citing—*Pinch v. Anthony*, 8 Allen, 536; *Falmouth Bank v. Cape Cod Ship Canal Co.*, 166 Mass. 550, 567, 44 N. E. 617; *Rogers v. Hosack's Ex'rs*, 18 Wend. 319, 334; *Morton v. Naylor*, 1 Hill, 583; *Richards v. Shingle, etc., Co.*, 74 Mich. 57, 41 N. W. 860; *Wright v. Ellison*, 1 Wall. 16, 17 L. E. 555; *Walker v. Brown*, 165 U. S. 654, 17 S. Ct. 453, 41 L. Ed. 865. Cf. *Kingsbury v. Burrill*, 151 Mass. 199, 24 N. E. 36.

³⁵ Livery of seisin was as applicable to chattels in the early law as to real estate. Ames's *Lectures on Legal Hist.* 172.

ing, and if an assignment is intended, however the intent may be shown, courts will carry out so far as possible the intention.

It was stated in an early Massachusetts case that "it is uniformly holden, that an assignment of an instrument under seal must be by deed: in other words, that the instrument of transfer must be of as high a nature, as the instrument transferred."³⁶ No authority is cited for this statement, but it has been several times repeated in Massachusetts.³⁷ There seems no warrant for it either on principle or authority, and parol assignments of choses in action under seal have been universally upheld in other jurisdictions.³⁸ It is possible that the confusion as to the necessity of a sealed assignment arose from a failure to distinguish assignments of ordinary covenants from assignments of covenants running with the land. In order that the benefit of a covenant shall run with the land it is essential that title to the land be transferred and a larger estate than a leasehold can only be transferred by deed. Consequently, without a deed, it may be said that the covenant cannot be assigned, so as to make the assignee entitled at common law to sue in his own name upon it. Here, however, we are dealing with an exception to the rule that choses in action are not assignable, and seeking the requisites for bringing a case within the exception. Moreover, even here it is not the assignment of the covenant which must be under seal, but the deed conveying the estate.³⁹

³⁶ *Wood v. Partridge*, 11 Mass. 488, 491.

³⁷ *Brewer v. Dyer*, 7 Cush. 337; *Bridgham v. Tileston*, 5 Allen, 371; *Sanders v. Partridge*, 108 Mass. 556, 558. These were all cases of leases and the question involved was whether the assignee of a lease could sue in his own name on the covenants contained in the lease. The case last cited points out that ownership of the leased estate can be transferred without a deed and that ownership of the estate involves a right to sue on the covenants. But the court in distinguishing the earlier decisions repeats the formula that an assignment of a contract under seal must itself be under seal. Cf. *Dunn v. Snell*, 15 Mass. 481, and *Currier v.*

Howard, 14 Gray, 511, which state the contrary.

³⁸ *Row v. Dawson*, 1 Ves. Sr. 331, 332; *Moore v. Waddle*, 34 Cal. 145; *Barrett v. Hinckley*, 124 Ill. 32, 14 N. E. 863, 7 Am. St. Rep. 331; *Montague v. Aygarn*, 164 Ill. App. 596; *Robbins v. Bacon*, 3 Greenl. 346; *Winship v. Portland Base Ball, etc., Assoc.*, 78 Me. 571, 574, 7 Atl. 706; *Prescott v. Hull*, 17 Johns. 284, 292; *Ford v. Stuart*, 19 Johns. 342; *Cannaday v. Shepard*, 2 Jones Eq. 224, 228; *Durst v. Swift*, 11 Tex. 273.

³⁹ See *Sanders v. Partridge*, 108 Mass. 556. So an assignment of a mortgage of real estate, where a seal is necessary for a conveyance of land, should be under seal, *Den v. Dimon*,

Except as statutes have made a change, an assignment not even be in writing. An oral assignment for value is sufficient not only to give the assignee a legal power of attorney to collect the claim, but also to create an equitable right as against the assignor, and any one standing in no better position. There are occasional statements that to make an oral assignment of a debt valid, as against creditors, or even between parties, there must be at least a symbolical or constructive delivery, although the delivery may be evidenced by a less significant act than is required for the assignment of a chose in action which is capable of manual delivery;⁴¹ but this doctrine cannot be accepted. Intangible choses in action do not pass in delivery,⁴² and except as statutes have changed the common law, intent to assign and consideration are the only requirements.

5 Halst. 156, though the mortgage debt might be assigned without a seal and the ownership of the debt would equitably entitle the assignee to the security.

* *Heath v. Hall*, 4 Taunt. 326; *Tibbits v. George*, 5 A. & E. 107; *Re Macauley*, 158 Fed. 322; *Lowery v. Peterson*, 75 Ala. 109; *Wiggins v. McDonald*, 18 Cal. 126; *Chamberlin v. Gilman*, 10 Colo. 94, 14 Pac. 107; *Mason v. Chicago Trust Co.*, 77 Ill. App. 19; *Hyatt v. Foster*, 195 Ill. App. 428; *McAleer v. McNamara*, 140 Iowa, 112, 117 N. W. 1122; *Jewett Lumber Co. v. Anderson Coal Co.*, 181 Iowa, 950, 165 N. W. 211; *Clark v. Wiss*, 34 Kans. 553, 9 Pac. 281; *Newby v. Hill*, 2 Metc. 530; *Lexington Brewing Co. v. Hamon*, 155 Ky. 711, 160 S. W. 264; *Edwards v. Succession of Daley*, 14 La. Ann. 384; *Howe v. Howe*, 97 Me. 422, 54 Atl. 908; *Onion v. Paul*, 1 H. & J. 114; *Smith v. Penn-American Plate Glass Co.*, 111 Md. 696, 77 Atl. 264; *Kellas v. Slack & Slack Co.*, 129 Md. 535, 541, 99 Atl. 677; *Macomber v. Doane*, 2 Allen, 541; *Donovan v. Halsey Fire Engine Co.*, 58 Mich. 38, 24 N. W. 819; *Harris v. Chamberlain*, 126 Mich. 280, 85 N. W. 728; *Hurley v. Bendel*, 67 Minn. 41, 69 N. W. 477;

Pass v. McRea, 36 Miss. 143; *Boyd v. Clark*, 63 Mo. App. 473; *Oppenheim v. First Natl. Bank*, 20 Mont. 50, 50 Pac. 419; *Curtis v. Zutaver*, 183 Neb. 183, 93 N. W. 400; *Gage v. New Jersey Produce*, 59 N. H. 383; *New Jersey Produce v. Gluck*, 79 N. J. L. 115, 74 Atl. 99; *Jemison v. Tindall*, 87 N. J. L. 99, 99 Atl. 408; *Risley v. Phenix Bank*, 38 N. Y. 318, 38 Am. Rep. 421, affirmed; *U. S. 125*, 28 L. Ed. 374, 4 S. Ct. 322; *Selleck v. Manhattan Fire & Marine Ins. Co.*, 117 N. Y. S. 964; *Hofferbert v. Duckett*, 175 N. Y. App. D. 480; *Ponton v. Griffitts*, 167 N. Y. S. 167; *Ponton v. Griffitts*, 167 N. C. 362; *Roberts v. First Nat. E. B. Bank*, 8 N. D. 474, 79 N. W. 993; *Mill Newell*, 20 S. Car. 123, 47 Am. L. 833; *Cleveland v. Martin*, 21 Tenn. 128; *Clark v. Gillespie*, 513 Tex. 513, 8 S. W. 121; *A. A. F. Lumber Co. v. Smith* (Tex. Civ. A. 151 S. W. 605; *Hutchins v. Watts*, 360 Vt. 360; *Wilt v. Huffman*, 46 W. 473, 33 S. E. 279; *Arpin v. Burch*, 619 Wis. 619, 32 N. W. 681.

⁴¹ *White v. Kilgore*, 77 Me. 57, 57 Atl. 739; *Whittle v. Skinner*, 23 Me. 532.

⁴² See *Lehman Dry Goods Co. v. Lemoine*, 129 La. 382, 56 So. 324.

to transfer such rights as the nature of the property permits to be transferred; and even tangible choses in action may be effectually assigned as between the parties, without delivery. Therefore where insurance policies were assigned by parol, as security to a creditor, the assignment was not invalidated as a preference, by the fact that the policies were not delivered until later and within four months before the assignor's bankruptcy.⁴³ Statutes, however, have made writing of importance in many jurisdictions.

In some States there have been from an early day statutes permitting the assignee of a bond or non-negotiable note or sometimes of any chose in action to sue in his own name if the assignment is in writing, and such statutes have been copied more recently in other jurisdictions.⁴⁴ The requirement of a written assignment in such jurisdictions, however, affects only the right of the assignee to sue in his own name. In such States, as well as elsewhere, an oral assignment, for valuable consideration, transfers an equitable right to the assignee which may be enforced in the assignor's name.⁴⁵ And in a jurisdiction where by statute the real party in interest is always allowed to sue in his own name, the legal effect of a previous statutory requirement of a written transfer in order to give the assignee a right enforceable at law in his own name, seems done away with.⁴⁶ Where by statute an assignment in writing is of importance, a blank indorsement of the tangible evidence of a claim has been held sufficient.⁴⁷ In life insurance policies, it is frequently provided that certain formalities must be observed in making an assignment, but such provisions are not generally

⁴³ *McDonald v. Daskam*, 116 Fed. 276, 53 C. C. A. 554. See also *Richardson v. White*, 167 Mass. 58, 44 N. E. 1072.

⁴⁴ *Enloe v. Reike*, 56 Ala. 500; *Hardie v. Mills*, 20 Ark. 153; *Herring v. First Nat. Bank*, 13 Ga. App. 492, 79 S. E. 359; *Chadsey Admr. v. Lewis*, 6 Ill. 153; *Phipps v. Bacon*, 183 Mass. 5, 66 N. E. 414; *Andrews v. Carr*, 28 Miss. 577; *Able v. Shields*, 7 Mo. 120; *Miller v. Paulsell*, 8 Mo. 355; *Patterson*

v. Rabb, 38 S. C. 138, 17 S. E. 463, 19 L. R. A. 831.

⁴⁵ *Gardner v. Mobile, etc., R. Co.*, 102 Ala. 635, 15 So. 271, 48 Am. St. Rep. 84; *Wilson v. Bowden*, 26 Ark. 151; *Chadsey Admr. v. Lewis*, 6 Ill. 153; *Rittenhouse v. Myers*, 10 Mo. 305.

⁴⁶ *Planters', etc., Ins. Co. v. Tumbstall*, 72 Ala. 142; *Lee v. Wimberly*, 102 Ala. 539, 15 So. 444; *Weinwick v. Bender*, 33 Mo. 80.

⁴⁷ *Small v. Smith*, 120 Minn. 118, 139 N. W. 133.

held material to the rights of the assignee against his assignor or to the rights of rival assignees as against one another.⁴ In all jurisdictions of the United States as well as in England, contracts for the sale of an interest in land must be in writing. Accordingly, an assignment of a contract right to buy land, since the contract gave the assignor an equitable interest in the land, must be in writing in order to be enforceable between assignor and assignee,⁵⁰ and under recording statutes, in order to be binding upon third persons, must be recorded.⁵¹ The seventeenth section of the English Statute of Frauds, and corresponding statutes in the various States in America recognize the right to assign orally choses in action even though they do not relate to land. How far these statutes affect the validity of a contract between assignor and assignee is elsewhere considered,⁵² but third persons cannot set up the defence of non-compliance with the statute,⁵³ and there can be no invalidity in an oral power of attorney to enforce a contract for the sale of land or of choses

⁴ In *Herman v. Connecticut Mut. Life Ins. Co.*, 218 Mass. 181, 105 N. E. 450, 451, the court said: "As between the plaintiff and Somer it is immaterial that the assignment was not written upon or attached to the policy, that no reference to the assignment was written or noted on the policy, or that no notice of it was given to the insurance company, either in the manner required by the fifth clause of the policy or otherwise. *Merrill v. New England Mut. Life Ins. Co.*, 103 Mass. 245, 252, 4 Am. Rep. 548; *Hewins v. Baker*, 161 Mass. 320, 37 N. E. 441; *Atlantic Mutual Life Ins. Co. v. Gannon*, 179 Mass. 291, 60 N. E. 933. See also *Northwestern Mutual Life Ins. Co. v. Wright*, 153 Wis. 252, 140 N. W. 1078; *Wood v. Phoenix Life Ins. Co.*, 22 La. Ann. 617; *Manhattan Life Ins. Co. v. Cohen* (Tex. Civ. App.), 139 S. W. 51; *Howe v. Hagan*, 110 N. Y. App. Div. 392, 97 N. Y. S. 86; *Cowdrey v. Vandenburg*, 101 U. S. 572, 25 L. Ed. 923; *New York Life Ins. Co. v. Dunlevy*, 204 Fed. 670; *Fortescue v. Barnett*, 3 M.

& K. 36. The contrary statement in *Palmer v. Merrill*, 6 Cush. 282 Am. Dec. 782, have not been followed. *James v. Newton*, 142 Mass. 366, 8 N. E. 122, 56 Am. Rep. 692; *Edwards v. White*, 167 Mass. 58, 60 N. E. 1072."

⁵⁰ See *infra*, §§ 487 *et seq.*

⁵¹ *Smith v. Burnham*, 3 Sumn. 4; *Dougherty v. Catlett*, 129 Ill. 431, N. E. 932; *Esslinger v. Pascoe*, 105 Ia. 86, 105 N. W. 362, 3 L. R. A. 147; *Connor v. Tippet*, 57 Mo. 594; *Hackett v. Watts*, 138 Mo. 540 S. W. 113; *Hartwig v. Gordon*, Neb. 657, 660, 56 N. W. 324; *Wilcox v. Womble*, 90 N. C. 254; *Bowser v. Cravener*, 56 Pa. 132, 140; *Whitcomb v. State Bank*, 7 Wis. 620. See also *infra*, § 491, and as to parol rescission of a contract for the sale of land, *ibid.*, *ad fin.* But see *Nazro v. Lombard*, 179 Mass. 451, 61 N. E. 43.

⁵² *Montague v. Aygarn*, 164 N. Y. App. 596.

⁵³ See *infra*, § 521.

⁵⁴ See *infra*, § 530.

in action which are within the Statute of Frauds; and such a power is implied in the attempted assignment. The obligor under such a contract, it would seem, therefore, cannot interpose the defence of the Statute of Frauds to a suit brought by the assignee to enforce the contract. If the assignor does not take the objection, no one else can.⁵⁴ It might be necessary, however, to bring such a suit in the name of the assignor, in spite of modern statutes, permitting an assignee to sue in his own name.

Intangible choses in action are not within the meaning of "goods and chattels" as these words are used in statutes requiring delivery or record of transfers of goods and chattels by way of security.⁵⁵

§ 431. Construction of assignment.

In case of doubt, an assignment is construed most strictly against the assignor,⁵⁶ and generally the rules ordinarily applicable to the construction of contracts are applied.

Where an attempted assignment is ineffectual because the supposed obligation to which it related did not exist, the assignment will generally be construed as transferring any rights of the assignor relating to the same subject-matter as the supposed obligation.⁵⁷ But the assignment of rights under a continuing contract does not imply an assignment of rights of action for previous breaches of the contract,⁵⁸ though transferring a right to all payments becoming due in the future even for work done prior to the assignment.⁵⁹ Similarly a sale of goods which the seller had previously bought with a warranty does not operate as an assignment of a right of action for

⁵⁴ See *Currier v. Howard*, 14 Gray, 511; *Bullion v. Campbell*, 27 Tex. 653.

⁵⁵ *Young v. Upson*, 115 Fed. 192; *Re Macauley*, 158 Fed. 322; *Preston Nat. Bank v. George T. Smith Co.*, 84 Mich. 364, 47 N. W. 502.

⁵⁶ *Swan v. Warren*, 138 Mass. 11.

⁵⁷ *Wetmore v. San Francisco*, 44 Cal. 294; *McCormick v. District of Columbia*, 18 D. C. 534; *Oneida Bank v. Ontario Bank*, 21 N. Y. 490; *cf.*

Neugass v. New Orleans, 43 La. Ann. 78, 9 So. 25.

⁵⁸ *Regan Engine Co. v. Pacific Engine Co.*, 49 Fed. 68, 1 C. C. A. 169; *Chicago Cheese Co. v. Fogg*, 53 Fed. 72; *Love v. VanEvery*, 18 Mo. App. 196. See also *Mullinax v. Lowry*, 140 Mo. App. 42, 124 S. W. 572; *Steele v. Brazier*, 139 Mo. App. 319, 123 S. W. 477.

⁵⁹ *Chapin v. Pike*, 184 Mass. 184, 68 N. E. 42.

damages for breach of the warranty.⁶⁰ Frequently an instrument in terms absolute is intended to operate merely as security for a debt, and this may be shown by parol.⁶¹ Whether an assignment which it is attempted to assign or a duty which it is attempted to delegate is of so personal a character as to make the assignment unsuccessful, is a question of construction to be determined by the nature of the case and the presumed intention of the parties.⁶²

§ 432. Rights of the assignee against the debtor.

One who has legal title to real estate or to chattel property which he holds subject to an equity, and who transfers legal title to a bona fide purchaser for value without notice transfers a title freed from the equity.⁶³ But the assignee of a non-negotiable chose in action, though he buys it for value and in good faith, takes it subject to all defences which the obligor may have had against the assignor,⁶⁴ unless the defence is by the form of the instrument intrusted to the assignee.

⁶⁰ *Smith v. Williams*, 117 Ga. 782, 45 S. E. 394, 97 Am. St. Rep. 220; *Walrus Manufacturing Co. v. McMeheh*, 39 Okla. 667, 136 Pac. 772; *Williston on Sales*, § 244.

⁶¹ *Wing & Bostwick Co. v. United States Fidelity Co.*, 150 Fed. 672; *Carozza v. Boxley*, 203 Fed. 673, 122 C. C. A. 69; *Despard v. Walbridge*, 15 N. Y. 277, 41 N. E. 572; *Protzman's Ex. v. Joseph*, 65 W. Va. 788, 65 S. E. 461.

⁶² *King v. West Coast Grocery Co.*, 72 Wash. 132, 72 Pac. 1081.

⁶³ See, e. g., *Ames, Legal Essays*, 253.

⁶⁴ *Mangles v. Dixon*, 3 H. L. C. 702, 731; *Phipps v. Lovegrove*, L. R. 16 Eq. 80, 88; *Stoddart v. Union Trust, Ltd.*, [1912] 1 K. B. 181, 189, 190; *Boatmen's Bank v. Fritzlen*, 175 Fed. 183; *Smith v. Carder*, 33 Ark. 709; *Kohn v. Sacramento Elec., etc., Ry.*, 168 Cal. 1, 141 Pac. 626; *Mereness v. Delemos*, 91 Conn. 651, 101 Atl. 8; *Thurston v. McLellan*, 34 App. D. C. 294; *York v. Scott*, 140 Ill. App. 178;

Rosenthal v. Rambo, 165 Ind. 5 N. E. 404; *Cress v. Ivens*, 163 Ill. 145 N. W. 325; *Sawyer v. Coolidge*, 163 Mass. 166, 74 N. E. 356; *Burton v. Dorey*, 221 Mass. 399, 405, 109 N. E. 146; *Gamble v. Gates*, 97 Mich. 466, 56 N. W. 855; *Decker v. Adair*, 171 Mich. 511, 78 Am. Dec. 65; *Malden v. Harris*, 26 Ohio St. 379; *W. Pelton*, 67 Ore. 239, 135 Pac. 9; *Egbert v. Kimberly*, 146 Pa. 9; *Real Estate Trust Co. v. Riter-Conley Mfg. Co.*, 223 Pa. 72 Atl. 695; *Trimmer v. Valley Mfg. Co.*, 85 S. Car. 13, 66 S. E. 1; *Ford v. Thompson*, 1 Head, 1; *Downer v. South Royalton Bank*, 25 Vt. 25; *Selden v. Williams*, 108 Vt. 542, 62 S. E. 380. Consequent case of conflict of laws the law governing the contract between creditor and debtor determines the rights of the creditor's assignee. *Northwestern Mut. Life Ins. Co. v. Adams*, 155 Ill. 335, 144 N. W. 1108, 52 L. R. (N. S.) 275.

otherwise has estopped himself to set up a defence,⁶⁵ or has given an absolute promise to pay the assignee in substitution for the assigned obligation.⁶⁶ This principle is applicable not simply to defences like non-performance, fraud, duress, mistake, covenants not to sue, which are applicable to the assigned obligation itself, but also to rights of set-off, or counter-claim arising out of separate matters which the obligor might have asserted against his original creditor, the assignor.⁶⁷ But if the local law does not permit a set-off of a claim which is not yet due, an assignment of a claim which is due cannot be met by

⁶⁵ In *Ex parte Asiatic Banking Corporation*, L. R. 2 Ch. 391, Lord Cairns said: "Generally speaking a chose in action assignable only in equity must be assigned subject to the equities existing between the original parties to the contract; but this is a rule which must yield when it appears from the nature or terms of the contract that it must have been intended to be assignable free from and unaffected by such equities." For cases where the debtor was held estopped, see *Webb v. Herne Bay Commissioners*, L. R. 5 Q. B. 642; *Dickson v. Swansea Vale Ry. Co.*, L. R. 4 Q. B. 44.

⁶⁶ *Held v. Beach-Robinson Co.*, 32 Cal. App. 93, 162 Pac. 661.

⁶⁷ *Cavendish v. Geaves*, 24 Beav. 163, 174 (but see *Stoddart v. Union Trust, Ltd.*, [1912] 1 K. B. 181); *American Steel Barge Co. v. Chesapeake, etc., Coal Agency Co.*, 115 Fed. 669, 677, 53 C. C. A. 301; *Tuscumbia, etc., R. Co. v. Rhodes*, 8 Ala. 206; *Adams v. Leavens*, 20 Conn. 73; *Hall v. Hickman*, 2 Del. Ch. 318; *Guerry v. Perryman*, 6 Ga. 119; *Gardner v. Risher*, 35 Kan. 93, 10 Pac. 584; *Adams v. Webster*, 25 La. Ann. 117; *Hooper v. Brundage*, 22 Me. 460; *Collins v. Campbell*, 97 Me. 23, 28, 53 Atl. 837, 94 Am. St. Rep. 458; *McKenna v. Kirkwood*, 50 Mich. 544, 15 N. W. 898; *Hunt v. Shackelford*, 55 Miss. 94; *Ford v. O'Donnell*, 40 Mo. App. 51; *Lewis v. Holdredge*, 56 Neb. 379, 76

N. W. 890; *Sanborn v. Little*, 3 N. H. 539; *Wood v. Mayor*, 73 N. Y. 556; *First Nat. Bank v. Bynum*, 84 N. C. 24, 37 Am. Rep. 604; *Metzgar v. Metzgar*, 1 Rawle, 227; *Clement v. Philadelphia*, 137 Pa. 328, 334, 20 Atl. 1000, 21 Am. St. Rep. 876; *Neal v. Sullivan*, 10 Rich. Eq. 276. See also *Bryne v. Dorey*, 221 Mass. 399, 109 N. E. 146. *Cf. Greene v. Darling*, 5 Mason, 201. So a particular credit item in a mutual account cannot be separately assigned. *Heiliger v. Ritter*, 78 N. Y. Misc. 264, 138 N. Y. S. 212. On the other hand a claim acquired after notice of the assignment cannot be set off. See cases *supra*, also *Campbell v. Equitable Life Ass. Soc.*, 130 Fed. 786. And the debtor, if he had notice of a proposed assignment of a claim against him, and did not inform the person proposing to take the assignment of an existing right of set-off against the assignor, cannot set it up against the assignee. *King v. Fowler*, 16 Mass. 397. Cases involving the question of the right of the maker of negotiable paper to set off against a transferee after maturity claims against the payee or indorsee though often decided as if depending upon the same principle, should perhaps be distinguished, since even after maturity the legal title to the note is transferable. As to such cases see—23 L. R. A. 326, n., 39 L. R. A. (N. S.) 658, n.

a set-off of a claim against the assignor which was not due at the time of the assignment and did not become due until the debtor had notice of the assignment.⁶⁸ Even where the debt against the assignor became due before notice of the assignment, but after the assignment, the right of set off has been denied,⁶⁹ since no action had been taken by the debtor after the assignment and prior to notice of it. It has also been held that if the assigned claim was not due at the time of the assignment, the debtor cannot set-off, when later sued upon it, a claim against the assignor which was due at the time of the assignment;—at least if the assignor is not insolvent.⁷⁰ It may be questioned how far the denial of a right of set-off because either the assigned claim or the cross claim was not due at the time of the assignment is consistent with the general principle allowing set-off against the assignee of claims due from the assignor. The only ground for supporting the general rule is that the legal right to the assigned claim still is in the assignor, and that therefore in an action on the claim there may be set off a claim against him unless it is inequitable for the defendant to assert the right. It is inequitable if the set-off was acquired after notice of the assignment,⁷¹ and it may be urged that it is inequitable in any case for the defendant to assert his set-off when the real plaintiff in interest, whether nominally plaintiff or not, is an assignee, unless the assignor is insolvent; since otherwise the defendant might collect his claim from the

⁶⁸ *Graham v. Tilford*, 1 Met. (Ky.) 112; *Walker v. McKay*, 2 Met. (Ky.) 294 (see also *Merchants' Nat. Bank v. Robinson*, 97 Ky. 552, 31 S. W. 136, 28 L. R. A. 760); *Chambliss v. Matthews*, 57 Miss. 306; *Myers v. Davis*, 22 N. Y. 489; *Martin v. Kunzmüller*, 37 N. Y. 396; *Roberts v. Carter*, 38 N. Y. 107; *Fera v. Wickham*, 135 N. Y. 223, 31 N. E. 1028, 17 L. R. A. 456; *Fuller v. Steigitz*, 27 Oh. St. 355, 22 Am. Rep. 312. See also *Backus v. Spaulding*, 129 Mass. 234; *Huse v. Ames*, 104 Mo. 91, 15 S. W. 965; *Follett v. Buyer*, 4 Oh. St. 586. Cf. *Tuscumbia &c. R. Co. v. Rhodes*, 8 Ala. 206; *Morrow's Assignees v. Bright*, 20

Mo. 298; *Williams v. Helme*, 1 Dev. Eq. 151; *Miller v. Kreiter*, 76 Pa. 78.

⁶⁹ *Beckwith v. Union Bank*, 9 N. Y. 211.

⁷⁰ *Koegel v. Michigan Trust Co.*, 117 Mich. 542, 76 N. W. 74; *Henderson v. Michigan Trust Co.*, 123 Mich. 688, 82 N. W. 510; *King v. West Coast Grocery Co.*, 72 Wash. 132, 129 Pac. 1081; See also *Stitt v. Horton*, 165 Ind. 555, 76 N. E. 241 (where the assignor is insolvent), and see *Scott v. Armstrong*, 146 U. S. 499, 36 L. Ed. 1059, 13 S. Ct. 148; *Matter of Hatch*, 155 N. Y. 401, 50 N. E. 49, 40 L. R. A. 664.

⁷¹ See *infra*, § 433.

assignor who really ought to pay it. This limitation, however, of the debtor's right of set-off does not seem to have prevailed.⁷² It seems rather to have been thought equitable for the debtor to be allowed to assert the right and to compel the assignee then to sue the assignor. If the same reasoning is followed where one or the other claim was not due at the time of the assignment, it would be reasonable to conclude that the debtor having in such cases a right against the assignor, in whom the legal right to the assigned claim still remained after the assignment, might set the claim off. It should be said, however, that the particular words of the statutes governing the right of set-off or counter-claim in different jurisdictions may be so clear as to make arguments based on general principles inapplicable.

A debtor is also entitled to set off against an assignee claims due from the latter and this is true even though the action is brought in the name of the assignor.⁷³ As an action on an assigned claim at law was until recent years necessarily brought in the name of the assignor, it need not appear in the plaintiff's writ or declaration that the action was for the use of an assignee.⁷⁴ It might seem necessarily to follow from this that the validity of an assignment is not an issue in an action brought in the assignor's name and cannot be set up; and indeed this has been held.⁷⁵ But just as equity would not permit the assignor whose name was used in the proceedings to control or affect them to the injury of the assignee, and courts of law gave effect to this equitable protection of the assignee,⁷⁶ so courts of equity should not allow the owner of a claim to be defrauded by having the claim collected in his name by one not entitled to do so; and as a payment to one claiming falsely to be an agent of another would not discharge the liability to

⁷² See cases cited *supra*, n. 67.

⁷³ *Cavendish v. Geaves*, 24 Beav. 163, 174; *Winchester v. Hackley*, 2 Cranch, 342, 2 L. Ed. 299; *Wartman v. Yost*, 22 Gratt. 595. In *Pates v. St. Clair*, 11 Gratt. 22, the court gave judgment for costs against the assignee for whose benefit the action was being prosecuted in the name of the assignor.

⁷⁴ *Hamilton v. Brown*, 18 Pa. 87.

⁷⁵ "Nor will the defendant be permitted to controvert the validity of the transfer. The assignee need not show any legal right in himself." *Hamilton v. Brown*, 18 Pa. 87, 79. See also *Gilmore v. Bangs*, 55 Ga. 403. *Lancey v. Foes*, 88 Me. 215, 219, 33 Atl. 1071.

⁷⁶ See *infra*, § 433.

the principal, an attempted satisfaction of the claim of a creditor by a payment to one falsely claiming to be assignee would be equally invalid. Even though judgment in the case goes in favor of the assignor and not of the alleged assignee, if the latter is actively controlling the litigation and will apparently direct the issue of execution and collection of the claim, the debtor should not be allowed without liability to allow the procedure of the court to be used by the alleged assignee to defraud the supposed assignor. And if the debtor is under such an equitable duty he should necessarily be protected from judgment by a defence. Whether the debtor would have to apply to equity to enjoin prosecution of the action by the alleged assignee, or whether an equitable plea to the action at law would be allowed to defeat the action and the judgment then rendered be regarded not as an adjudication of the claim itself but only of the right of the alleged assignee to prosecute an action upon it, or whether on motion in the action at law setting up that the action was being prosecuted without authority of the plaintiff the court should stay further proceedings, might depend upon local procedure.⁷⁷ Wherever the right of the assignee must be enforced in his own name any difficulty of procedure disappears, since it becomes part of the plaintiff's case to prove a valid assignment,⁷⁸ unless the debtor has de-

⁷⁷ In *Riley v. Taber*, 9 Gray, 372, an officer who, after receiving an execution with notice that a claim on which judgment had been recovered, had been assigned to another person and prosecuted at his cost, collected the amount of the execution and paid it to the nominal plaintiff, was held liable to the assignee. There seems equally good reason for holding liable one who with knowledge of an assignment knowingly takes any step in the course of litigation, or apart from litigation, to satisfy a claim in a method technically valid, but which will defraud the person beneficially interested in the claim. The beneficial interest of the original owner of a claim who has made no valid assignment should certainly receive as much protection

as the interest of an equitable assignee.

⁷⁸ *Globe Works v. United States*, 45 Ct. Cl. 497; *Jarrell v. Lillie*, 40 Ala. 271; *Stair v. Richardson*, 108 Ind. 429, 9 N. E. 300; *Wood v. Neely*, 7 Baxt. 586. So where the claim is based on a negotiable instrument the obligor may show that an alleged transfer was legally void. *Bullock v. Dodds*, 2 B. & Ald. 258; *Gaither v. Farmers' Bank*, 1 Pet. 37, 7 L. Ed. 43; *Nichols v. Fearson*, 7 Pet. 103, 106 9 L. Ed. 623; *Stone v. Mitchell*, 7 Ark. 91; *Lynch v. Dodge*, 130 Mass. 458. In *Commercial Nat. Bank v. Spaid*, 8 Bradwell, 493, an acceptor who had paid an indorsee who claimed through a transfer for a gaming consideration made void by statute, was held liable again to the payee.

barred himself from contesting its validity by a recognition of it after knowledge of the facts.⁷⁹ So the debtor may object that the character of the claim is such that public policy forbids its assignment.⁸⁰

If, however, the objection to the validity of an assignment is not that it is void but voidable only at the option of the assignor, or of some third person, the debtor has no legal defence whether or not action is brought in the assignee's name for it cannot be assumed that the assignor is desirous of avoiding the assignment.⁸¹ The generality of the statements in some of the cases so deciding would lead to the belief that the debtor not only might, but must pay an assignee who had acquired his assignment by fraud. The correctness of such a view cannot be admitted. It is true that not even an ordinary equitable defence is permissible to an action by the assignee.^{81a} The defrauded person may not wish to take advantage of his right to avoid the assignment and unless he does so, the debtor should be required to pay the assignee. The only way to protect the rights of all persons is to require the debtor to join, by way of interpleader, the assignee and the person who may be defrauded, offering to pay to whichever of these parties may be held entitled to receive payment, and unless the debtor takes this course he should be liable to a defrauded third person, or to any other person having a similar equity.⁸² Where

⁷⁹ *Higgs v. Northern Assam Tea Co.*, L. R. 4 Ex. 387; *Ex parte Universal Life Assurance Co.*, L. R. 10 Eq. 458; *Merchant Banking Co. v. Phoenix Steel Co.*, 5 Ch. D. 205; *Harris v. Baltimore*, 73 Md. 22, 17 Atl. 1046, 20 Atl. 111, 985, 9 L. R. A. 677; *King v. West Coast Grocery Co.*, 72 Wash. 132, 129 Pac. 1081. See also *Kull v. Thompson*, 38 Mich. 685.

⁸⁰ *Colonial Bank v. Sutton*, 79 N. Y. Misc. 244, 139 N. Y. S. 1002.

⁸¹ *Wood v. Steele*, 65 Ala. 436; *Lehman v. Clark*, 85 Ala. 109, 4 So. 651; *Prouty v. Roberts*, 6 Cush. 19, 52 Am. Dec. 761; *Carrier v. Sears*, 4 Allen, 336, 339; *Blanchard v. Commonwealth*, 6 Watts, 309; *Stoner v. Commonwealth*,

16 Pa. 387. See also *Kull v. Thompson*, 38 Mich. 685.

^{81a} Nothing can be allowed as an equitable defence at law which would not form the basis of an unconditional permanent injunction in equity.

⁸² In *Chappelear v. Martin*, 45 Ohio St. 126, 12 N. E. 448, payment by the maker of a promissory note to the bearer was held no discharge where the maker had notice that the note did not belong to the person who presented it.

In *Currey v. Joplin Savings Bank*, 100 Mo. App. 532, 74 S. W. 1036, the indorsement of a certificate of deposit was secured by a trick practiced upon the depositor, and payment

the debtor has notice, not that any specific person has been defrauded by the assignment, but that the assignment has been made in fraud of creditors, it is certain that no valid plea at law based on these facts can be made.⁸³ And no procedure by way of interpleader seems possible here, or necessary to make safe payment by the debtor to the assignee. The debtor cannot be required to interplead all creditors that may be defrauded. The creditors acquire no right against the claim assigned or against any specific property until they attach it.⁸⁴

As an assignee takes subject to defences there may be against his claim, so he is entitled to any advantages to which his assignor was entitled with reference to the claim. Thus an assignee for value is entitled to the benefit of any securities for the claim, though not in terms assigned.⁸⁵ So if the assignor was entitled to priority of payment from the debtor's estate, the assignee is entitled to the same priority, since he is in effect enforcing the assignor's right.⁸⁶

by the bank which had issued the certificate to the indorsee with notice of the facts was held no defence to an action by the depositor.

The situation is somewhat analogous to that of a bailee of goods who seeks to set up a *jus tertii* as a defence to an action by the bailor. As to this see, *Williston*, Sales § 421. Wherever the debtor may otherwise be liable again he should be allowed to interplead.

⁸³ *Blackford v. Westchester Fire Ins. Co.*, 101 Fed. 90, 41 C. C. A. 226; *Wood v. Steele*, 65 Ala. 436; *Gilmore v. Bangs*, 55 Ga. 403; *Sullivan v. Bonesteel*, 79 N. Y. 631; *Kamber v. Becker*, 27 Pa. Super. 266.

⁸⁴ In *Murphy v. Marland*, 8 Cush. 575, the court held that an assignee under an assignment made in fraud of creditors might specifically enforce the assigned contract against the debtor.

⁸⁵ *Edwards v. Bay State Gas Co.*, 184 Fed. 979, and cases cited; *Griffin v. Camaek*, 36 Ala. 695, 76 Am. Dec. 344. In case of several partial assignments, each assignee is entitled to such a ratable portion of the security

as the fraction of the claim assigned to him bears to the whole. The first partial assignee cannot claim the whole security so far as necessary to enable him to collect the portion of the debt assigned to him. *Carlisle v. Jumper*, 81 Ky. 282; *Moore's Appeal*, 92 Pa. 309.

⁸⁶ Thus the assignee of a claim for wages is entitled to the same priority under the National Bankruptcy Act as the assignor. *Shropshire v. Bush*, 204 U. S. 186, 27 S. Ct. 178, 51 L. Ed. 436. So the assignee of the claim of a material man. *In re Bennett*, 153 Fed. 673, 82 C. C. A. 531. And see to similar effect as to assignments of claims entitled for various reasons to priority. *Union Trust Co. v. Walker*, 107 U. S. 596, 2 S. Ct. 229, 27 L. Ed. 490; *Leftwich Lumber Co. v. Florence Bldg. Assoc.*, 104 Ala. 584, 18 So. 48; *Duncan v. Hawn*, 104 Cal. 10, 37 Pac. 626; *McAvity v. Lincoln, etc., Co.*, 83 Me. 504, 20 Atl. 82; *Sepp v. McCann*, 47 Minn. 364, 50 N. W. 246. *Cf. Tewksbury v. Bronson*, 48 Wis. 581, 4 N. W. 749.

§ 433. Notice to the debtor as affecting the assignee's right against him

The debtor should not be prejudiced by an assignment of which he has no notice. Accordingly if, prior to notice, he pays the debt to the assignor or is released from it by him, or acquires a set-off, or any defence for value, he can use his defence if sued by the assignee;⁸⁷ and payment without notice of a prior assignment, made in good faith to a subsequent assignee, discharges the debtor within this principle, since the subsequent assignee

⁸⁷ *Williams v. Sorrell*, 4 Ves. 389; *Cook v. Mutual Ins. Co.*, 53 Ala. 37; *Smith v. Carder*, 33 Ark. 709; *McCarthy v. Mt. Tecarte Co.*, 110 Cal. 687, 43 Pac. 391; *Ballinger v. Vates*, 26 Colo. App. 116, 140 Pac. 931; *Tuttle v. Fowler*, 22 Conn. 58; *Guerrey v. Perryman*, 6 Ga. 119; *Metropolitan Life Ins. Co. v. Lewis*, 14 Ga. App. 10, 80 S. E. 17; *Parmly v. Buckley*, 103 Ill. 115; *Barber v. Barth*, 192 Ill. 460, 61 N. E. 388; *Miers v. Charles H. Fuller Co.*, 167 Ill. App. 49; *Morris v. Hankel Printing Co.*, 202 Ill. App. 331; *Callanan v. Windsor*, 78 Ia. 193, 42 N. W. 652; *Bull v. Sink*, 8 Kans. App. 860, 57 Pac. 853; *Clark v. Boyd*, 6 T. B. Mon. 293; *Kugler v. Taylor*, 19 La. Ann. 100; *Brown v. Leavitt*, 26 Me. 251; *Robinson v. Marshall*, 11 Md. 251; *Connor v. Parker*, 114 Mass. 331; *Shields v. Taylor*, 25 Miss. 13; *Weinwick v. Bender*, 33 Mo. 80; *Leahi v. Dugdale's Adm'x*, 34 Mo. 99; *Bartlett v. Eddy*, 48 Mo. App. 32; *Washoe County Bank v. Campbell*, 41 Nev. 153, 167 Pac. 643; *Marsh v. Garney*, 69 N. H. 236, 45 Atl. 745; *Ingalls v. Burlingame*, 71 N. H. 19, 51 Atl. 175; *Reed v. Marble*, 10 Paige, 409; *Trustees v. Wheeler*, 61 N. Y. 88, 120; *Heermans v. Ellsworth*, 64 N. Y. 159; *Van Keuren v. Corkins*, 66 N. Y. 77; *Horowitz v. David*, 145 N. Y. S. 998; *Rayburn v. Hurd*, 20 Oreg. 229, 25 Pac. 635; *Bury v. Hartman*, 4 S. & R. 175, 177; *Brindle v. M'Ilvane*, 9 S. & R. 175; *Trants v. Brown*, 17 S. & R. 287;

Pellman v. Hart, 1 Pa. St. 263, 266; *Gaullagher v. Caldwell*, 22 Pa. 300, 60 Am. Dec. 85; *Commonwealth v. Sides*, 176 Pa. 616, 35 Atl. 136; *Ahrens & Ott Mfg. Co. v. Moore*, 131 Tenn. 191, 174 S. W. 270; *East Texas Ins. Co. v. Coffee*, 61 Tex. 287; *Alfalfa Lumber Co. v. Brady* (Tex. Civ. App.), 149 S. W. 204; *Gulf & C. Ry. Co. v. Stubbs* (Tex. Civ. App.), 166 S. W. 699; *Lampson v. Fletcher*, 1 Vt. 168, 18 Am. Dec. 676; *Loomis v. Loomis*, 26 Vt. 198; *Stebbins v. Bruce*, 80 Va. 389; *Dial v. Inland Logging Co.*, 52 Wash. 81, 100 Pac. 157; *Skobis v. Ferge*, 102 Wis. 122, 78 N. W. 426; *Stebbins v. Union Pac. R. Co.*, 2 Wyo. 71. *Cf. Stoddart v. Union Trust, Ltd.*, [1912] 1 K. B. 181; *Terney v. Wilson*, 45 N. J. L. 282. But a misstatement by the assignee to the debtor of the terms of his assignment will not prevent the assignee from insisting on his full rights unless the debtor has taken prejudicial action relying on the misstatement. *Weinberg v. Stratton*, 163 Mich. 408, 128 N. W. 926. A sub-assignee has also been held to take his rights subject to defences which the debtor had against the original assignee, *Martin v. Richardson*, 68 N. C. 255, but the correctness of this may be doubted. The sub-assignee in enforcing the claim is acting on behalf not of his assignor, but of the original assignor, and at common law would sue in the latter's name.

has in effect a power of attorney from the assignor.⁸⁸ the other hand payment to the assignor or other defence required by the debtor against the assignor after notice of the assignment are invalid,⁸⁹ unless the defence, though acquired notice, is based on a right of the defendant inherent in the contract by its terms. Thus if payments under an executory contract are assigned, the debtor may set up failure of the assignor to fulfil his part of the contract though such failure occurs after notice of the assignment,⁹⁰ for the assignor cannot give and

⁸⁸ *Laughlin v. District of Columbia*, 116 U. S. 485, 29 L. Ed. 701, 6 Sup. Ct. 472; *Mathews v. Hamblin*, 28 Miss. 611, 615; and see *infra* § 435 n. 9.

⁸⁹ *Legh v. Legh*, 1 B. & P. 447; *Brice v. Bannister*, 3 Q. B. D. 569, 578; *Liquidation Estates Purchase Co. v. Willoughby*, [1898] A. C. 321; *Welch v. Mandeville*, 1 Wheat. 233, 4 L. Ed. 79; *Mandeville v. Welch*, 5 Wheat. 277, 283, 5 L. Ed. 87; *Broadwell v. Imms*, 14 Ala. App. 437, 70 So. 294; *State v. Jennings*, 10 Ark. 428; *Nance v. Polk*, 116 Ark. 588 (not fully reported), 171 S. W. 1195; *First Nat. Bank v. Perris Irrigation Co.*, 107 Cal. 55, 40 Pac. 45; *Kitsinger v. Beck*, 4 Col. App. 206, 35 Pac. 278; *Fassett v. Mulock*, 5 Col. 466; *Chapman v. Shattuck*, 8 Ill. 49, 52; *Carr v. Waugh*, 28 Ill. 418; *Chicago Title Co. v. Smith*, 158 Ill. 417, 41 N. E. 1076; *Pearson v. Luecht*, 199 Ill. 475, 483, 65 N. E. 363; *Felthousen v. Lanward Pub. Co.*, 159 Ill. App. 416; *Daggett v. Flanagan*, 78 Ind. 253; *McFadden v. Wilson*, 96 Ind. 253; *Kithcart v. Kithcart*, 145 Ia. 549, 124 N. W. 305, 30 L. R. A. (N. S.) 1062; *Marr v. Hanna*, 7 J. J. Marsh. 642, 23 Am. Dec. 449; *Hackett v. Martin*, 8 Me. 77; *Mathews v. Houghton*, 10 Me. 420; *Milliken v. Loring*, 37 Me. 408; *Palmer v. Palmer*, 112 Me. 149, 91 Atl. 281; *Eastman v. Wright*, 6 Pick. 316; *Cutler v. Haven*, 8 Pick. 490; *Jones v. Witter*, 13 Mass. 304; *St. Johns v. Charles*, 105 Mass. 262; *St. Andrew v. Manchaug Mfg. Co.*,

134 Mass. 42; *Schilling v. Mulk*, Minn. 122, 56 N. W. 586; *Ander Miller*, 15 Miss. 586; *Wells v. Ed Hotel Co.*, 96 Miss. 191, 50 So. 27 L. R. A. (N. S.) 404; *Leahey v. dale's Adm'r*, 41 Mo. 517; *Lij South Omaha Co.*, 24 Neb. 69 N. W. 129; *Cameron v. Little*, 13 N. 23; *Dunklee v. Greenfield Co*, N. H. 245; *Sloan v. Sommers*, 2 (N. J.), 509; *Andrews v. Beeck Johns. Cas.* 411; *Littlefield v. Sto Johns.* 425; *Manufacturers' Com cial Co. v. Rochester, R. Co.*, N. Y. S. 989; *Wilson v. Stilwell*, Oh. St. 464, 471; *Gaullagher v. C well*, 22 Pa. St. 300, 302, 60 Am. 85. Compare *Beran v. Tradesm Nat. Bank*, 137 N. Y. 450, 33 N. 593; *First Nat. Bank v. Clark*, 9 E. 589; *Strong v. Strong*, 2 Aiken, Upton v. Wallace, 44 Ct. 552; *Q v. Colchester South*, 20 Ont. See also cases of partial assignment *infra*, § 444. Under the Iowa Co the debtor of an "open account" r discharge himself by paying the signor at any time prior to suit brou by the assignee though after notice the assignment, *Wing v. Page*, 62 87. but the debtor is not bound to the assignor under these circumstances. *Bailey v. Union Pac. Ry. Co.*, 62 354, 17 N. W. 567.

⁹⁰ *Smith v. Wall*, 12 Colo. 363, Pac. 42; *Fulton Nat. Bank v. Fult County*, 144 Ga. 691, 87 S. E. 10; *Buttrick Lumber Co. v. Collins*, 2

a larger right than he has himself; and breach of warranty may similarly be asserted against the assignee of a non-negotiable note, if the warranty was given at the time when the note was made, though the breach of warranty did not occur until after notice of the assignment.⁹¹ Moreover, if the debtor has a defence to a contract good against an assignee thereof, he may even after notice of the assignment rescind the original contract with the assignor and make a new contract with him relating to the same subject-matter, provided that this is not done with the fraudulent purpose of injuring the assignee.⁹²

A difficulty of procedure existed at common law where the debtor had acquired after notice of the assignment a defence good against the assignor. For the assignee under the old procedure was obliged to sue in the name of the assignor. To

Mass. 413, 418, 89 N. E. 138; *Pacific Rolling Mill Co. v. English*, 118 Cal. 123, 50 Pac. 383; *Grant v. Sickelsteel Lumber Co.*, 155 Mich. 600, 119 N. W. 1092; *Botsford v. Lull*, 30 Pa. Super. 292; *Rockwell v. Daniels*, 4 Wis. 432; *Whan v. Hope Natural Gas Co.*, 81 W. Va. 338, 94 S. E. 365. See also *Young v. Kitchin*, 3 Ex. D. 127; *Newfoundland v. Newfoundland R. Co.*, 13 A. C. 199; *Stoddart v. Union Trust, Ltd.*, [1912] 1 K. B. 181, 189; *Boogher v. Roach*, 12 App. Cas. D. C. 477; *Van Akin v. Dunn*, 117 Mich. 421, 75 N. W. 938.

⁹¹ *Rosenthal v. Rambo*, 165 Ind. 584, 76 N. E. 404.

⁹² In *Homer v. Shaw*, 212 Mass. 113, 98 N. E. 697, a contractor had assigned the payments to become due on his contract to the plaintiff, and notice of the assignment was given to the defendant, the other party to the contract. Thereafter, the contractor informed the defendant that he would be unable to complete the work for lack of funds, and the defendant made a new arrangement with him for the completion of the work which was in effect a rescission of the original contract, and the substitution of a new one

in its stead. The court held that the statement by the contractor of his inability to perform the original contract would have warranted a finding of repudiation and justified the defendant in refusing further performance so that the assignee would have been entitled to nothing, and added: "The assignor needed immediate financial assistance, and if the defendant might have advanced the money which the evidence shows he furnished to enable him to pay his employees, yet if he had done so the plaintiff's assignment would have been given priority over the loan. *Buttrick Lumber Co. v. Collins*, 202 Mass. 413, 89 N. E. 138. The parties while they could not modify to his prejudice the terms of the contract assigned without the plaintiff's consent, or by a secret fraudulent arrangement deprive him of the benefit of the assignment, were not precluded from entering into a new agreement if performance by the assignor had become impossible from unforeseen circumstances." See also *Tooth v. Hallett*, L. R. 4 Ch. 242; *Brice v. Bannister*, 3 Q. B. D. 569; *Ex parte Moss*, 14 Q. B. D. 310; *Cf. Drew v. Josolyne*, 18 Q. B. D. 590.

such a suit a defence good against the assignor seemed but as it was inequitable to allow the debtor to set up the defence under the circumstances, a court of equity formerly have enjoined the debtor from setting up his defence to the action;⁹³ and after the recognition by courts of law, at the close of the eighteenth century of the equitable rights of the assignee, the plaintiff, without the necessity of applying for an injunction might reply that the action though nominally on behalf of the assignor, was in fact prosecuted for the benefit of an assignee and that the defendant had notice of the assignment before he acquired his defence.⁹⁴ By some form of pleading appropriate to the jurisdiction in question the same result is everywhere reached.⁹⁵

§ 434. Notice to the debtor as affecting the assignee's rights against the assignor's creditors.

No notice to the debtor of an assignment of a non-negotiable chose in action is necessary to give the assignee an equitable right. This is universally agreed to be so as between the parties;⁹⁶ and is generally held in a contest between the assignee and the assignor's creditors. Therefore, without having gi

⁹³ See *Legh v. Legh*, 1 B. & P. 447; *Jeffs v. Day*, L. R. 1 Q. B. 372.

⁹⁴ *Legh v. Legh*, 1 B. & P. 447; *Welch v. Mandeville*, 1 Wheat. 233, 4 L. Ed. 79; *Strong v. Strong*, 2 Aik. 373.

⁹⁵ *Mandeville v. Welch*, 5 Wheat. 277, 283, 5 L. Ed. 87; *Fassett v. Mulock*, 5 Col. 466; *Chapman v. Shattuck*, 8 Ill. 49, 52; *Marr v. Hanna*, 7 J. J. Marsh. 642, 23 Am. Dec. 449; *Hackett v. Martin*, 8 Me. 77; *Matthews v. Houghton*, 10 Me. 420; *Eastman v. Wright*, 6 Pick. 316; *Cutler v. Haven*, 8 Pick. 490; *St. Johns v. Charles*, 105 Mass. 262; *Anderson v. Miller*, 15 Miss. 586; *Lipp v. South Omaha Co.*, 24 Neb. 692, 40 N. W. 129; *Duncklee v. Greenfield Co.*, 23 N. H. 245; *Sloan v. Sommers*, 2 Green (N. J.), 509; *King v. Miller*, 53 Or. 53, 97 Pac. 542; *Gaullagher v. Caldwell*, 22 Pa. St. 300,

302, 60 Am. Dec. 85; *Strong v. Strong*, 2 Aiken, 373. See also *Brown v. Hartford Fire Ins. Co.*, 4 Fed. 379 (Case No. 2009); *Wagner v. National Ins. Co.*, 90 Fed. 395; *C. C. A. 121*; *Chisholm v. Newton*, Ala. 371; *Cunningham v. Carper*, 10 Ala. 109, 112; *Reed v. Nevins*, Me. 193; *Rockwood v. Brown*, 1 G. 261.

⁹⁶ *Knickerbocker Trust Co. v. Co.*, 139 Fed. 792; *Columbia, etc., Tr. Co. v. First Nat. Bank*, 116 Ky. 364, S. W. 156; *Quigley v. Welter*, 95 Mich. 383, 104 N. W. 236; *Virginia-Carolina Chem. Co. v. McNair*, 139 N. C. 38, 51 S. E. 949; and see cases cited in this section *passim*. Therefore if the assignor collects the claim he holds the amount collected as constructive trust for the assignee. *MacDonald v. Knickerbocker*, 5 Minn. 352.

notice to the debtor, the assignee will be preferred over a subsequent garnishment of the debt by a creditor of the assignor,⁹⁷ and the debtor remains liable to the assignee, if by failing to disclose an assignment of which he had notice, he is compelled pay the assignor's creditor.⁹⁸ It is generally said, however, that notice must be given to the garnished debtor in time to

⁹⁷ *Pickering v. Ilfracombe Ry. Co.*, L. R. 3 C. P. 235; *Robinson v. Newbitt*, L. R. 3 C. P. 264; *Jones v. Lowery Banking Co.*, 104 Ala. 252, 16 So. 11; *McIntyre v. Hauser*, 131 Cal. 11, 63 Pac. 69; *Title Ins. & Trust Co. v. Williamson*, 18 Cal. App. 324, 123 Pac. 245; *Walton v. Horkan*, 112 Ga. 814, 38 S. E. 105, 81 Am. St. Rep. 77; *Savage v. Gregg*, 150 Ill. 161, 37 N. E. 312; *McGuire v. Pitts' Sons*, 42 Iowa, 535; *Dickinson v. Davis*, 171 Iowa, 29, 153 N. W. 203; *Hall v. Kansas City Terra Cotta Co.*, 97 Kans. 103, 154 Pac. 210, L. R. A. 1916 D. 361; *Millett v. Swift*, 138 Ky. 408, 128 S. W. 312; *Littlefield v. Smith*, 17 Me. 327; *Thayer v. Daniels*, 113 Mass. 129; *Whittredge v. Sweetser*, 189 Mass. 45, 75 N. E. 222; *Tabor v. Van Vranken*, 39 Mich. 793; *MacDonald v. Kneeland*, 5 Minn. 352; *Union Iron Works Co. v. Kilgore*, 65 Minn. 497, 67 N. W. 1017; *Schoolfield v. Hirsh*, 71 Miss. 55, 14 So. 528, 42 Am. St. Rep. 450; *Hendrickson v. Trenton Bank*, 81 Mo. App. 332; *Young v. Bank of Princeton*, 97 Mo. App. 576, 71 S. W. 713; *Oppenheimer v. First Nat. Bank*, 20 Mont. 192, 50 Pac. 419; *Lewis v. Holdredge*, 56 Neb. 379, 76 N. W. 890; *Marsh v. Garney*, 69 N. H. 236, 45 Atl. 745; *Corning v. Records*, 69 N. H. 390, 46 Atl. 462, 76 Am. St. Rep. 178; *Board of Education v. Duparquet*, 50 N. J. Eq. 234, 24 Atl. 922; *Jenkinson v. New York Finance Co.*, 79 N. J. Eq. 247, 82 Atl. 36; *Williams v. Ingersoll*, 89 N. Y. 508; *Anniston Nat. Bank v. Durham*, 118 N. C. 383, 24 S. E. 792; *Knisely v. Evans*, 34 Ohio St. 158; *Market Nat. Bank v. Raspberry*,

34 Okl. 243, 124 Pac. 758, L. R. A. 1916 E. 79; *Meier v. Hess*, 23 Oreg. 599, 32 Pac. 755; *Patten v. Wilson*, 34 Pa. 299; *Noble v. Thompson Oil Co.*, 79 Pa. 354, 367, 21 Am. Rep. 66; *Phillips Estate (No. 4)*, 205 Pa. 525, 531, 55 Atl. 216, 97 Am. St. Rep. 750; *Tierney v. McGarity*, 14 R. I. 231; *Chase v. Duby*, 20 R. I. 463; *Brown v. Minis*, 1 McCord, 80; *Zimmerman Land & Irrig. Co. v. Rooney Mercantile Co. (Tex. Civ. App.)*, 195 S. W. 201; *Bellingham Bay Co. v. Brisbois*, 14 Wash. 173, 44 Pac. 153; *Gray v. Hof-far*, 5 Brit. Col. 56. In a few States, however, garnishment before notice of an assignment is valid. *Goslan v. Powell*, 32 La. Ann. 521; *Bernard v. Whitney Nat. Bank*, 43 La. Ann. 50; 8 So. 702, 12 L. R. A. 302; *Clodfelter v. Cox*, 1 Sneed, 330, 60 Am. Dec. 157; *Dews v. Olwill*, 3 Baxt. 432; *Rodes v. Haynes*, 95 Tenn. 673, 33 S. W. 564; *Dillingham v. Traders' Ins. Co.*, 120 Tenn. 302, 108 S. W. 1148, 16 L. R. A. (N. S.) 220; *Ward v. Morrison*, 25 Vt. 593; *Nichols v. Hooper*, 61 Vt. 295, 17 Atl. 134; *Wolcott v. Mongeon*, 88 Vt. 361, 92 Atl. 457. (Notice by the assignor is insufficient.) In Connecticut a creditor who garnishees a claim in ignorance of an assignment is preferred over the assignee if the latter had failed to give notice to the debtor or within a reasonable time after the execution of the assignment. *Foster v. Mix*, 20 Conn. 395. See also *President, etc., of City Bank v. Thorp*, 79 Conn. 194, 64 Atl. 205, 465.

⁹⁸ *Milliken v. Loring*, 37 Me. 408; *Tabor v. Van Vranken*, 39 Mich. 793.

enable him to state in his affidavit or answer the facts of assignment and thereby prevent a judgment charging him. But though it would be everywhere conceded that a garnishee debtor without notice must be protected, it has been held in some courts that notice is effectual even after judgment charging him and that if payment of the judgment is made after such notice, the assignee may compel the debtor to pay again.¹

Similarly in jurisdictions where mechanics' liens give to the lienor only such rights as the general contractor may have. An assignee of the general contractor though he has given notice of his assignment is preferred to the holder of a subsequent lien.² A prior assignee who has not given notice to the debtor prevails also over a subsequent assignment in bankruptcy by the assignor.³ But where an assignment is made to secure present and future advances, the assignee will be subordinated to an attaching creditor, as to advances made before the assignee after notice of the attachment.⁴

¹ See especially *Howe v. Howe*, 97 Me. 422, 425, 54 Atl. 908; *Kingman v. Perkins*, 105 Mass. 111; *Whittredge v. Sweetser*, 189 Mass. 45, 75 N. E. 222; *Peterson v. Kingman*, 59 Neb. 667, 81 N. W. 847; *Marsh v. Garney*, 69 N. H. 236, 45 Atl. 745; *Corning v. Records*, 69 N. H. 390, 394, 46 Atl. 462, 76 Am. St. Rep. 178; and note in L. R. A. 1916 E. 84-88.

² *McGuire v. Pitts' Sons*, 42 Ia. 535; *MacDonald v. Kneeland*, 5 Minn. 352; *Bellingham Bay Co. v. Brisbois*, 14 Wash. 173, 44 Pac. 153, 46 Pac. 238.

³ Mechanics' liens are of two kinds—In some States the mechanic or material-man is given a direct lien on the property; in others he is merely subrogated to the rights of the general contractor. See 27 Cyc. 101. It is only in States where the latter kind of lien is given that the text is applicable.

⁴ *Spengler v. Stiles-Tull Lumber Co.*, 94 Miss. 780, 48 So. 966; *Board of*

Education v. Duparquet, 50 N. E. 234, 24 Atl. 922; *Copeland Manton*, 22 Oh. St. 398; *Hall v. Bailey*, 79 Wis. 229, 48 N. W. 385. See also *Brill v. Tuttle*, 81 N. Y. 454, 37 N. Y. Rep. 515; *Beardsley v. Cook*, N. Y. 143, 38 N. E. 109; *cf. Carte Brady*, 51 Fla. 404, 41 So. 539; *Beardsley v. Brown*, 71 Ill. App. 199; *Sirson v. New Orleans*, 109 La. 897, 30 So. 912; *Bourget v. Donaldson*, Mich. 478, 47 N. W. 326, where a statute giving mechanics' liens was of a different character.

⁵ *Burn v. Carvalho*, 4 Mylne & 690; *Greey v. Dockendorff*, 231 U. S. 513, 58 L. Ed. 339, 34 S. Ct. 16; *Young v. Upson*, 115 Fed. 192; *In re Macauley*, 158 Fed. 322; *In re Cincinnati Iron Store Co.*, 167 Fed. 45; 93 C. C. A. 122; *Muir v. Schenck*, Hill, 288, 38 Am. Dec. 633; *Bunn v. Bronson*, 78 Conn. 679, 63 A. 396.

⁶ *Howe v. Howe*, 97 Me. 422, 54 Atl. 908.

§ 435. Notice to the debtor as affecting the mutual rights of successive assignees.

If an assignment of itself be regarded as creating a legal right in the assignee, the first of two or more assignments would apparently prevail over the others. Similarly even though an assignment is held to create merely an equitable right, the prior assignment being the prior equity would prevail; and such is the rule in many of the United States without regard to notice given to the debtor.⁶ But even though the right be regarded as legal, it may nevertheless be defeasible; and, in England, by a rule which though not depending upon Statute may be compared in its effect to a recording act, or to the rule in sales of chattels preferring a second vendee with delivery over a prior vendee without delivery, whichever of several assignees first gives notice is preferred over other assignees, though they have prior assignments;⁷ and the English rule is followed in many jurisdictions in the United States.⁸

⁶ *Sutherland v. Reeve*, 151 Ill. 384, 38 N. E. 130; *White v. Wiley*, 14 Ind. 496; *Summers v. Hutson*, 48 Ind. 228; *Newby v. Hill*, 2 Metc. (Ky.) 530; *Lexington Brewing Co. v. Hamon*, 155 Ky. 711, 160 S. W. 264; *Columbia, etc., Trust Co. v. First Nat. Bank*, 116 Ky. 364, 25 Ky. L. Rep. 561, 76 S. W. 156; *Thayer v. Daniels*, 113 Mass. 129; *Whittredge v. Sweetser*, 189 Mass. 45, 75 N. E. 222; *Herman v. Connecticut Mut. Life Ins. Co.*, 218 Mass. 181, 105 N. E. 450, 451; *Burton v. Gage*, 85 Minn. 355, 88 N. W. 997; *Muir v. Schenck*, 3 Hill, 228, 38 Am. Dec. 633; *Bush v. Lathrop*, 22 N. Y. 535, 546; *Greentree v. Rosenstock*, 61 N. Y. 583, 593; *Williams v. Ingersoll*, 89 N. Y. 508, 523; *Fairbanks v. Sargent*, 104 N. Y. 108, 118, 9 N. E. 870, 58 Am. Rep. 490; *Fortunato v. Patten*, 147 N. Y. 277, 41 N. E. 572; *Central Trust Co. v. West India Imp. Co.*, 169 N. Y. 314, 323, 62 N. E. 387; *Lindsay v. Wilson*, 2 Dev. & Bat. Eq. 85; *Meier v. Hess*, 23 Ore. 599, 32 Pac. 755; *Youngberg v. El Paso Brick Co.* (Tex. Civ. App.), 155 S. W. 715; *Davis v. State Nat. Bank*

(Tex. Civ. App.), 156 S. W. 321; *West Texas Lumber Co. v. Green County* (Tex. Civ. App.), 188 S. W. 283; *Daily's Ex. v. Warren*, 80 Va. 512; *Clarke v. Hogeman*, 13 W. Va. 718; *Tingle v. Fisher*, 20 W. Va. 497.

⁷ *Dearle v. Hall*, 3 Russ. 1; *Foster v. Cockerell*, 3 Cl. & F. 456; *Freshfield's Trust*, 11 Ch. D. 198. See *Ward v. Duncombe*, [1893] A. C. 369, 391; *In re Weniger's Policy*, [1910] 2 Ch. 291. So in Scotland, *Redfearn v. Ferrier*, 1 Dow. P. C. 50.

The rule is enforced in England against assignees in bankruptcy as well as other assignees, a subsequent assignment prevailing over the prior right of an assignee in bankruptcy who has failed to notify the debtor. *Re Barr's Trusts*, 4 K. & J. 219; *Re Russell's Policy Trusts*, L. R. 15 Eq. 26. But the prior assignee of an equitable chose in action was preferred over a subsequent assignee who first gave notice in *Hill v. Peters*, [1918] 2 Ch. 273.

⁸ *Judson v. Corcoran*, 17 How. 612, 15 L. Ed. 231; *Spain v. Hamilton's Adm.*,

good faith and for value, the prior assignee cannot properly deprive him of this legal right." ¹³

If knowledge of the rule requiring notice could be widely diffused among the community, the English rule would have the same advantages in a lesser degree which a recording system for deeds and mortgages possesses. As notice is everywhere agreed to be vital in order to protect an assignee against fraudulent settlements between the debtor and assignor, it seems best to adopt the test of notice in contests between successive assignees, even though prior assignees are likely to suffer thereby, until business men learn what is necessary. A difficulty arises in applying this rule, however, where a garnishment of the debt is made between the dates of the first assignment without notice to the debtor, and a second assignment with such notice. The garnishment since it precedes the second assignment must be superior to it. On the other hand, the garnishment is subordinate to the first assignment.¹⁴ Accordingly, in this situation, it has been held that the first assignment is superior to the second, though the debtor had earlier notice of the latter.¹⁵

Statutes sometimes require record of an assignment of wages or notice of it to the assignor as a condition precedent to its validity. Under such statutes that assignment which first complies with the statutory requirement, prevails.¹⁶ Wherever under the existing law a prior assignee has the superior right,

349, 11 L. R. A. (N. S.) 471. See also *Graham Paper Co. v. Pembroke*, 124 Cal. 117, 56 Pac. 627, 44 L. R. A. 632]. But without discussion of estoppel a contrary decision was reached in regard to a non-negotiable note in *Emley v. Perrine*, 58 N. J. L. 472, and in regard to a policy of insurance in *In re Weniger's Policy*, [1910] 2 Ch. 291. In *Phelps v. Linnan*, 174 Ia. 138, 156 N. W. 294, a second assignee was given the written contract under which the assignor's rights arose and by representing to the debtor that there had been a re-assignment obtained payment. This payment was held to bar an action against the debtor by the first assignor,

though he had given notice of his assignment before the payment was made. If the case is sound an assignee under any written contract must get the writing to be secure.

¹³ *Ibid.*

¹⁴ See *supra*, § 434.

¹⁵ *Phillips Estate* (No. 4), 205 Pa. 525, 55 Atl. 216, 97 Am. St. Rep. 750.

¹⁶ *Peabody v. Lewiston*, 83 Me. 286, 22 Atl. 171; *Whitcomb v. Waterville*, 99 Me. 75, 58 Atl. 68; *Hall v. Boston Glass Co.*, 207 Mass. 328, 93 N. E. 640; *Thompson v. Erie R. Co.*, 207 N. Y. 171, 100 N. E. 791; *Bowley v. Erie R. Co.*, 70 N. Y. Misc. 168, 128 N. Y. S. 468.

if the subsequent assignee collects the claim after he has acquired knowledge of the prior, and equitably superior, assignment, he is liable at the suit of the first assignee.¹⁷ If the assignee also was aware at the time he paid the second assignee of the existence of the prior assignment, he also is liable to the first assignee.¹⁸ It has heretofore been assumed that all of the assignments in question were assignees of the whole claim, and if partial assignments are protected by the law to the same extent as total assignments are, the result will not be different if only a part of the claim is assigned. It has been held, however, under the Georgia Code, that the assignee of an entire claim acquires legal ownership thereto, while it still remains true that the assignee of part of a claim acquires only an equitable right; and that consequently a subsequent assignment of the whole claim taken in good faith and for value prevails over and invalidates a prior partial assignment. Whatever may be the necessity of such a decision under the Georgia Code, it seems to reach an undesirable result in view of the business importance of partial assignments. When the decision is followed it should be understood that a partial assignment is worthless as security since the assignor remains able to invalidate it at any time by making a total assignment. Nor does it seem that notice to the debtor would help the partial assignor unless the debtor promised to pay him. The rule would probably not be followed even in jurisdictions which allow or require an assignee of an entire claim to sue in his own name;²⁰ as such permission is properly held by most courts to make a change in procedure only, not in substantive

¹⁷ *Brooks v. Hinton State Bank*, 26 Okla. 56, 110 Pac. 46; *Carnegie Trust Co. v. Battery Place Realty Co.*, 67 N. Y. Misc. 452, 122 N. Y. S. 697.

¹⁸ *Carnegie Trust Co. v. Battery Place Realty Co.*, 67 N. Y. Misc. 452, 122 N. Y. S. 697.

¹⁹ *King v. Central of Georgia Ry. Co.*, 135 Ga. 225, 69 S. E. 113. See also *The Elmbank*, 72 Fed. 610.

²⁰ In *Fairbanks v. Sargent*, 104 N. Y. 108, 9 N. E. 870, 58 Am. Rep. 490, 117 N. Y. 320, 22 N. E. 1039, 6 L. R. A.

475, it was held after elaborate consideration, that a prior partial assignment prevailed over a subsequent assignment of the whole claim who took in good faith and without notice. The same result was reached in *Gillette v. Murphy*, 7 Okla. 91, 54 Pac. 413. In *Bridge v. Connecticut Mut. Life Co.*, 152 Mass. 343, 25 N. E. 61, a prior partial assignee would apparently have been preferred over a subsequent total assignee had he not been guilty of laches.

§ 436. Notice to the assignee.

It is possible to make a gift of tangible property without notice to the donee if delivery is made to a third person on behalf of the donee.²⁰ And not only may the legal title to property be transferred to a donee in this way, but also a trust may be created by either a declaration of trust on the part of the settlor or by a conveyance in trust of which the beneficiary has no knowledge.²¹ So a deed may be effectually delivered to a third person without notice to the grantee or covenantor.²² In all these cases the assent of the donee, if that is essential, is presumed, though subject to his right of rejection of the benefit when he gets knowledge of it. A tangible chose in action may be dealt with in similar fashion.²³ But some limitations must be observed in the case of an intangible chose in action. The owner of such property may indeed declare himself trustee of it or assign it to another person (who is not the debtor) as trustee for a third person. But he cannot make such an assignment to the debtor himself as trustee. A trust requires for its existence a *res* to which the trust may attach. The only existing *res* is the claim against the debtor and of this the debtor himself cannot be made trustee, since this would involve the same person being debtor and creditor. If the creditor attempted to make the debtor trustee and the latter assented a court of equity should hold him bound to pay the proposed *cestui que trust*, but the obligation would be that of one who makes a promise for the benefit of a third person, rather than of a trustee. To create such a contract the debtor must assent to the proposal.²⁴

²⁰ 20 Cyc. 1198.

²¹ 39 Cyc. 79.

²² See *supra*, § 213.

²³ See *infra*, § 439.

²⁴ In *Alexander v. Steinhardt*, [1903] 2 K. B. 208, Bigham, J., held that where a debtor mailed instructions to his agent directing the payment of certain money to a creditor and also mailed notice of this to the creditor but became bankrupt before either letter arrived, that an equitable assignment had been made on the posting

of the letter. The court said: "There was a clear intention to assign, sufficiently evidenced by the letters. In my opinion the case is just the same as if Walker & Co. had inclosed in a letter to the plaintiff a draft at sight on the defendants by way of payment of their debt, and I cannot doubt that the rights of the plaintiff upon that draft would arise as soon as the letter inclosing it was posted." It is submitted, however, that the decision is unsound and that the case is not like

§ 437. What amounts to notice.

Where there is a question of the priority of successive assignments, in jurisdictions which follow the English rule concerning notice, and also in all jurisdictions where the question arises whether a defence set up by the debtor was acquired before notice of the assignment, it is important to determine what constitutes notice. In the first place actual knowledge acquired in whatever manner and for whatever purpose, is sufficient, if it is such as would operate upon the mind of any rational man of business, and make him act with reference to the knowledge he has so acquired;²⁵ and even though there is no actual knowledge of an assignment, if there is knowledge of such facts as would put a reasonable man upon inquiry, and as would indicate heedless disregard of others' rights if no attention were paid to them, the effect is the same as if actual notice had been given.²⁶ But if information was casually given under such circumstances as naturally to pass out of the debtor's mind, it will not be regarded as notice;²⁷ though a formal notice would doubtless be effective whether forgotten or not. Notice by word of mouth is sufficient.²⁸ Notice to a corporate officer whose duty it is to receive or to communicate the fact to the corporation will bind the corporation;²⁹ notice given to one of the several co-trustees who are the debtors, binds all;³⁰ But where a trustee was also a beneficiary, and as such made assignments of his beneficial interests, his knowledge of the

that supposed of mailing a draft. The draft is a formal instrument and property in it will pass on mailing it, as property would pass in the goods when shipped, but rights in an intangible chose in action cannot be created in the same way. As to the necessity of notice to the assignee of an assignment, see *Nixon v. Joshua Hendy Machine Works*, 51 Wash. 419, 99 Pac. 11. See also *infra*, § 440.

²⁵ *Meux v. Bell*, 1 Hare, 73; *Lloyd v. Banks*, L. R. 3 Ch. 488; *Arden v. Arden*, 29 Ch. D. 702; *Guthrie v. Bashline*, 25 Pa. 80.

²⁶ *Anderson v. Van Alen*, 12 Johns. 343; *Tritt's Adm. v. Colwell's Adm.*,

31 Pa. 228. In *Barron v. Porter*, 44 Vt. 587, however, it is said that though notice need not be given by the assignee directly, it must at least indirectly emanate from him and be by his procurement.

²⁷ *Saffron Building Soc. v. Rayner*, 14 Ch. D. 406; *Re Barr*, 4 K. & J. 219; *Ex parte Carbis*, 1 Mont. & Ayrt. 693n.

²⁸ *Browne v. Savage*, 4 Drew, 635; *Smith v. Smith*, 2 C. & M. 231; *Alletson v. Chichester*, L. R. 10 C. P. 319.

²⁹ *Gale v. Lewis*, 9 Q. B. 730; *Alletson v. Chichester*, L. R. 10 C. P. 319.

³⁰ *Smith v. Smith*, 2 Cr. & M. 231; *Ward v. Duncombe*, [1893] A. C. 369; *Foster v. Mix*, 20 Conn. 395.

first assignment was held not to bind the trustees, and a subsequent assignee who gave formal notice was preferred.³¹ On the other hand if the assignee is one of several co-trustees who are the debtors, the knowledge of the assignee has been held notice.³² The ground of distinction taken is that an assignor has motives for concealing the assignment from his co-trustees, but an assignee has not. Somewhat similarly the knowledge of an agent or trustee in a transaction in which he is committing a fraud for his own advantage will not be imputed to the principal or co-trustees.³³ If notices of assignment are simultaneous, the prior assignee would prevail.³⁴ A distinction which is not without force between the position of the debtor and that of an assignee has been thus stated: "The fact, however, of such substitution of a new creditor must, in order to make the debtor liable to the assignee, be brought home to the debtor with much exactness and certainty before he has paid the debt. The rule of notice to him is much more stringent than that which may defeat the title of a purchaser of a chose in action or of real estate. The latter is free to purchase or refuse to purchase as he chooses, and therefore it is his duty, before acting, to trace out any reasonable doubt and to inform himself of the true facts as soon as anything arises to put him on inquiry. But the debtor is not so situated. He must pay to his original creditor when the debt is due, unless he can establish affirmatively that some one else has a better right. The notice to him, therefore, must be of so exact and specific a character as to convince him that he is no longer liable to such original creditor, and to place in his hands the means of defence against him, or at least the information necessary to interplead the assignee."³⁵

³¹ *Browne v. Savage*, 4 Drew, 635; *Lloyd's Bank v. Pearson*, [1901] 1 Ch. 885.

³² *Browne v. Savage*, 4 Drew, 635. An earlier decision which seems directly contrary was not cited. *Timson v. Ramsbottom*, 2 Keen, 35.

³³ *Thomson-Houston Elec. Co. v. Capitol Elec. Co.*, 65 Fed. 341, 12 C. C. A. 643; *Atlantic Mills v. Indian Orchard Mills*, 147 Mass. 268, 17 N. E.

496; *Newell v. Hadley*, 206 Mass. 335, 347, 92 N. E. 507, 29 L. R. A. (N. S.) 908.

³⁴ *Johnstone v. Cox*, 16 Ch. Div. 571.

³⁵ *Skobis v. Ferge*, 102 Wis. 122, 130, 78 N. W. 426, citing, —*Christmas v. Russell*, 14 Wall. 69, 84, 20 L. Ed. 762; *Brady v. Loring*, 70 Ill. App. 191; *In re Tichener*, 35 Beav. 317.

§ 438. Whether the assignee is subject to equities of persons.

Though it is well settled that an assignee is subject to equities of the obligor, it is a matter of dispute how an assignee is subject to equities of third persons against the assignor; as, for instance, where the assignor was himself the assignee of the chose in action the assignment of which had been procured by fraud, or where for any reason the assignor had made the assigned claim subject to a trust actual or constructive. An assignee who takes the assignment with notice of the fraud against the assigned right, (and still more clearly if he takes the assignment to satisfy the claim) would everywhere undoubtedly hold the assigned chose in action subject to the prior claim. But even though the assignee paid value with no knowledge of any outstanding claim, it is still true that the defrauded owner or person beneficially entitled to the assignment has an equity prior in time and, therefore, superior to that of the ultimate assignee. If, indeed, the latter could be regarded as the owner of a legal right, his right would be superior to the original equity.³⁷ What has been already said in regard to the assignment of choses in action and is later summarized³⁸ indicates that the ultimate purchaser cannot be regarded as himself the legal owner of the chose in action in the full sense of the word; but it has been urged by a learned writer that the ultimate assignee has a legal power of attorney which equity should not deprive him if he has acquired it for value and in good faith. This may be granted, but it cannot be admitted that the mere possession of a power of attorney involves any legal ownership of the right to which the power relates. It is the giving of a right of ownership which has constituted historically the contribution of courts of equity to the law of assignment. Whatever changes of procedure may have been made, it still seems true that such ownership of a chose in action as an assignee has is properly spoken of as equitable.

³⁷ *Buffalo Glass Co. v. Assets Realization Co.*, 133 N. Y. App. D. 775, 117 N. Y. S. 1087.

^{37a} *Infra*, § 447.

³⁸ Ames, 1 Harv. L. Rev. 7, *Constitution of Trusts* (2d ed.), 310.

³⁷ See, *e. g.*, *Duncan Townsite v. Lane*, 245 U. S. 308, 311, 62 L. Ed. 309, 38 S. Ct. 99.

^{38a} See *infra*, §§ 446a, 447.

though the power of attorney which goes with the assignment expressly or by implication is a legal right (not, however, a legal property right). Accordingly, the latent or collateral equity against the assignor of an intangible chose in action should prevail over the right of the subsequent purchaser in good faith; and in the absence of an estoppel such is the rule prevailing in England and in many of the United States.³⁹ In some States, however, the courts have followed an early statement of Chancellor Kent,⁴⁰ which is now overruled in New York,⁴¹ to the effect that an assignee is not bound by equities in favor of third persons since though he can make inquiries of the debtor before taking the assignment and thereby acquaint himself with any defences the debtor may have, no such procedure is possible in regard to equities of unknown third persons.⁴² Whatever may be the practical force of the reasoning of Chancellor Kent, it fails to meet the technical argument that the assignee is entitled to enforce merely the assignee's rights as under a power from him, and is, therefore, necessarily subject to the same defences to which he is subject, but if, as

³⁹ *Cockell v. Taylor*, 15 Beav. 103; *Barnard v. Hunter*, 2 Jur. N. S. 1213; *Sutherland v. Reeve*, 151 Ill. 384, 38 N. E. 130; *Pearson v. Luecht*, 199 Ill. 475, 65 N. E. 363; *Brown v. Equitable Life Assur. Soc.*, 75 Minn. 412, 78 N. W. 103, 671, 79 N. W. 968; *Tripp v. Jordan et al.*, 177 Mo. App. 339, 164, S. W. 158; *Bush v. Lathrop*, 22 N. Y. 535; *Cutts v. Guild*, 57 N. Y. 229; *Owen v. Evans*, 134 N. Y. 514, 31 N. E. 999; *Central Trust Co. v. West India Co.*, 169 N. Y. 314, 62 N. E. 387; *Culmer v. American Grocery Co.*, 21 N. Y. App. Div. 556, 48 N. Y. S. 431; *State v. Hearn*, 109 N. C. 150, 13 S. E. 895; *Gillette v. Murphy*, 7 Okl. 91, 54 Pac. 413; *Perkins v. W. A. Lippincott Co.*, 260 Pa. 473, 103, Atl. 877; *Downer v. South Royalton Bank*, 39 Vt. 25. See also *Western Nat. Bank v. Maverick Nat. Bank*, 90 Ga. 339, 16 S. E. 942, 35 Am. St. Rep. 210; *Osborn v. McClelland*, 43 Ohio St. 284, 1 N. E. 644.

⁴⁰ In *Murray v. Lylburn*, 2 Johns. Ch. 441. See also *Livingston v. Dean*, 2 Johns. Ch. 479.

⁴¹ See New York decisions stated *supra*, n. 39.

⁴² *Winter v. Montgomery Gas Light Co.*, 89 Ala. 544, 7 South. 773; *First National Bank v. Perris Irrigation District*, 107 Cal. 55, 40 Pac. 45; *Ohio Life Ins. Co. v. Ross*, 2 Md. Ch. 25; *Duke v. Clark*, 58 Miss. 465; *Williams v. Donnelly*, 54 Neb. 193, 74 N. W. 601; *DeWitt v. VanSickle*, 29 N. J. Eq. 209; *Miffin County Bank's Appeal*, 98 Pa. 150; *Huber's Assigned Estate*, 21 Pa. Sup. Ct. 612, 615 (but see *Henry v. Black*, 213 Pa. 620, 63 Atl. 250; *Perkins v. W. A. Lippincott Co.*, 260 Pa. 473, 103 Atl. 877). In a few of these decisions which relate to mortgages and judgments, it is not clear how far the court intended to lay down broadly a principle covering all non-negotiable choses in action.

some of the decisions hold, the assignee under modern law acquires the legal ownership of the assigned right as if a novation had been made, the latent equities would off.⁴³

A distinction must be taken, however, where the chose in action has a tangible form, especially if it is by law assignable. An overdue negotiable promissory note though often treated as a chose in action is in reality different. After maturity the transfer of such a note by the holder transfers a legal title and though the circumstance that the transfer is after maturity puts the taker of the note on inquiry as to defence the maker may have (since if he had had no defence the instrument would presumably have been paid) yet the fact that the instrument is overdue gives no reason to suppose that there are collateral equities affecting the transfer of title. In such a case, therefore, the *bona fide* purchaser of the note is protected.⁴⁴ A principle is applicable also to choses in action having tangible form like certificates of policies of insurance, non-negotiable bonds, somewhat similar to those that invoked when they are made the subject of gift.⁴⁵ The ownership of the document is regarded as conferring a kind of legal ownership to the chose in action represented by it.

⁴³ See *infra*, § 446.

⁴⁴ *Wolf v. American Trust & Sav. Bank*, 214 Fed. 761, 132 C. C. A. 410; *Mohr v. Byrne*, 135 Cal. 87, 67 Pac. 11; *Young Men's &c. Co. v. Rockford Nat. Bank*, 179 Ill. 599, 46 L. R. A. 753, 70 Am. St. Rep. 135; *Justice v. Stonecipher*, 267 Ill. 448, 108 N. E. 722; *Moore v. Moore*, 112 Ind. 149, 13 N. E. 673, 2 Am. St. Rep. 170; *Eversole v. Maull*, 50 Md. 95; *Gardner v. Beacon Trust Co.*, 190 Mass. 27, 76 N. E. 455, 2 L. R. A. (N. S.) 767, 112 Am. St. Rep. 303; *Etheridge v. Gallagher*, 55 Miss. 458; *Lee v. Turner*, 89 Mo. 489, 14 S. W. 505; *Neuhoff v. O'Reilly*, 93 Mo. 164, 6 S. W. 78 (compare *Turner v. Hoyle*, 95 Mo. 337, 8 S. W. 157; *Crawford v. Johnson*, 87 Mo. App. 478, 484; *Priest v. Garnett*, (Mo. App. 1917), 191

S. W. 1048; *Patterson v. Ral*, S. C. 138, 17 S. E. 463, 19 L. R. A. 1048; *See also Combs v. Hodge*, 21 How. 16 L. Ed. 115; and the arguments in *Pomeroy's Equity Juris.*, §§ 707 and 11 Harv. L. Rev. 40. *But contra, In re European Bank*, L. Ch. 891; *Foley v. Smith*, 6 Wall. 4 L. Ed. 931; *Texas v. White*, 7 Wall. 19 L. Ed. 227; *Vermilye v. Adam Press Co.*, 21 Wall. 138, 22 L. Ed. 138; *Bird v. Cockrem*, 28 La. Ann. 70; *v. Evans*, 134 N. Y. 514, 31 N. E. 622; *Weathered v. Smith*, 9 Tex. 622 may be argued with some force that sections 52, 55, and 59 of the Negotiable Instruments Law support the view of the party having the collateral equity.

⁴⁵ See *infra*, § 439.

cordingly a *bona fide* purchaser of a certificate of stock,⁴⁶ a non-negotiable bond or note,⁴⁷ or a policy of insurance,⁴⁸ is preferred to one having an equitable right against the assignor. Furthermore, it has been held that a written assignment of a chose in action by one who seeks to avoid the assignment later on equitable grounds estops the claimant as against a *bona fide* purchaser who bought the chose in action on the faith of that writing.⁴⁹ In the cases thus far referred to the assignor though subject to an equity was either the legal owner of the chose in action or had an assignment from the legal owner. An assignor who has no legal title but is a mere bailee of a non-negotiable tangible chose in action can give no right even to a *bona fide* purchaser which can stand against the bailor's claim.⁵⁰

§ 439. Gifts of tangible choses in action.

Certain choses in action have such tangible form that the form is popularly regarded as being itself the obligation. To some extent the law has sanctioned this popular view. A bond, a policy of insurance, negotiable paper, a savings bank book,

* Colonial Bank v. Cady, 15 A. C. 267, 278, 285; Ambrose v. Evans, 66 Cal. 74, 4 Pac. 960; Arnold v. Johnson, 66 Cal. 402, 5 Pac. 796; Otis v. Gardner, 105 Ill. 436. But see Ireland v. Hart, [1902] 1 Ch. 522; Taliaferro v. First Bank, 71 Md. 200, 214, 17 Atl. 1036; Dueber Watch Case Mfg. Co. v. Daugherty, 62 Ohio St. 589, 57 N. E. 455.

^a Rimmer v. Webster, [1902] 2 Ch. 163; Cowdrey v. Vandenburg, 101 U. S. 572, 25 L. Ed. 923; Adams v. District of Columbia, 17 Ct. of Cl. 351; International Bank v. German Bank, 71 Mo. 183, 36 Am. Rep. 468; Putnam v. Clark, 29 N. J. Eq. 412; Grocers' Bank v. Neet, 29 N. J. Eq. 449; Combes v. Chandler, 33 Oh. St. 178; Taylor v. Gitt, 10 Barr, 428. But see Blackman v. Lehman, 63 Ala. 547, 35 Am. Rep. 57; Covell v. Tradesman's Bank, 1 Paige, 131; Patterson v. Rabb, 38 S. C. 138, 17 S. E. 463, 19 L. R. A. 831.

^a Plummer v. People's Bank, 65 Iowa, 405, 21 N. W. 699. But see Brown v. Equitable Life Assur. Soc., 75 Minn. 412, 78 N. W. 103, 671, 79 N. W. 968; Culmer v. American Grocery Co., 21 N. Y. App. Div. 556, 48 N. Y. S. 431.

⁴⁸ See Cowdrey v. Vandenburg, 101 U. S. 572, 25 L. Ed. 923; Campbell v. Brackenridge, 8 Black, 471, Thurston v. McLellan, 34 App. D. C. 294; Cochran v. Stewart, 21 Minn. 435; Moore v. Metropolitan Bank, 55 N. Y. 41, 14 Am. Rep. 173; Mifflin County Bank's Appeal, 98 Pa. 150; State Bank v. Hastings, 15 Wis. 75. But see Owen v. Evans, 134 N. Y. 514, 31 N. E. 999; Central Trust Co. v. West India Co., 169 N. Y. 314, 324, 62 N. E. 387.

⁵⁰ Blackman v. Lehman, 63 Ala. 547, 35 Am. Rep. 57; Midland Railroad Co. v. Hitchcock, 37 N. J. Eq. 549. See also Combes v. Hodge, 21 How. 397, 16 L. Ed. 115.

is more than mere evidence of a claim. Indeed, where surrender of the document is essential to the enforcement chose in action this method of looking at the matter is technically exact.⁵¹

Where for instance a bank book must be presented prerequisite to drawing money (as is ordinarily true of savings bank books) the book itself is representative of the obligation. Where on the other hand (as is ordinarily true in regard to bank accounts subject to check) a bank book need not be presented in order to withdraw deposits, it is merely convergent evidence of the claim against the bank, not representative of it. In accordance with this distinction (though as will be seen from the following section a gift of an intangible chose in action unless made by deed or for consideration is ineffectual to create an irrevocable right⁵²) the mere delivery of a policy of insurance,⁵³ or savings bank book,⁵⁴ or a non-neg-

⁵¹ See also, *infra*, § 1042.

⁵² The gift, of course, becomes effectual if the chose in action is reduced to possession or a novation made with the debtor before revocation. See, e. g., *Marston v. Industrial Trust Co.* (R. I.), 107 Atl. 88.

⁵³ *Gledhill v. McCoombs*, 110 Me. 341, 86 Atl. 247; *Harrison v. McConkey*, 1 Md. Ch. 34; *Crittenden v. Phoenix Co.*, 41 Mich. 442, 2 N. W. 657; *McCord v. Noyes*, 3 Bradf. (N. Y. Surr.) 139; *Lacey v. Lacey*, 7 Barr, 251, 253, 47 Am. Dec. 513; *Bond v. Bunting*, 78 Pa. 210, 218; *Madeira's App.*, 17 W. N. C. (Pa.) 202; *Malone's Estate*, 13 Phila. 313; *Northwestern Mutual L. I. Ins. Co. v. Wright*, 153 Wis. 252, 140 N. W. 1078. See also *New York Life Ins. Co. v. Dunlevy*, 214 Fed. 1, 130 C. C. A. 473.

⁵⁴ *Camp's Appeal*, 36 Conn. 88, 4 Am. Dec. 39; *Schollmuer v. Schoendelen*, 78 Ia. 426, 43 N. W. 282, 16 Am. St. Rep. 455; *Hill v. Stevenson*, 63 Me. 364, 18 Am. Rep. 231; *Drew v. Hagerty*, 81 Me. 231, 17 Atl. 63, 3 L. R. A. 230, 10 Am. St. Rep. 255; *Augusta Savings Bank v. Fogg*, 82

Me. 538, 541, 20 Atl. 92; *French v. Schwarze*, 122 Md. 12, 89 Atl. 111; *Kimball v. Leland*, 110 Mass. 111; *Foss v. Lowell Bank*, 111 Mass. 477; *Sheedy v. Roach*, 124 Mass. 477, 478, 12 Am. Rep. 630; *Davis v. Ney*, 125 Mass. 590, 28 Am. Rep. 272; *Pierce v. Boston Bank*, 129 Mass. 425, 37 Am. Rep. 477; *Wade v. Smith*, 213 Mass. 34, 99 N. E. 477; *Laing v. Durand*, 84 N. J. Eq. 93, 88 Atl. 884; *Penfield v. Thayer*, 2 E. R. 305. (See *Curry v. Powers*, 125 N. Y. 212, 25 Am. Rep. 577); *Ridgely v. Thrall*, 125 N. Y. 572, 21 Am. Rep. 758; *Hoar v. Hoar*, 5 R. I. 637, (N. Y. Surr. Ct.) 637; *Fiero v. Fierstein & Co.* (N. Y. Super. Ct.), 151; *Tilghman v. Wheaton*, 8 R. I. 536, 5 Am. Rep. 621, 94 Am. Dec. 126; *Cass v. Dennison*, 9 L. I. 88, 11 Am. Rep. 212; *Providence Inst. v. Taft*, 14 R. I. 537. See also *Venturi v. Silvio*, 197 Ala. 61, 73 So. 45. But see, *contra*, *M'Gonigle v. Murray, Jr.* Rep. 3 Eq. 460; *Murray v. Cannon*, 41 Md. 466 (cf. *Dougherty v. Moore*, 71 Md. 248, 251, 18 Atl. 17 Am. St. Rep. 524); *Walsh's Appeal*, 122 Pa. 177, 15 Atl. 470, 9 Am. St. Rep. 83. In *Foley v. New York Sa-*

able or unindorsed bill or note of a third person,⁵⁵ or lottery ticket,⁵⁶ with intent to give creates an irrevocable right in the donee to enforce the claim, and delivery to a third person on behalf of the donee is sufficient though unknown to the donee, if the transaction is beneficial to him.⁵⁷

Upon the authorities there is some difficulty presented by the gift of a non-negotiable bond. "In gifts *causa mortis* the irrevocable right of the donee is admitted both in England and the United States."⁵⁸ "In gifts *inter vivos*, on the other hand, if *Edwards v. Jones*,⁵⁹ is still law, the donee has no claim against the obligor."⁶⁰ A deed is as effective a method of

Bank, 157 N. Y. App. Div. 868, 142 N. Y. S. the court enforced a gift *causa mortis*, though the bank book was not actually delivered. The case seems questionable, though the donor's intent was sufficiently manifested, and an order was delivered. Where, however, the bank has expressly or impliedly accepted the donee as a creditor a valid novation may arise though the book was never delivered. *Marston v. Industrial Trust Co.*, (R. I.) 107 Atl. 88.

⁵⁵ *Jones v. Deyer*, 16 Ala. 221, 225; *McHugh v. O'Connor*, 91 Ala. 243, 9 So. 165; *Buschian v. Hughart*, 28 Ind. 449; *Gammon Seminary v. Robbins*, 128 Ind. 85, 27 N. E. 341, 12 L. R. A. 506; *Meriwether v. Morrison*, 78 Ky. 572; *Wing v. Merchant*, 57 Me. 383; *Trowbridge v. Holden*, 58 Me. 117; *Grover v. Grover*, 24 Pick. 261, 35 Am. Dec. 319; *Hale v. Rice*, 124 Mass. 292; *Lyle v. Burke*, 40 Mich. 499; *Malone v. Doyle*, 56 Mich. 222, 23 N. W. 26; *Marston v. Marston*, 21 N. H. 491; *Westerlo v. DeWitt*, 36 N. Y. 340, 93 Am. Dec. 517; *Mack v. Mack*, 3 Hun. 323; *Montgomery v. Miller*, 3 Redf. (N. Y. Surr.) 154; *Scott v. Lauman*, 104 Pa. 593; *Horner's Appeal*, 2 Pennyp. 289; *Hopkins v. Manchester*, 16 R. I. 663, 19 Atl. 243, 7 L. R. A. 387; *Brunson v. Brunson*, Meigs, 630; *Carpenter v. Dodge*, 20 Vt. 595; *Wilson v. Car-*

penter, 17 Wis. 512; *Rupert v. Johnston*, 40 U. S. Q. B. 11, 16. And see *Lee v. Magrath*, L. R. 10 Ir. 313. *Hitch v. Davis*, 3 Md. Ch. 266, is *contra*. A gift by the donor of his own note is of course ineffectual. *Wisler v. Tomb*, 169 Cal. 382, 146 Pac. 876.

⁵⁶ *Gold v. Rutland*, 1 Eq. Cas. Abr. 346; *Grangiac v. Arden*, 10 Johns. 293.

⁵⁷ *Northwestern Mut. L. Ins. Co. v. Wright*, 153 Wis. 252, 140 N. W. 1078.

⁵⁸ *Ames's Cases on Trusts* (2d ed.), 145 n. citing: *Snellgrove v. Bailly*, 3 Atk. 214; *Duffield v. Elwes*, 1 Bligh, n. s. 497, 542; *Gardner v. Parker*, 3 Mad. 184; *Staniland v. Willott*, 3 Macn. & G. 664, 676; *Waring v. Edmonds*, 11 Md. 424; *Kiff v. Weaver*, 94 N. C. 274, 55 Am. Rep. 601; *Wells v. Tucker*, 3 Binn. 366; *Lee v. Boak*, 11 Gratt. 182.

⁵⁹ 1 Mylne & Cr. 226.

⁶⁰ *Ames's Cases on Trusts* (2d ed.), 145. The author adds: "This case was followed in *Searle v. Law*, 15 Sim. 95, and approved in *Re Richardson*, 30 Ch. Div. 396, 401, 404. But see, *contra*, *Roberts v. Lloyd*, 2 Beav. 376; *Patterson v. Williams*, Ld. & G. temp. Plunket, 95, 99 (*semble*); and especially in *Re Patrick*, [1891] 1 Ch. 82.

This distinction between a gift *inter vivos* and a *donatio mortis causa*, it is safe to say, was not contemplated by Lord Hardwicke in *Snellgrove v.*

giving a non-negotiable chose in action having tangible for delivery of the document,⁶¹ as against the assignor or one claiming no higher right. As against a subsequent innocent purchaser of the document from the assignor, the grantee by whom the document was delivered would doubtless fail.

The point which has troubled the courts in regard to assignments by voluntary deed is the frequently asserted rule that equity will not aid a voluntary covenant. This rule should not prevent, however, an assignment by deed from operating as an irrevocable power. The difficulty such as it is has troubled the courts only in dealing with assignments of legal choses in action. A voluntary assignment of an equitable chose in action (that is a right enforceable only in equity as that *cestui que trust* against his trustee) has not been questioned

Baily, 3 Atk. 214. See also 1 Bligh, (N. S.) 497, 506, per Sugden *arguendo*. And since the donor cannot recover the bond from the donee, having voluntarily parted with it (Barton v. Gainer, 3 H. & N. 387, see also *supra*, 140 n. 1; *infra*, 156, n. 1; 162, n. 4), and for want of it is also without remedy against the obligor, we have this anomalous condition of things, namely, two adverse claimants of a debt confessedly due, and the courts powerless to give judgment for either.

This unfortunate conclusion is avoided, and consistency maintained, in this country, where the gift of a bond *inter vivos* is put on the same footing with a gift in view of death. Ensign v. Kellogg, 4 Pick. 1; Hunt v. Hunt, 119 Mass. 474; Cox v. Hill, 6 Md. 274 (*semble*); Ruckman v. Ruckman, 33 N. J. Eq. 354; Gilchrist v. Stevenson, 9 Barb. 9; Hunter v. Hunter, 19 Barb. 631; Hackney v. Vrooman, 62 Barb. 650; Johnson v. Spies, 5 Hun, 468 (*semble*); Taber v. Willets, 44 Hun, 346; Re Wirt, 5 Dem. 179; Pringle v. Pringle, 59 Pa. 281; Zimmerman v. Streep, 75 Pa. 147; Elam v. Keen, 4 Leigh, 333; Sterling v. Wilkinson, 83 Va. 791, 3 S. E. 533 (*semble*); Lewis v. Mason's Adm'r, 84 Va. 731, 10 S. E. 529 (*sem-*

ble); Fleshman v. Hoylman, 27 W. 728; Wilson v. Carpenter, 17 Wis. (*semble*). See also Rupert v. John, 40 U. C. Q. B. 11, 16, 17." Bu Wood v. Partridge, 11 Mass. 488.

⁶¹ Hopkins v. Radford, Brown, 40; Drakeford v. Wilks, 3 Atk. Patterson v. Williams, Ll. & G. t. Plunket, 95, 99; Pearson v. Amic Assurance Office, 27 Beav. 229; Ell v. King, 14 Ch. D. 179; Justice Wynne, 12 Ir. Ch. R. 289; Otis v. B. with, 49 Ill. 121; Badgley v. Votrain Ill. 25, 28, 18 Am. Rep. 541; Massé Huntington, 118 Ill. 80, 7 N. E. : Emley v. Perrine, 58 N. J. L. 472 Atl. 951; Trough's Est., 75 Pa. 1 Bond v. Bunting, 78 Pa. 210; Scot Dixon, 108 Pa. 6, 56 Am. Rep. 1 But see *contra*, Ward v. Audland Beav. 201.

^{61a} Donaldson v. Donaldson, K 711; Villers v. Beaumont, 1 Vern. 1 Ellison v. Ellison, 6 Ves. 656; Bent v. Mackay, 15 Beav. 12; Voyle Hughes, 2 Sm. & G. 18; Lambe Orton, 1 Dr. & Sm. 125; Gilbert Overton, 2 Hem. & M. 110; Re Way Trusts, 2 D. J. & S. 365; Nanney Morgan, 37 Ch. Div. 346; Re Lucan, Ch. D. 470; Gannon v. White, 2 Eq. 207; Ensign v. Kellogg, 4 Pick.

§ 440. Gifts of intangible choses in action.

Unless a chose in action has such tangible form as to induce the law to regard it as in the nature of chattel property, certainly no effective gift of it can be made without a deed, for either delivery or a deed is essential to a gift even of chattel property.⁶² Even though a deed of a chose in action be given, there is this difference between such a transfer and a transfer of chattel property by deed: the chose in action is in its nature not fully assignable, but the title to the chattel can and does pass without delivery. It is moreover constantly stated that equity will not aid a volunteer, and the inference is possible from such statements that equity will not give to a donee by deed of a chose in action the protection accorded to assignees of choses in action who pay value for the assignment. The cases are not wholly satisfactory, but even a voluntary assignment by deed should be protected as against the assignor or any successor to his rights. The assignment imports a covenant not to revoke the power given to the assignee or to derogate from the assignment. Accordingly if the assignor should do so he would be liable in damages. Moreover, the debtor will frequently be unable to determine without litigation whether the assignment was for consideration or not, and whether the assignment has been revoked or not. The situation is one where there are likely to be several suits if the assignment is not protected, where there should be none.⁶³ Unless the authority

Stone v. Hackett, 12 Gray, 227; *Henderson v. Sherman*, 47 Mich. 267, 11 N. W. 153; *Johnson v. Williams*, 63 How. Pr. 233; *Ham v. Van Orden*, 84 N. Y. 257; *Patton v. Cledennin*, 3 Murph. (N. C.) 68; *Chasteen v. Martin*, 84 N. C. 391.

⁶² In *Irons v. Smallpiece*, 2 B. & A. 551, Tenterden said: "In order to transfer property by gift, there must either be a deed or instrument of gift or delivery." In *Cochrane v. Moore*, 25 Q. B. D. 57, 61, Fry, L. J., said of this statement: "If he meant that an instrument in writing not under seal was different from parol in respect of a gift *inter vivos*, he was probably in

error." The numerous decisions showing the necessity of delivery of a gift of chattel property are collected in 20 Cyc. 1195.

⁶³ See *Fortescue v. Barnett*, 3 Mylne & K. 36; *Re Patrick*, [1891] 1 Ch. 82; *Otis v. Beckwith*, 49 Ill. 121; *Massey v. Huntington*, 118 Ill. 80, 7 N. E. 269; *Trough's Estate*, 75 Pa. 115; *Scott v. Dixon*, 108 Pa. 6, 56 Am. Rep. 192. In *Anning v. Anning*, 4 Comm. Law Rep. (Australia, 1907) 1049, it was held that an assignment by deed was good. Some of the judges thought it was good on the general principle laid down in the English cases that the donor must do everything possible or

given by the assignor is under seal or given for consideration it is revocable in spite of an intent or agreement that be irrevocable. The agreement sounds in contract and for its validity the same requisites as any promise.⁶⁴ In respect an assignment differs from a declaration of trust which is valid though made without consideration.⁶⁵ An assignment without consideration will, however, create an assignment though revocable agency. Therefore, if the assignor has revoked the authority, the obligor cannot set up lack of consideration for the assignment.⁶⁶ Whether in a jurisdiction which by statute permits an assignee to sue in his own name an assignee merely for collection may do so, has been somewhat disputed, but it seems generally permitted.⁶⁷ The

the gift would be incomplete. Isaacs, J., however, suggested as another theory that the deed contained an implied covenant that the grantor would do nothing to derogate from his deed. *Cf. Edwards v. Jones*, 1 Mylne & C. 226. See further cases cited in the following section. Under the English Judiciary Act it has been held that a voluntary assignment of an existing debt is a valid legal assignment. *Hambleton v. Brown*, [1917] 2 K. B. 93.

⁶⁴ In *Cook v. Lum*, 55 N. J. L. 373, 26 Atl. 803, the assignor had deposited a sum of money with K, who gave her a paper upon which were figures showing the amount deposited, but nothing else except the date. This paper was given by the assignor on her death-bed to the plaintiff. After the assignor's death the plaintiff brought suit against the administrator of the assignor, but was held not entitled to recover. The court said: "The donor parted with nothing that was essential to her own dominion over the money in question." See also *Sewell v. Moxey*, 2 Sim. (N. S.) 189; *Airey v. Hall*, 3 Sm. & G. 315; *Walker v. Bradford Bank*, 12 Q. B. D. 511; *Re Richardson*, 30 Ch. D. 396; *Maynard v. Maynard*, 105 Me. 567, 75 Atl. 299; *Jackson v. Sessions*, 109

Mich. 216, 67 N. W. 315; *M. Bordwell*, 83 Minn. 54, 85 N. W. 52 L. R. A. 849, 85 Am. St. F. 101; *Smither v. Smither*, 30 Hun, 101; *Caumont v. Bogert*, 36 Hun, 101; *Matson v. Abbey*, 70 Hun, 101; *N. Y.* 179, 36 N. E. 11; *Re Long*, 4 Yerg. 68; *Cowen v. Fidelity Bank*, 94 Tex. 547, 64 S. W. 771.

⁶⁵ *Ames' Cas. Trusts* (2d ed. 1892).

⁶⁶ *Walker v. Bradford Bank*, 12 Q. B. D. 511; *Harding v. Harding*, 12 Q. B. D. 442; *Henderson Nat. Bk. v. Lagow*, 3 Ky. L. Rep. 173, 174; *v. Bacon*, 183 Mass. 5, 66 N. E. 101; *Coe v. Hinkley*, 109 Mich. 608, 158 W. 915; *Hickman v. Chaney*, 158 Mich. 217, 118 N. W. 993; *Richardson v. Mead*, 27 Barb. 178; *Merrick v. Richardson*, 38 Barb. 574; *Allen v. Brown*, 38 Barb. 86; *Sheridan v. Mayor*, 68 Barb. 30; *Levins v. Stark*, 57 Or. 181, 100 Pac. 980; *Buxton v. Barrett*, 140 Cal. 40; *Pearce v. Wallis*, 58 Tex. Civ. 315, 124 S. W. 496. But see *note, Brownlow & G. 40*; *Patten v. Williams*, Lloyd & G. temp. Pl. 95; *Hill v. Sheibley*, 64 Ga. 529; *man v. Hoey*, 89 N. Y. 537.

⁶⁷ *Greig v. Riordan*, 99 Cal. 31, 100 Pac. 913; *Cobb v. Doggett*, 142 Cal. 142, 75 Pac. 785; *Goodnow v. L*

that a declaration of trust may be made without consideration has in some cases led the courts to treat as declarations of trust transactions intended as gifts, but ineffectual as such for lack of either consideration or an assignment under seal.⁶⁸ But the general rule is now well established that an intended transfer will not be given effect as a declaration of trust.⁶⁹ An assignment made to secure an antecedent debt is generally held to have been made for value,⁷⁰ as is also true of similar assignments of negotiable instruments,⁷¹ though generally not of chattels⁷² except where made so by the Uniform Sales Act.⁷³

§ 441. Partial assignments.

Several different kinds of transactions may be entered into by those who seek to transfer a partial interest in a chose in action.

1. An intention may be manifested that the assignee shall enforce the entire claim against the debtor and, having done so, shall retain part for himself and turn over the remainder to the assignor.

2. It may be contemplated that the assignor shall collect the whole claim from the debtor, and shall turn over a portion of what he collects to the so-called assignee.

3. It may be contemplated that the assignee shall be authorized to demand from the debtor directly, payment of his portion of the claim, but shall not be authorized to demand payment of the whole.

field, 63 Iowa, 275, 19 N. W. 226; Rullman v. Rullman, 81 Kans. 521, 106 Pac. 52; State *ex rel.* Adjustment Co. v. Superior Court, 67 Wash. 355, 121 Pac. 847; Hankwitz v. Barrett, 143 Wis. 639, 128 N. W. 430.

⁶⁸ Morgan v. Malleson, L. R. 10 Eq. 475.

⁶⁹ Milroy v. Lord, 4 De Gex F. & J. 264; Bridge v. Bridge, 16 Beav. 315, 326, 327; Trimmer v. Danby, 25 L. J. Ch. 424; Conner v. Trawrick, 37 Ala. 289, 79 Am. Dec. 58; Peters v. Fort Madison Co., 72 Iowa, 405, 34 N. W. 190; Young v. Young, 80 N. Y. 422, 36 Am. Rep. 634; *Re* Crawford, 113 N. Y. 560, 21 N. E. 692, 5 L. R. A. 71;

Flanders v. Blandy, 45 Oh. St. 108, 12 N. E. 321.

⁷⁰ Henderson Nat. Bank v. Lagow, 3 Ky. L. Rep. 173; Shaford v. Detroit Sav. Bank, 125 Mich. 431, 84 N. W. 624; Bradley v. Thorne, 67 Minn. 281, 69 N. W. 909; Manufacturers' Commercial Co. v. Rochester R. Co., 117 N. Y. S. 989.

⁷¹ *Infra*, § 1146.

⁷² Williston, Sales, § 620.

⁷³ Such consideration is sufficient under Sec. 76 of the Act. Williston, Sales, 619, 620. The jurisdictions in which the statute has been enacted are enumerated *infra*, § 506.

If the transaction is of the first sort, there is in effect a total assignment, so far as the collection of the claim is concerned. The assignee is *dominus* of the whole claim and becomes trustee of a portion of the proceeds after collection.⁷⁴ What has been said already in regard to assignments of an entire claim is applicable to such cases, except that if all persons interested are parties to a suit to collect the claim, the assignee's recovery will be limited to the amount which he is equitably entitled to keep.⁷⁵

Cases of the second type are not properly called assignments: How far a contract of the so-called assignor to pay out of the claim when collected gives an equitable lien on the fund, has been previously considered.⁷⁶ It is cases of the third kind which are generally referred to as partial assignments, and in this book, unless special indication is made to the contrary, the words partial assignment are used to denote a case of this sort.

It should be observed that an assignment of a divisible portion of performance separately due under a contract is not to be regarded as a partial but as a total assignment, though other sums are also due or to become due under the contract.⁷⁷

§ 442. A partial assignment gives the assignee no right to sue at law.

A debtor who is bound for the payment of a sum of money or for the delivery of a quantity of goods cannot be required to make performance in instalments unless he expressly or impliedly agreed to do so,⁷⁸ as a banker does when he receives a depositor's account subject to check;⁷⁹ nor can the law

⁷⁴ Cases of this sort are—*Comfort v. Betts*, [1891] 1 Q. B. 737; *Tancred v. Delagoa Bay R. Co.*, 23 Q. B. D. 239. (*Cf. Mercantile Bank v. Evans*, [1899] 2 Q. B. 613); *Columbian Reinforced Concrete Co. v. Rose*, 187 Fed. 803, 109 C. C. A. 563; *In re Stiger*, 202 Fed. 791, 796; *Cress v. Ivens*, 163 Ia. 650, 145 N. W. 325; *Wheless v. Meyer & Schmid Co.*, 140 Mo. App. 572, 120 S. W. 708; *St. Nicholas Hotel Co. v. Meyer & Schmid Co.*, 140 Mo. App. 592, 120 S. W. 714; *Cogan v. Conover*

Mfg. Co., 69 N. J. Eq. 809, 64 Atl. 973, 115 Am. St. Rep. 629; *Fairbanks v. Sargent*, 117 N. Y. 320, 332, 22 N. E. 1039, 6 L. R. A. 475; *Randel v. Vanderbilt*, 75 N. Y. App. D. 313, 318, 78 N. Y. S. 124.

⁷⁵ *McCrum v. Corby*, 11 Kan. 464.

⁷⁶ See *supra*, § 429.

⁷⁷ *Timmons v. Citizens' Bank*, 11 Ga. App. 69, 74 S. E. 798.

⁷⁸ *Infra*, § 861.

⁷⁹ *Weinstock v. Bellwood*, 12 Bush,

fairly subject a debtor to several actions where he has contracted to perform a single act. Therefore, as the assignor himself is not entitled to bring action for a part, he cannot in any way authorize another to do so; so that under ordinary procedure at common law, a partial assignee cannot maintain an action either in his own name or in that of the assignor;⁸⁰ even though by statute an assignee of a chose in action is allowed to sue in his own name.⁸¹

139, 140; *Skobis v. Ferge*, 102 Wis. 122, 131, 78 N. W. 426.

⁸⁰ *Fairlie v. Denton*, 8 B. & C. 395; *Mandeville v. Welch*, 5 Wheat. 277, 5 L. Ed. 87; *Bosworth v. Jacksonville Nat. Bank*, 64 Fed. 615, 12 C. C. A. 331, 24 U. S. App. 413; *Sheats v. Markley*, 249 Fed. 315, 161 C. C. A. 323; *Kansas City, etc., R. Co. v. Robertson*, 109 Ala. 296, 19 So. 432; *Andrews v. Frierson*, 134 Ala. 626, 33 So. 6; *Thomas v. Rock Island Gold, etc., Mining Co.*, 54 Cal. 578; *Chicago, Burlington & Quincy R. v. Provolt*, 42 Colo. 103, 93 Pac. 1126, 16 L. R. A. (N. S.) 587; *Pueblo v. Dye*, 44 Colo. 35, 96 Pac. 969; *Timmons v. Citizens' Bank*, 11 Ga. App. 69, 74 S. E. 798; *Potter v. Gronbeck*, 117 Ill. 404, 7 N. E. 586; *German Fire Ins. Co. v. Bullene*, 51 Kans. 764, 33 Pac. 467; *Weinstock v. Bellwood*, 12 Bush, 139; *Getchell v. Maney*, 69 Me. 442, 444; *Whitcomb v. Waterville*, 99 Me. 75, 58 Atl. 68; *Palmer v. Palmer*, 112 Me. 149, 91 Atl. 281; *Palmer v. Merrill*, 6 Cush. 282, 52 Am. Dec. 782; *Cotting v. Foster*, 178 Mass. 564, 566, 60 N. E. 386; *Andrews Electric Co. v. St. Alphonse, etc., Soc. (Mass.)*, 123 N. E. 103; *Milroy v. The Spurr Mountain Iron Min. Co.*, 43 Mich. 231, 5 N. W. 287; *Dean v. St. Paul, etc., R. Co.*, 53 Minn. 504, 55 N. W. 628; *Cross v. Page & Hill Co.*, 116 Minn. 123, 133 N. W. 178; *Swift v. Wabash R. Co.*, 149 Mo. App. 526, 131 S. W. 124; *Otis v. Adams*, 56 N. J. L. 38, 27 Atl. 1092; *Sternberg & Co. v. Lehigh*

Valley R. Co., 78 N. J. L. 277, 73 Atl. 39; *Field v. Mayor*, 6 N. Y. 179, 57 Am. Dec. 435; *Stanbery v. Smythe*, 13 Oh. St. 495; *McDaniel v. Maxwell*, 21 Oreg. 202, 28 Am. St. Rep. 740; *Vetter v. Meadville*, 236 Pa. 563, 85 Atl. 19; *Carter v. Nichols*, 58 Vt. 553, 5 Atl. 197; *Dudley v. Barrett*, 66 W. Va. 363, 66 S. E. 507.

⁸¹ *Sternberg & Co. v. Lehigh Valley R. Co.*, 78 N. J. L. 277, 73 Atl. 39, *affd.* in 80 N. J. L. 468, 78 Atl. 1135; *National Union F. Ins. Co. v. Denver, etc., R. Co.*, 44 Utah, 26, 137 Pac. 653. In England the matter has been the subject of much doubt. In *Brice v. Bannister*, 3 Q. B. D. 569, a partial assignee was allowed with little discussion to maintain an action against the debtor though the assignor was not a party to the action. This case was criticised on this ground, it seems justly, by Chitty, J., in a decision of the Court of Appeal in *Durham v. Robertson*, [1898] 1 Q. B. 765, but the point was expressly left undecided. In *Skipper v. Holloway*, [1910] 2 K. B. 630, *Darling, J.*, followed *Brice v. Bannister*, but his decision was reversed by the Court of Appeal on another point. In *Forster v. Baker*, [1910] 2 K. B. 636, *Bray, J.*, held the partial assignee of a judgment debt was not entitled to execution because the assignment of part of a chose in action could not give rise to a legal right. The decision was affirmed on the somewhat narrower principle (which seems nevertheless to involve

It is generally stated as an exception to the rule that a partial assignee cannot sue at law, that this is permissible if the debtor consents to the partial appropriation by an assignment of it.⁸² Doubtless, "the debtor's acceptance or promise gives the assignee an action at law against him [the debtor] not on the assignment but on the promise."⁸³ In other words, novations are possible by which the debtor enters into separate contracts in lieu of the original single contract; partial assignment by the assignor operating as an assent on his part to the creation of such contracts. It has been held occasionally that where no objection is made by a debtor to notice of a partial assignment he thereby becomes liable to the partial assignee,⁸⁴ but, on the one hand, as will be argued in the following sections, even though the debtor objects to the assignment, he ought not to be allowed to defeat it, and on the other hand to give silence the effect of assent to a novation. In the absence of special circumstances seems to enlarge too much the possibility of making out contracts by tacit acceptance.

§ 443. Rights of partial assignee in equity and under code

As between the assignor (or any one who stood in no better position than the assignor) and a partial assignee it was early recognized in England that the assignee was equitably entitled to the portion of the claim assigned to him.⁸⁵ And though a partial assignee can have no better right in equity than at law to compel an objecting debtor to perform part to the assignee and the remainder to the assignor,⁸⁷ the difficulty can be evaded

by a similar conclusion as to any partial assignment) that as the assignor had only the right to an execution on the whole debt, he could give an assignee no different right. In *Conlan v. Carlow County Council*, [1912] 1 Ir. R. 535, Bray's opinion was approved and followed.

⁸² *Mandeville v. Welsh*, 5 Wheat. 277, 286, 5 L. Ed. 87; *Sheatz v. Markley*, 249 Fed. 315, 161 C. C. A. 323; *Vetter v. Meadville*, 236 Pa. 563, 85 Atl. 19, and see cases in this section and the following section *passim*.

⁸³ *Bank of Harlem v. Bayonne*, N. J. Eq. 246, 253, 21 Atl. 478.

⁸⁴ *Cross v. Page & Hill Co.*, 116 M. 123, 133 N. W. 178; *Friedman v. C. C. Smith* (Mo. App.), 196 S. W. 75. See also cases in regard to the effect of the assent of a check on the liability of a bank to the payee, *supra*, § 42.

⁸⁵ See *supra*, § 91.

⁸⁶ This was so decided in *Row v. Dawson*, 1 Ves. Sr. 331 (1749); *1 v. Morris*, 4 Sim. 607. See also *Yee v. Groves*, 1 Ves. Jr. 280.

⁸⁷ See cases cited *infra*, n. 90.

"In equity, the interests of all parties can be determined in a single suit. The debtor can bring the entire fund into court, and run no risks as to its proper distribution. If he be in no fault, no costs need be imposed upon him, or they may be awarded in his favor. If he be put to extra trouble in keeping separate accounts, he can, if it is reasonable, be compensated for it. In many ways a court of equity can, while a court of law, with its present modes, cannot, protect the rights and interests of all parties concerned." ⁸⁸ To one who is disposed to doubt the propriety of equitable protection of partial assignments of choses in action, it might well be asked: "Should it be that the debtor cannot assign to a creditor what the same creditor can attach." ⁸⁹ And it is now well settled that a partial assignee is equitably entitled to the part of the chose in action assigned to him and may enforce his rights by means of a suit in equity or its modern code equivalents.⁹⁰ The essential feature of procedure in equity is that all parties interested in the fund can be made parties and the debtor can pay into court the whole amount due as an entirety. Under code procedure this result may be achieved as readily as under

⁸⁸ *Exchange Bank v. McLoon* 73, Me. 498, 505, 40 Am. Rep. 388.

⁸⁹ *Ibid.*, p. 506. That the creditor can attach by garnishment, see *James v. Newton*, 142 Mass. 366, 375, 8 N. E. 122, 56 Am. Rep. 692.

⁹⁰ *Carroll v. Kelly*, 111 Ala. 661, 20 So. 456 (*cf.* *Andrews v. Frierson*, 134 Ala. 626, 33 So. 6); *Grain v. Aldrich*, 38 Cal. 514, 99 Am. Dec. 423; *Lawson v. Lyon*, 136 Ga. 214, 71 S. E. 149; *Timmons v. Citizens' Bank*, 11 Ga. App. 69, 74 S. E. 798; *Warren v. First Nat. Bank*, 149 Ill. 9, 38 N. E. 122, 25 L. R. A. 746; *Lapping v. Duffy*, 47 Ind. 51; *Palmer v. Palmer*, 112 Me. 149, 91 Atl. 281; *James v. Newton*, 142 Mass. 366, 8 N. E. 122, 56 Am. Rep. 692; *Andrews Electric Co. v. St. Alphonse &c. Soc.*, 233 Mass. 20, 123 N. E. 103; *Schilling v. Mullen*, 55 Minn. 122, 56 N. W. 586; *Whitney v. Cowan*, 55 Miss. 626; *Field v. Mayor*, 6 N. Y.

179, 57 Am. Dec. 435; *Risley v. Phoenix Bank*, 83 N. Y. 318, 38 Amer. Rep. 421 (*affd.* 111 U. S. 125); *Carvill v. Mirror Films*, 165 N. Y. S. 676; *Etheridge v. Vernoy*, 74 N. C. 800; *Geist's Appeal*, 104 Pa. 351; *Harris County v. Campbell*, 68 Tex. 22, 3 S. W. 243, 2 Am. St. 467; *Dudley v. Barrett*, 66 W. Va. 363, 66 S. E. 507. See also *Kentucky Lumber &c. Co. v. Montz*, 158 Ky. 328, 164 S. W. 935. An exceptional decision to the contrary is *Bosworth v. Jacksonville Nat. Bank*, 64 Fed. 615, 12 C. C. A. 331. And see *Rice v. Dudley*, 34 Mo. App. 383; *Gordon v. Jefferson City*, 111 Mo. App. 23, 85 S. W. 617; *Friedman v. Griffith* (Mo.), 196 S. W. 75. In Pennsylvania it seems that by no procedure can a municipality be compelled to recognize a partial assignment. *Philadelphia's Appeals*, 86 Pa. 179; *Vetter v. Meadville*, 236 Pa. 563, 85 Atl. 19.

the old form of a bill in equity. The assignor and partial assignee may be allowed to join as plaintiffs;⁹¹ or the partial assignee may separately intervene in an action by the assignor against the debtor.⁹²

It is essential in any event, however, that the assignor be made a party to the litigation;⁹³ but it has been held that the right to require the joinder of the assignor may be waived by failure to take seasonable objection.⁹⁴ If a part of the assignor's duties in a bilateral contract are delegated to a partial assignee, as well as part of the assignor's rights assigned, the question should be dealt with on the same principles as where a total assignment of the duties and rights of the party to a bilateral contract is attempted; namely, inquiry should be separately made whether the duties may be partly delegated and also whether the right is in its nature capable of assignment. If these questions are answered in the affirmative, the enforcement of the partial right should be allowed.⁹⁵

§ 444. Rights of the debtor to settle with his creditor in spite of partial assignments.

The Supreme Court of Wisconsin has held ⁹⁶ that though a partial assignee may maintain a suit to enforce his assignment, making both assignor and debtor parties, nevertheless, where

⁹¹ Delaware County Commissioners *v.* Diebold Safe & Lock Co., 133 U. S. 473, 488, 10 S. Ct. 399, 33 L. Ed. 674; *Evans v. Durango Land & Coal Co.*, 80 Fed. 433, 25 C. C. A. 531; *Guagler v. Chicago &c. R. Co.*, 197 Fed. 79; *Schilling v. Mullen*, 55 Minn. 122, 56 N. W. 586; *Whittemore v. Judd &c. Oil Co.*, 124 N. Y. 565, 27 N. E. 244, 21 Am. St. Rep. 708; *National Union Fire Ins. Co. v. Denver &c. R. Co.*, 44 Utah, 26, 137 Pac. 653; *Watson v. Milwaukee &c. R. Co.*, 57 Wis. 332, 15 N. W. 468; *Ramsay v. Johnson*, 8 Wyo. 476, 58 Pac. 755, 80 Am. St. Rep. 948. See also *Pueblo v. Dye*, 44 Colo. 35, 96 Pac. 969. But see *Independent School Districts v. Independent School District*, 50 Ia. 322; *Pelly v. Bowyer*, 7 Bush, 513.

⁹² *Trinity County Lumber Co. v. Holt* (Tex. Civ. App.), 144 S. W. 1029; *Wells v. Crawford*, 23 Colo. App. 103, 127 Pac. 914. See also *Reid v. Hennessy Co.*, 45 Mont. 462, 124 Pac. 273.

⁹³ *Thompson v. Gimbel Bros.*, 71 N. Y. Misc. 126, 128 N. Y. S. 210.

⁹⁴ *National Union Fire Ins. Co. v. Denver &c. R. Co.*, 44 Utah, 26, 137 Pac. 653.

⁹⁵ See *Delaware County v. Diebold Safe & Lock Co.*, 133 U. S. 473, 10 S. Ct. 399, 33 L. Ed. 674, where the court distinguished partial assignments of contracts for public works from other building contracts.

⁹⁶ In *Thiel v. John Week Lumber Co.*, 137 Wis. 272, 118 N. W. 802.

a creditor has given orders upon his debtor for a part of the debt, thereby making a partial assignment, the debtor might refuse to recognize the assignment and "could at any time have discharged its debt to the plaintiff (the assignor) by paying him the whole sum due, without regard to the rejected orders or liability to their holders;" and that therefore unless the debtor chose to assent to the partial assignment, the assignor could maintain an action against him for the whole claim. This doctrine finds some support in a few other cases.⁹⁷ Such a doctrine is, however, inconsistent with a recognition of any equitable right in the partial assignee. If he has such a right and the debtor has notice of it, the debtor should be liable if he knowingly destroys the right by paying the assignor, just as one who owes money to a trust estate would continue to be liable if he should pay the trustee, his legal creditor, when he knew that the trustee was about to defraud his *cestui que trust*. If the debtor is unwilling to pay his debt in separate sums corresponding to the respective interests of the assignor and assignee, he should pay the whole fund into court and ask the court to distribute it among the parties equitably entitled. A settlement with the assignor will not discharge him from liability. The weight of authority supports the conclusion that payment to the assignor will not discharge the debtor.⁹⁸ Where

⁹⁷ *Kendall v. United States*, 7 Wall. 113, 19 L. Ed. 85; *Shearer v. Shearer*, 137 Ga. 51, 72 S. E. 428; *Chapman v. Shattuck*, 8 Ill. 49; *Chicago, etc., R. Co. v. Nichols*, 57 Ill. 484; *Eaves v. Chicago &c. R. Co.*, 200 Ill. App. 380; *Skobis v. Ferge*, 102 Wis. 122, 78 N. W. 426. See also *Sheatz v. Markley*, 249 Fed. 315, 161 C. C. A. 323; *Carter v. Nichols*, 58 Vt. 553, 5 Atl. 197. But it may be assumed such courts would all hold with *Burditt v. Porter*, 63 Vt. 296, 21 Atl. 955, 25 Am. St. Rep. 763, that a creditor of the assignor who has garnished the debt cannot set up that a partial assignment is ineffectual, if the debtor does not wish to object.

⁹⁸ *Liquidation Estates Purchase Co. v. Willoughby*, [1898] A. C. 321; *Bal-*

linger v. Vates, 26 Colo. App. 116, 140 Pac. 931; *Western & Atlantic R. Co. v. Union Investment Co.*, 128 Ga. 74, 57 S. E. 100; *Palmer v. Palmer*, 112 Me. 149, 91 Atl. 281; *James v. Newton*, 142 Mass. 366, 372, 8 N. E. 122, 56 Am. Rep. 692; *Schilling v. Mullen*, 55 Minn. 122, 56 N. W. 586; *A. K. McInnis Lumber Co. v. Rather*, 111 Miss. 55, 71 So. 264; *Bank of Harlem v. Bayonne*, 48 N. J. Eq. 246, 21 Atl. 478; *Todd v. Meding*, 56 N. J. Eq. 83, 38 Atl. 349; *Field v. Mayor*, 6 N. Y. 179, 57 Am. Dec. 435; *Marshall v. Meech*, 51 N. Y. 140, 10 Am. Rep. 572; *Brill v. Tuttle*, 81 N. Y. 454, 37 Am. Rep. 515; *Fairbanks v. Sargent*, 117 N. Y. 320, 330, 331, 22 N. E. 1039, 6 L. R. A. 475; *Seiter v. Smith*, 105 Tex. 205, 147 S. W. 226; *Gulf &c. Ry.*

the partial assignment is to an attorney the case may perhaps be distinguished on the ground that public policy favors the termination of litigation. This reasoning is particularly applicable to claims for torts;⁹⁹ but even such partial assignments would probably be generally protected¹⁰⁰ In jurisdictions where the partial assignee is protected, if the debtor settles with the assignor, with notice of the partial assignment, for less than the full amount of the claim, the assignor must pay the assignee the full amount of his share.¹

§ 445. Implied warranties of the assignor.

It was early decided that the assignor of a claim impliedly covenanted against any acts of his own, or of any one claiming under him, in derogation of the assignment.² Therefore if the assignor collects the claim, he holds what he has collected as constructive trustee for the assignee.³ Under the early law no further warranty was implied.⁴ But the development of the law of implied warranty in the sale of goods during the nineteenth century has naturally resulted in the implication of analogous warranties in the sale of choses in action. Accordingly, one who assigns for value a chose in action impliedly warrants in the absence of a manifestation of a contrary intention that the claim is genuine and legally enforceable to the amount, if any, specified in the assignment.⁵ It has been held,

Co. v. Stubbs (Tex. Civ. App.), 166 S. W. 699; *Quick v. Colchester South*, 30 Ont. 645; and see cases of orders to pay part of a fund, cited *supra*, § 425.

⁹⁹ The right of a defendant in a tort action to settle with the plaintiff, in spite of notice of a partial assignment to the plaintiff's attorney, was upheld in *Weller v. Jersey City, etc., R. Co.*, 66 N. J. Eq. 11, 57 Atl. 730.

¹⁰⁰ *Trinity County Lumber Co. v. Holt* (Tex. Civ. App.), 144 S. W. 1029.

¹ *Garrett v. Morgan*, 11 Rob. (La.), 447. But where the partial assignment was made after action brought on the claim by the assignor, the assignee though not affected by payment to the assignor of the judgment subsequently obtained (the payment being made

with notice of the assignment), was held bound by the amount of the judgment. *Trinity County Lumber Co. v. Holt* (Tex. Civ. App.), 144 S. W. 1029.

² *Deering v. Farrington*, 1 Mod. 113, s. c. 3 Keb. 304. See to the same effect, *Eaton v. Mellus*, 7 Gray, 566, and remarks by Isaac, J., in *Anning v. Anning*, 4 Comm. L. Rep. 1049 (Australia, 1907).

³ *MacDonald v. Kneeland*, 5 Minn. 352; *Watson v. McManus*, 224 Pa. 430, 73 Atl. 931.

⁴ In *Deering v. Farrington*, 1 Mod. 113, s. c., 3 Keb. 304, Lord Hale expressly states that no covenant is implied against an elder title.

⁵ *Galbreath v. Wallrich*, 45 Col. 537,

however, that the invalidity of a chose in action due to lack of authority on the part of the signer of the obligation to bind his principal (the supposed debtor) as he attempted to do, is not covered by the implied warranty of one who sells the chose in action.⁶ But unless it can be rested on an exceptional rule limiting warranties implied on sales of public securities, this decision seems erroneous. There is no reason why an assignor should not be held to warrant as fully that the instrument assigned is executed by an authorized agent as any other fact involving the genuineness or validity of the obligation.⁷ Indeed there seems no reason to distinguish the warranties to be implied on the assignment of a non-negotiable chose in action from those implied when negotiable instruments are sold without indorsement or with only a qualified indorsement. In regard to such instruments the Negotiable Instruments Law provides:⁸

"Every person negotiating an instrument by delivery or by a qualified indorsement, warrants,—

1. That the instrument is genuine and in all respects what it purports to be;
2. That he has a good title to it;
3. That all prior parties had capacity to contract;

102 Pac. 1085; *Decker v. Adams*, 4 Dutch. 511, 513; *Wood v. Sheldon*, 42 N. J. L. 421, 36 Am. Rep. 523; *Koch v. Hinkle*, 35 Pa. Super. 421; *Kingsley v. Fitts*, 55 Vt. 293; *Trustees v. Siers*, 68 W. Va. 125, 69 S. E. 468. See also *Valentine v. Berrien Springs Water Power Co.*, 128 Mich. 220, 87 N. W. 370; *Miners' Bank v. Burress*, 164 Mo. App. 690, 147 S. W. 1110; *Bank of Commerce v. Ruffin* (Mo. App.), 175 S. W. 303. But see *Pierce v. Coryn*, 126 Ill. App. 244. For a case where by the express terms of the assignment the assignor undertook to transfer only such rights as he might have, see *Maxfield v. Jones*, 106 Ark. 346, 153 S. W. 584. Cf. *Trustees v. Siers*, 68 W. Va. 125, 69 S. E. 468. In *Bonds-Foster Lumber Co. v. Northern Pac. R. Co.*, 53 Wash. 302, 306, 101 Pac.

877, the court said: "One who accepts an assignment of a contract, which by express terms is made nonassignable, acquires only a cause of action against the assignor."

⁶ *First Nat. Bank v. Drew*, 191 Ill. 186, 60 N. E. 856. In this case the court held: "The seller of orders issued to him by drainage commissioners for his services impliedly warrants that the instruments are genuine and that he is the owner thereof and authorized to transfer title, but there is no implied warranty that they are issued by authority of law or that they are worth what they represent."

⁷ In *Flynn v. Allen*, 57 Pa. 482, the assignor was held to warrant the authority of the agent who executed the obligation.

⁸ Sec. 65.

4. That he has no knowledge of any fact which would impair the validity of the instrument or render it valueless.

But when the negotiation is by delivery only, the warranty extends in favor of no holder other than the immediate transferee.

The provisions of subdivision three of this section do not apply to persons negotiating public or corporation securities, other than bills and notes."⁹

Undoubtedly an assignor may by express agreement limit the warranties which would otherwise be implied. How far this is done by the words "without recourse" has occasioned some dispute. It has been held that this throws the risk, even of forgery of the obligation, upon the assignee;¹⁰ but the more reasonable construction of these words is that the assignor is only seeking to make certain what the law would indeed, in any event, imply from a mere assignment, that he is not responsible for the solvency of the debtor;¹¹ for an assignor unlike the indorser of negotiable paper, warrants only that the assigned claim is legally valid. He does not guarantee that the debtor will fulfil his obligations.¹² It seems probable that the warranty on assignment extends only to the immediate assignee. This is the law in regard to chattels.¹³ And authority seems also to point that way in regard to choses in action.¹⁴

§ 446. Procedure.

As has been seen,¹⁵ at common law an assignee of a chose in action could enforce his right at law only in the name of the assignor. He had, however, full power to control an action in

⁹ See *infra*, § 1162.

¹⁰ 2 Hen. & M. (Va.) 189. See also Litt. Sel. Cas. (Ky.) 200.

¹¹ This was so held in *Houston v. McNeer*, 40 W. Va. 365, 22 S. E. 80.

¹² *Galbreath v. Wallrich*, 45 Col. 537, 102 Pac. 1085; *Langdale v. Griffin*, 135 Ga. 669, 70 S. E. 561; *Robinson v. McNeill*, 51 Ill. 225; *Maynard v. Maynard*, 105 Me. 567, 75 Atl. 299; *Riley v. Galarneault*, 103 Minn. 165, 144 N. W. 755.

¹³ See *Williston, Sales*, § 244.

¹⁴ See *Mardis v. Tyler*, 10 B. Mon. 376, and the extract from the Negotiable Instruments Law quoted in the text. But see *contra*, *Redwine v. Brown*, 10 Ga. 317.

¹⁵ *Supra*, § 408. See also *Forth v. Stanton*, 1 Saund. *210; *Winchester v. Hackley*, 2 Cranch, 342, 2 L. Ed. 299; *Dawes v. Boyleston*, 9 Mass. *337.

that name if the whole right of action was assigned. If the assignor became bankrupt the right of the assignee to enforce the claim in the assignor's name was not lost;¹⁸ and if the assignor died the assignee could sue in the name of his executor or administrator.¹⁷ The assignor was entitled to indemnity against costs,¹⁸ but if thus protected the use of his name could not be prevented by any protest on his part;¹⁹ and since the beginning of the nineteenth century, courts of law have themselves so far recognized the equity of the assignee that defences which would be legal had suit been for the benefit of the assignor, in whose name it was brought, will not be permitted against the assignee if on the principles established by courts of equity the assignee should not be subject to them.²⁰ If the assignee has an adequate remedy at law by an action in the name of the assignor, equity will not entertain a suit by him against the debtor.²¹ But wherever the remedy at law is inadequate, the assignee may sue in equity and in such a suit must proceed in his own name.²² By statute the procedure in regard to the enforcement of the assignee's rights has been much changed in modern times. The statutes may be classed under several heads:

1. An assignee under a written assignment may enforce his rights in his own name or at law. Under such a statute the effect of oral assignments is unchanged.

2. The real party in interest must be plaintiff in any litigation.

3. A chose in action is made assignable so as to vest title therein in the assignee.

¹⁸ *Winch v. Keeley*, 1 T. R. 619; *Sawtelle v. Rollins*, 23 Me. 196; *Reed v. Paul*, 131 Mass. 129. See also *Atwood v. Bailey*, 184 Mass. 133, 134, 68 N. E. 13; *St. Albans Granite Co. v. Elwell*, 88 Vt. 479, 92 Atl. 974.

¹⁷ *Phillips v. Wilson*, 25 Ill. App. 427.

¹⁹ *Welch v. Mandeville*, 1 Wheat. 233, 4 L. Ed. 79; *Anderson v. Miller*, 15 Miss. 586; *Gordon v. Drury*, 20 N. H. 353.

¹⁹ *Calhoun v. Tullass*, 35 Ga. 119; *Sumner v. Sleeth*, 87 Ill. 500; *Anderson v. Miller* 15 Miss. 586; *Deaver v. Eller*,

7 Ired. Eq. 24; *St. Albans Granite Co. v. Elwell*, 88 Vt. 479, 92 Atl. 974.

²⁰ See *Winch v. Keeley*, 1 T. R. 619. See also *supra*, § 433, and cases cited in the preceding notes.

²¹ See *supra*, § 410.

²² *Sammis v. Wightman*, 31 Fla. 45, 12 So. 536; *Haskell v. Hilton*, 30 Me. 419; *Mills v. Hoag*, 7 Paige, 18, 31 Am. Dec. 271; *Sedgwick v. Cleveland*, 7 Paige, 287; *Hathaway v. Scott*, 11 Paige, 173; *Lowry v. Morrison*, 11 Paige, 327; *Varney v. Bartlett*, 5 Wis. 276.

How far these statutes work a change other than one merely of procedure, is open to argument in each case. It would seem certainly that a mere provision that the real party in interest must bring suit in his own name should effect only a change of procedure. As to statutes in different form the matter is not so clear; but it seems undesirable, unless the words of a particular statute clearly require it, to alter the rules of substantive law elaborated by courts of equity concerning the assignment of choses in action; since as appears from the following section these rights seem more in conformity with justice than those based on the assumption that a chose in action is transferable in the same way and to the same extent as a chattel. A chose in action and a chattel are inherently different in their characteristics. In fact the change effected by modern statutes has generally been held procedural only and not to alter the substantial rights of the parties.²³

Consequently "whether an assignee can maintain an action in his own name, is held to be determined by the *lex fori*, and not by the *lex loci contractus*, a matter not of right but of remedy."²⁴ Such statements, therefore, as are occasionally found to the effect that complete legal ownership passes to the assignee of a legal chose in action²⁵ must be regarded as unfor-

²³ *Carozza v. Boxley*, 203 Fed. 673, 122 C. C. A. 69; *Glenn v. Busey*, 5 Mackey (D. C.), 233; *Eaves v. Chicago, etc., R. Co.*, 200 Ill. App. 380; *Leach v. Greene*, 116 Mass. 534; *Beckwith v. Union Bank*, 9 N. Y. 211; *Myers v. Davis*, 22 N. Y. 489; *Fuller v. Steiglitz*, 27 Oh. St. 355, 358, 22 Am. Rep. 312; *Bentley v. Standard Fire Ins. Co.*, 40 W. Va. 729, 23 S. E. 584; *Watkins v. Angotti*, 65 W. Va. 193, 63 S. E. 969.

²⁴ *Richardson v. New York Central R. Co.*, 98 Mass. 85, 92. See also *Joseph Dixon Co. v. Paul*, 167 Fed. 784, 93 C. C. A. 204; *American Lithographic Co. v. Ziegler*, 216 Mass. 287, 103 N. E. 909; *Tully v. Herrin*, 44 Miss. 626; *Lodge v. Phelps*, 1 John. Cas. 139; *Northwestern Mut. Life Ins. Co. v. Adams*, 155 Wis. 335, 144 N. W. 1108, 52 L. R. A. (N. S.) 275.

²⁵ This seems the established mode of expression in England. In *Fitzroy v. Cave*, [1905] 2 K. B. 364, the court said: "Henceforth in all courts, a debt must be regarded as a piece of property capable of legal assignment in the same sense as a bale of goods." See also *Hambleton v. Brown*, [1917] 2 K. B. 93. Before 1889 in England a buyer in possession of a bale of goods not having acquired title could transfer none even to an innocent purchaser; nor could a seller left in possession after he had transferred title. By statute passed in that year both these rules were changed. *Williston, Sales*, § 319. Is the right of the assignee of a chose in action like that of the owner of a bale of goods in 1888 or in 1890? or does a statute which in terms applies to the rights of the owner of tangible

tunate if not erroneous, unless clearly required by the terms of a particular local statute.

§ 446a. Distinction between legal and equitable rights.

As will appear from the following section important consequences follow from the answer given to the question whether the assignee's right is legal or equitable. If the matter is looked at from a historical point of view it is obvious that the protection of the assignee's right has been largely due to courts of equity.²⁶ But, long before an assignee was allowed by statute to sue at law in his own name, courts of law had adopted and applied the doctrines originated by courts of equity in regard to assignments; and though the assignee was compelled to use his assignor's name, his rights were generally enforceable, except in the case of partial assignments, in courts of law: In one sense, therefore, the assignee has a legal right; that is, he has a right enforceable in courts of law. But the term equitable right is used to indicate not simply the court in which a right is enforced but also the inherent nature of a right. It is unfortunate that legal terminology has not found separate words for these two ideas, but it is even more important to determine whether a right is equitable in the second sense than to determine in what court it is enforceable.²⁷ The fundamental

property impliedly affect intangible property also? It is unfortunate that the idea expressed in *Walker v. Bradford Old Bank*, 12 Q. B. D. 511, 515, should not rather prevail, "section 25, subs. 6 of the Judicature Act of 1873, does not in my view, give any new rights, but only affords a new mode of enforcing old rights." See also *Close v. Independent Gravel Co.*, 156 Mo. App. 411, 138 S. W. 81.

²⁶ See *supra*, §§ 409, 410.

²⁷ The word "equitable," has the following meanings in current legal use.

1. Exclusively enforceable in courts of chancery;
2. Enforceable in courts of chancery, though not exclusively;
3. Originally enforceable in courts of

chancery though no longer so, but retaining characteristics which distinguished the right in question when enforced in chancery;

4. Having characteristics of rights enforced by courts of chancery, though neither now nor at any other time enforced in such courts;

5. Fair or just.

It is in the third sense that the rights of an assignee are equitable. There is a corresponding ambiguity in the antithesis to "equitable." The antithesis to the fifth meaning given above is "inequitable," but the antithesis in each of the other cases can be nothing but "legal," which has, moreover, still another meaning as opposed to "illegal." See further, 31 Harv. L. Rev. 822.

characteristic of an equitable obligation in the latter sense is that it binds primarily a particular person, and binds others only when their relation to that person is such that in conscience they should be subject to his duties. The Court of Chancery has been the tribunal where such duties have ordinarily been enforced. But even in jurisdictions where the distinction between legal and equitable courts is still preserved, courts of law to-day enforce a great variety of such rights and duties without thereby changing their essential characteristics.

Though legal ownership is conceived fundamentally as a right good against all the world, actual instances of such ownership are often much more narrowly limited. The owner of a chattel which has been stolen from him is likely to find his right against the world considerably qualified if the thief is in a place where the principles of market overt prevail. In the law of sales of chattels, the legal title passes to the buyer, without transfer of possession, if the parties so intend; yet in many jurisdictions the seller in possession can destroy the buyer's right by a resale, and even the seller's attaching creditors are often allowed a right superior to that of the buyer. On the other hand, where statutory provision is made for giving effective public notice of an equitable right, the equitable owner may acquire rights good against the world. The recording system thus enables one who has an equitable easement or other equitable right in real estate, based on contract, to protect himself against the world. It follows that one whose title is equitable may have in a particular case much more comprehensive ownership than another person who has a legal title. One who has a recorded contract for the transfer of Blackacre, especially if he has paid the price and the time for conveyance has come, has more comprehensive rights than the grantee under an unrecorded deed of Whiteacre who has not paid the price and whose estate is subject to a vendor's lien. Yet the former has an equitable and the latter a legal title.

Doubtless the reasons which have led to limitations of legal ownership have often been fundamentally the same as those controlling the habitual limitations of equitable ownership. In the case suggested above of a purchaser of a chattel without delivery, the reason why a purchaser in good faith from the

seller in possession has been protected by courts of law, is the same reason which has led equity habitually to protect purchasers for value. The limitations set by recording statutes on legal titles have a similar foundation. Nevertheless, the methods by which such results are obtained at law and in equity are fundamentally different. The law achieves the result by imposing limitations on a title which would otherwise be absolute. Equity achieves the result by extending to others, so far as is conscientious, an obligation which is primarily personal to one. It may be conceded that even this distinction of method is not always observed, and that instances may be found where equitable ownership is treated in a way analogous to legal ownership, but, nevertheless, the fundamental distinction exists.

Whether in a theoretical system of jurisprudence it is worth while to have two roads by which the same result may be achieved is rather beside the point in England and America, for the two systems exist and the roots of the equitable theory of ownership sink too deep to make it possible to tear them up, and an attempt to do so is likely to cause more confusion and incorrect conclusions than advantages in a body of law which has developed for centuries with the double system.

§ 447. Whether the assignee's right is legal or equitable.

The right of an assignee of a chose in action may be called equitable in this sense because of the following characteristics:

1. An assignee takes subject to all existing equities in favor of the debtor.²⁸

2. An assignee loses the benefit of his assignment if the debtor in good faith acquires a defence against the assignor even after the date of the assignment.²⁹

3. The assignee also takes subject to rights of set-off existing in favor of the debtor at the time of the assignment, or acquired by the debtor prior to notice of the assignment.³⁰

4. A prior assignment though for value is subordinated to a subsequent assignment for value if the subsequent assignee in

²⁸ See *supra*, § 432.

²⁹ See *supra*, § 433.

³⁰ See *supra*, § 432.

good faith actually collects the claim or makes a novation the debtor.³¹

5. In most jurisdictions the assignee takes subject to an equitable claim against the assignor existing at the time of the assignment in favor of a third person.³²

6. A prior partial assignee (whose claim is everywhere to be merely equitable)³³ is protected as against a subsequent assignment of the whole claim made for value and in good faith.³⁴ All of these characteristics of the assignee's right are explicable on the theory that his right is equitable in its nature. Most of them are not necessarily inconsistent with the theory that his right is legal, but a few of them are inconsistent. In the case of a transfer of chattel property it is often held that a subsequent purchaser with delivery is preferred to a prior purchaser without delivery; and yet the prior purchaser is regarded as having a legal right. So where real estate is conveyed to two purchasers, the second purchaser prevails if he records his deed, and yet the first purchaser had title. In these cases the legal title of the first purchaser is made defeasible by subsequent events. So it may be said that the right of a prior assignee is defeasible by a subsequent assignment to one who collects the claim, or, under the English rule, to the one who first gives notice to the debtor. If this were the true state of the law, to look at the matter, however, the burden of proof should be upon one who asserted that the legal title of the assignor had been defeated, whereas it has been held that if the debtor has paid the assignor, after the assignment, the burden is upon the assignee to show that the debtor had notice of the assignment prior to the payment.³⁵ It may also be regarded as consistent with a legal right in the assignee that he should take subject to equities in favor of the assignor. This may be considered as a mere definition or limitation of the size of the legal right assigned; though confusion is likely to arise from this mode of regarding the matter. As title to a horse obtained by fraud will pass free of the defrauded seller's equity if sold to a

³¹ See *supra*, § 435.

³² See *supra*, § 438.

³³ See *supra*, §§ 442, 443.

³⁴ See *supra*, § 435 *ad fin.*

³⁵ See *supra*, § 435.

³⁶ *Burritt v. Tidmarsh*, 1 Ill. 571; *Heermans v. Ellsworth*, 64 Ill. 159.

fide purchaser for value without notice, so it will naturally seem that if the legal title to a chose in action passes to an assignee that the assignee ought similarly to take free of the debtor's defence of fraud or from any other equitable defence.²⁷ However this may be, certainly the allowance of set-off against the assignee of claims the debtor has against the assignor, especially claims acquired subsequently to the assignment, and the enforcement of latent equities in favor of third persons, are both inconsistent with the theory of a legal right. The only explanation of the debtor's right to set off against the assignee a totally separate claim against the assignor is that the legal right to the assigned claim is still in the assignor.

In a system of law where the smaller of two mutual debts cancels the other *pro tanto*²⁸ it would not be necessary to deny the assignee legal ownership of the assigned claim in order logically to reach this result; but in the common law a cross-claim is not payment or part payment of the original claim,²⁹ the right of set-off is rather in the nature of a cross-action.

²⁷ In *Stoddart v. Union Trust, Ltd.*, [1912] 1 K. B. 181, the assignee of a sum of money to fall due under a contract for the sale of a newspaper sued to recover the money. The defendant claimed that the contract was induced by fraud of the assignor, and being unable to offer to rescind the contract, set up a counter-claim against the assignee for damages; the court held that the counter-claim could not be supported because the subject-matter of it was not sufficiently connected with the original contract; but Vaughan Williams, L. J., at page 189 said: "I think that a debtor sued by the assignee of a debt might set up the defence that the contract under which the debt arose ought to be set aside and cancelled on the ground of fraud, but whether that could have been done in the present case is immaterial, for the defendants have not sought to do that, for the reason that they have so acted with regard to the subject-matter, the sale of which was the consideration for

the debt, that they could not repudiate the contract." Buckley, L. J., though willing to assume this to be true nevertheless, said at page 190, "Notice of the assignment was given to the debtors. As from that moment Price ceased to be, and Stoddart became the owner of that debt of 800 l., if there was such a debt." There is at least an apparent inconsistency in this latter statement, and in the statement that rescission would be permitted on account of the fraud of the assignor. ~~§ 10~~ the English Statute giving the assignee a right of action in his own name did not expressly preserve the right of the debtor to set up equities existing against the assignor, it may be feared that the English Court would find it difficult so to hold, in view of their broad statements as to the nature of the assignee's right.

²⁸ As in the Civil Law. See *infra*, § 859.

²⁹ *Ibid.*

Certainly it seems impossible to say, that it is a legal limitation of the claim, and if it is only an equity, it would be cut off by the assignment if the assignee became the legal owner of the claim. So in the case of latent equities, if the assignee were really the legal owner of the assigned claim, he could not be affected by an equity which a third person had against the assignor; as for instance, if the assignor had procured the claim by fraud from a third party. The assignee as *bona fide* purchaser of a legal title would prevail over the prior equity of the defrauded original owner. However opposed this result may be to the weight of authority some may think it desirable. Indeed, perhaps the chief reason (other than a blind revolt at the assertion that choses in action are not transferable when in fact they are transferred every day) why the view is often taken that the assignee of a chose in action acquires legal ownership is because thereby so-called latent equities against the claim would be cut off, and it is thought unfair to subject the assignee to equities which he is unable to discover. On the other hand, it is to be observed that intangible choses in action are not primarily intended for merchandising, as chattels are. The rule in regard to latent equities has no importance not only where negotiable paper is concerned, but where choses in action having tangible form like policies of insurance, savings bank books, or non-negotiable notes are in question. The delivery of the document will cut off the equity. If, therefore, the parties desire to put an obligation in a merchantable form they can (if they wish) do so, and can do so without making the obligation negotiable. For such property, then, as an intangible chose in action, there seems little reason to prefer the assignee to a previously defrauded owner of the claim. Where the sale of property is a necessary function of commercial activity, it is socially desirable to protect the new purchaser at the expense of a former innocent victim; but the desirability of this policy seems limited to that class of property.

Finally, it is also inconsistent with the view that the assignee of a chose in action acquires a right legal in its nature if his assignment though subsequent in time is not given precedence over any prior assignment which was confessedly merely equitable. Consequently, if the assignment of an entire

claim creates a legal right, it would prevail over a prior partial assignment, and also over a prior total assignment of the claim made before it had arisen, though after the contract out of which the claim arose had been entered into; since confessedly the rights of both a partial assignee,⁴⁰ and of an assignee of a future right⁴¹ are equitable. In neither case does such a result seem desirable or warranted by the authorities. Other cases also may be supposed on which no actual authority can be found. Suppose that the second of two assignees for value first receives payment, which he demands and takes in ignorance of the rights of the prior assignee who had, however, previously notified the debtor of his rights, the latter being forgetful or fraudulent in making payment. If the rights of an assignee are equitable the second assignee can keep what he has obtained. If, however, the prior assignee has a legal right, protected against all the world by notice to the debtor, the second assignee obtained nothing by his assignment, and received by mistake and for no present value, money due to another, which he must surrender. Suppose again that a parol assignment without consideration is made and notice of the assignment given to the debtor, and thereafter a release without consideration is made by the assignor to the debtor. If the equitable rule that an assignment without consideration is not entitled to protection prevails, the assignor was justified in revoking his assignment, in effect, by giving a release. If, however, assignment and notice create a legal right, this would not be true.

It seems, therefore, that the authorities referred to in a preceding section holding that merely procedural changes have been effected by modern statutes are sound and that the assignee's right should still be regarded as equitable in the sense of being governed and defined by the principles originally established by courts of equity.⁴²

⁴⁰ See *supra*, §§ 442, 443.

⁴¹ See *supra*, § 414.

⁴² See further articles by the present writer in 30 Harv. L. Rev. 91, 31 *id.*

822; by Professor Cooke in 29 *id.* 816, 30 *id.* 449; and by Professor George L. Clark in Vol. 15, No. 17, of the Univ. of Mo. Bulletin.

BOOK III

THE STATUTE OF FRAUDS

CHAPTER XV

SCOPE OF STATUTE

PROMISES TO ANSWER FOR THE DEBT OF ANOTHER

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§ 448. Purpose and history of statute of frauds.

As has been seen ¹ a contract in writing was classed by the common law with parol contracts and had no added validity on account of the writing. Writing was indeed from the very nature of the case, necessary to formal contracts, but was not the particular formality which gave force to the contracts. The importance of written evidence to secure defendants against unfounded and fraudulent claims became early obvious, and in the reign of Charles II. the well known Statute of Frauds ² was enacted.

Most of the sections of this statute which relate to the necessity of written memoranda for contracts have been re-enacted in the United States. So far as this is not true attention will be called to the fact in connection with specific sections of the statute. When the promisor has the option of either of two alternatives, one within and one without the statute, his promise is wholly unenforceable because it is said the enforceability of the alternative within the statute would operate as pressure upon the promisor to perform the other alternative.³ This seems clear where the permissible alternative is for the payment of liquidated damages, for there the parties intend a

¹ See *supra*, § 107.

² 29 Car. II, Cap. 3.

³ *Quirk v. Bank of Commerce*, 244 Fed. 682, 687, 157 C. C. A. 130; *Howard v. Brower*, 37 Ohio St. 402;

Wolfskill v. Wells, 154 Mo. App. 302, 134 S. W. 51; *Andrews v. Broughton*, 78 Mo. App. 179; *Patterson v. Cunningham*, 12 Me. 506; *Mather v. Scoles*, 35 Ind. 1.

single primary obligation and that within the statute;⁴ but not so clear where a real option is intended to be given.⁵ The rule seems to hold good, however, even in the latter case.⁶

§ 449. Scope of the English statute.

The sections of the Statute of Frauds which relate to the necessity of a writing are Sections 1, 2, 3, 4, 7, 8, 9, 17. A summary of these sections is as follows:

Section 1. Leases and estates or interests in lands created by parol and not put in writing and signed by the parties creating them, or their agent, shall have the effect only of estates at will.

Section 2. Except leases not exceeding the term of three years whereupon the rent amounts to at least two-thirds of the full value of the thing demised.

Section 3. No leases, estates or interests in land not being copyhold or held under customary tenure, shall be assigned, granted or surrendered, unless by deed or note in writing signed by the party so assigning, granting, or surrendering, or his agent.

Section 4. No action shall be brought to charge any executor or administrator on any special promise to answer damages out of his own estate; (2), or to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person; (3), or to charge any person upon any agreement made upon consideration of marriage; (4), or upon any contract or sale of lands, tenements, or hereditaments, or any interest in them; (5), or upon any agreement that is not to be performed within one year of the making thereof; (6), unless the agreement or some memorandum or note thereof shall be in writing and signed by the party to be charged, or by some person thereunto by him lawfully authorized.

⁴ See, e. g., *Goodrich v. Nichols*, 2 Root, 498, holding the entire contract unenforceable, and the contrary decision of *Mercier v. Campbell*, 14 Ont. L. Rev. 639, which is criticised in 46

Can. Law Journal, 273, and 26 Law Quar. Review, 194.

⁵ See *infra*, § 781.

⁶ See cases *supra*, n. 3. Cf. diss. opinion in *Howard v. Brower*, 37 Ohio St. 402.

Section 7. All declarations of trusts or lands shall be proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing, or they shall be utterly void.

Section 8. Provided that trusts by operation of law shall have the same effect as if this statute had not been made.

Section 9. All grants or assignments of any trusts shall likewise be in writing signed by the party granting or assigning the same, or by such last will or devise, or else shall likewise be utterly void.

Section 17. No contract for the sale of any goods, wares, and merchandises for the price of £10 sterling, or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized.

Of these sections only section four and section seventeen fall within the scope of this book.

§ 450. American statutes.

The various clauses of the English statute are generally reenacted in the United States, and slight changes in wording are not generally treated as varying the meaning of a provision.⁷ The provision relating to sales of goods is omitted more frequently from the statutes of American States than any other.⁸ Besides the contracts enumerated in the Statute of Frauds a writing is generally requisite for the enforceability of a new promise to extend the Statute of Limitations,⁹ and in some States is requisite for contracts to revive a debt barred by bankruptcy¹⁰ or to make a will or leave a legacy, or for the authorization of agents for some purposes,¹¹ and in a few States an agreement for the commissions of real estate brokers must be written.¹¹ The acceptance of a bill of exchange must gen-

⁷ But see *infra*, §§ 525, 526.

⁸ See *infra*, § 505.

⁹ See *supra*, § 164.

¹⁰ See *supra*, § 158.

¹⁰ See *supra*, § 276.

¹¹ See 9 L. R. A. (N. S.) 983, 13 Ann. Cas. 977. A difference in the effect of this provision and that of

erally be in writing;¹² and assignments of vessels, patents and copyrights, wages and occasionally other kinds of contracts are often required by statute to be in writing in order to be completely effective.

§ 451. Promises by an executor to pay damages out of his own estate.

This clause has been construed as if the words "for the debt or default of another" were to be understood at the end of the clause, which is thus in effect equivalent to the next clause in the statute, so far as concerns executors and administrators. Accordingly an executor or administrator who for a consideration moving to himself undertakes as an original obligor to assume and discharge a debt of the testator, is bound without writing.¹³ The statute also is construed as inapplicable to contracts made by an executor or administrator on behalf of the estate,¹⁴ though such contracts, as has been seen,¹⁵ impose

most clauses of Statutes of Frauds is indicated in the following extract from the opinion of the court in *Paul v. Graham*, 193 Mich. 447, 160 N. W. 616, 617: "It has been the rule of this court to permit recoveries for services actually performed under contracts void under the statute of frauds, either at the contract price or under a quantum meruit. *Fuller v. Rice*, 52 Mich. 435, 18 N. W. 204; *Moore v. Nason*, 48 Mich. 300, 12 N. W. 162; *Smith v. Manufacturing Co.*, 175 Mich. 371, 141 N. W. 563; *Smith v. Piano Co.*, 185 Mich. 313, 151 N. W. 1025. If this rule is to be made applicable to this section of the Statute of Frauds, it would practically nullify the effect of the statute. Demands for commissions by real estate brokers are not usually made or pressed until the contract is performed. This being so, a recovery could be had, in nearly every instance, either at the contract price or under the quantum meruit. In order to give the act the effect which the Legislature evidently intended it

should have, we have decided to hold that no recovery can be had under this section unless the agreement therefor is in writing. This is in accord with the holding of other courts which have construed similar statutes. *Leimbach v. Regner*, 70 N. J. L. 608, 57 Atl. 138; *Blair v. Austin*, 71 Neb. 401, 98 N. W. 1040; *McCarthy v. Loupe*, 62 Cal. 299."

¹² See *infra*, § 1195.

¹³ *Bott v. Barr*, 95 Ind. 243; *Blake v. Robinson*, 129 Ia. 196, 105 N. W. 401; *Gabbert v. Evans*, 184 Mo. App. 283, 2166 S. W. 635; *Hall v. Richardson*, 2 Hun, 444, aff'd without opinion in 89 N. Y. 636; *Bellows v. Sowles*, 57 Vt. 164, 52 Am. Rep. 118.

¹⁴ *Pratt v. Humphrey*, 22 Conn. 317; *Brown v. Quinton*, 86 Kan. 658, 122 Pac. 116; *Stebbins v. Smith*, 4 Pick. 97; *Meade v. Bowles*, 123 Mich. 696, 82 N. W. 658; *Hall v. Richardson*, 22 Hun, 444, aff'd without opinion in 89 N. Y. 636; *Fehlinger v. Wood*, 134 Pa. 517, 19 Atl. 746.

¹⁵ See *supra*, § 310.

a personal liability on the executor or administrator. It might seem that if the estate was without assets from which the executor or administrator could reimburse himself, such a contract was within the words of the statute,¹⁶ but there is clearly no suretyship for the estate even in such a case, since the executor or administrator is the primary or only debtor.¹⁷ Still more clearly a promise to pay from the assets of the estate cannot be within the statute.¹⁸

§ 452. Purpose of the second clause of section 4 of the statute.

It is of assistance in the construction of the next provision of the statute to have in mind the probable purpose of the legislature in providing that promises to answer for the debt of another must be in writing. Why should such promises, more than others, be subject to that requirement? Doubtless because the promisor has received no benefit from the transaction. This circumstance may make perjury more likely, because while in the case of one who has received something the circumstances themselves which are capable of proof show probable liability, in the case of a guaranty nothing but the promise is of evidentiary value. Moreover, as the lack of any benefit received by the guarantor increases the hardship of his being called upon to pay, it also increases the importance of being very sure that he is justly charged. If these are the reasons for this clause of the statute it is not a mere technicality to require as the fundamental element in a valid oral promise to discharge another's liability the receipt by the promisor of a *quid pro quo*, or beneficial consideration; and whatever conflict there may be in the decisions, it is at least true that without consideration of this kind, such a promise is unenforceable. The Supreme Court of the United States has said in a leading case:¹⁹

¹⁶ See *Pratt v. Humphrey*, 22 Conn. 317.

¹⁷ As to the necessity of the estate being liable as a principal debtor in order to bring the executor's promise within the statute, see cases cited *supra*, n. 13 and also *Dillaby v. Wilcox*, 60 Conn. 71, 22 Atl. 491, 13 L. R. A. 643, 25 Am. St. Rep. 299; *Cochrane v.*

McEntee (N. J.), 51 Atl. 279; *Wales v. Stout*, 115 N. Y. 638, 21 N. E. 1027.

¹⁸ *Hannan v. Dreckman*, 182 Ill. App. 146, and see further as to this section of the statute, Ann. Cas. 1913, c. 396n.

¹⁹ *Davis v. Patrick*, 141 U. S. 479, 487, 35 L. Ed. 826, 12 S. Ct. 58.

“The purpose of this provision was not to effectuate, but to prevent, wrong. It does not apply to promises in respect to debts created at the instance and for the benefit of the promisor, but only to those by which the debt of one party is sought to be charged upon and collected from another. The reason of the statute is obvious, for in the one case if there be any conflict between the parties as to the exact terms of the promise, the courts can see that justice is done by charging against the promisor the reasonable value of that in respect to which the promise was made, while in the other case, and when a third party is the real debtor, and the party alone receiving benefit, it is impossible to solve the conflict of memory or testimony in any manner certain to accomplish justice. There is also a temptation for a promisee, in a case where the real debtor has proved insolvent or unable to pay, to enlarge the scope of the promise or to torture mere words of encouragement and confidence into an absolute promise; and it is so obviously just that a promisor receiving no benefits should be bound only by the exact terms of his promise, that this statute requiring a memorandum in writing was enacted. Therefore, whenever the alleged promisor is an absolute stranger to the transaction, and without interest in it, courts strictly uphold the obligations of this statute. But cases sometimes arise in which, though a third party is original obligor, the primary debtor, the promisor, has a personal, immediate and pecuniary interest in the transaction, and is therefore himself a party to be benefited by the performance of the promisee. In such cases the reason which underlies and which prompted this statutory provision fails, and the courts will give effect to the promise.”

§ 453. Guaranties of all kinds of obligations included in the statute.

Under the words in the second clause of Section 4, “debt, default, or miscarriages” are included, all forms of liability. A special promise to answer for the obligation of another in tort,²⁰

²⁰ *Kirkham v. Marter*, 2 B. & Ald. 613; *Turner v. Hubbell*, 2 Day, 457, 2 Am. Dec. 115; *Baker v. Morris*, 33 Kan. 580, 582, 7 Pac. 267; *Combs v.*

Harshaw, 63 N. C. 198; *Hamm v. McAfee*, 5 Allen (N. Brunswick), 386. See also *Richardson v. Crandall*, 48 N. Y. 348; and *infra*, § 482. A dictum

or for the violation of a statutory duty,²¹ or for a contractual obligation other than a money debt is within the statute.²² Therefore an oral warranty of title of goods sold by another may be within the statute as a promise to answer for the express or implied obligation of the seller to warrant his title.²³ Whether in any particular case such a warranty is collateral depends upon the question whether sole credit in the matter was given the promisor.²⁴ The word "miscarriage" in the statute has been given the widest meaning. It was said by Abbott, C. J.,²⁵ that the word comprehended "that species of wrongful act the consequences for which the law would make the party civilly responsible." The word "default," if given a natural meaning, implies not simply that there was a primary obligation, but that default had been made in performing it or was to be made, as a condition precedent to the performance of the special promise. The word "debt," however, seems to involve no such implication.

The courts have not generally sought to attach special meanings to these several words, but have rather assumed, probably correctly, that several words of somewhat similar meaning were inserted in the statute with the purpose of covering all kinds of obligations.

§ 454. No promise is within the statute unless there is another obligation.

It is essential that a primary obligation of some kind shall be incurred in order to bring the case within the statute. Therefore a promise to be answerable for the debt or default of one who is not responsible, either because he never has entered into

to the contrary in *Buckmyr v. Darnall* (s. c. *Birkmyr v. Darnell*), 2 Ld. Ray. 1085, s. c. 3 Salk. 15, 6 Mod. 248, Holt, 606, must be regarded as inaccurate.

²¹ *Redhead v. Cator*, 1 Stark. 14.

²² *Clay v. Walton*, 9 Cal. 328 (a promise to become responsible for all brick furnished "and whatever contract or agreement" should be made); *Knisely v. Brown*, 95 Ill. App. 516

(promise to furnish \$450 worth of livery stable service due from another).

²³ *Stratton v. Hill*, 134 Mass. 27; *In re Tozer*, 46 Mich. 299, 9 N. W. 424.

²⁴ This was held to be the case and the promise not within the statute in *Schell v. Stephens*, 50 Mo. 375; *Farnham v. Chapman*, 61 Vt. 395, 18 Atl. 152.

²⁵ *Kirkham v. Marter*, 2 B. & Ald. 613.

an obligation in fact,²⁶ or because he is incompetent to bind himself legally, as where an agent gives an oral personal guarantee of an *ultra vires* contract of his principal,²⁷ or a promisor

²⁶ *Mease v. Wagner*, 1 McCord, 395. In this case the defendant on buying goods from the plaintiff for the funeral of a friend (Mrs. Bradley) said: "Charge them to the estate of Dr. Bradley, and as soon as his nephew comes to town he will pay for them, or I will." The nephew refused to pay and was not the executor or administrator of the estate. The defendant was held liable, the court saying: "had the defendant undertaken for the estate or legal representative of Mrs. Bradley, who was legally bound to pay the expenses of her funeral, it would have been a different question." In *Read v. Nash*, 1 Wilson, 305, the plaintiff's testator brought an action for assault against J, and the defendant being present promised the testator if he would not proceed to trial, to pay him £50 and costs; whereupon the testator withdrew his record. The promise was held not within the statute because it did not appear that there was liability on the part of J, for if he had proceeded to trial he might have obtained a verdict. In *Mountstephen v. Lakeman*, L. R. 7 H. L. 17, affirming L. R. 7 Q. B. 196, the defendant had requested the plaintiff to do certain work upon a sewer of which a Board of Health had charge. A question was raised by the plaintiff whether the Board would authorize the work or become responsible for its payment, and the defendant then said: "go on and do the work and I will see you paid." The Board repudiated any obligation and in fact was not liable. The court held that the jury was warranted in finding the defendant had entered into a personal and primary contract to pay for the work; and Lord Selborne said: "There are some observations in the opinions of the

learned judges in the Court of Queen's Bench which certainly do look at first sight as if some of those learned judges thought that there might be a valid contract of suretyship, or a secondary liability upon the principle of a guaranty for the debt of some one else, to which the law relative to that description of contracts would apply, although there might be in truth no principal debtor. If that was the view of the learned judges, with all respect to them, I must confess myself unable to follow it. There can be no suretyship unless there be a principal debtor, who of course may be constituted in the course of the transaction by matters *ex post facto*, and need not be so at the time, but until there is a principal debtor there can be no suretyship. Nor can a man guarantee anybody else's debt unless there is a debt of some other person to be guaranteed." See also *Ledlow v. Beeton*, 36 Ala. 596; *Ingraham v. Strong*, 41 Ill. App. 46; *Ressetter v. Waterman*, 151 Ill. 169, 176, 37 N. E. 875; *Downey v. Hinchman*, 25 Ind. 453; *Jepherson v. Hunt*, 2 Allen, 417; *Sampson v. Swift*, 11 Vt. 315; *Walker v. Norton*, 29 Vt. 226; *Brown v. Gillies*, 26 Dom. L. R. 438, *aff'd* in *Gillies v. Brown*, 53 Can. S. C. 557.

²⁷ *Voris v. Star City Building Assoc.*, 20 Ind. App. 630, 50 N. E. 779. See also *Drake v. Flewellen*, 33 Ala. 106; *Kilbride v. Moss*, 113 Cal. 432, 45 Pac. 812. But see *Hooker v. Russell*, 67 Wis. 257, 30 N. W. 358, an action on an oral promise made by the defendant, an officer of a village, to pay for the services rendered to the village if it failed to, do so where the court refused to decide as unnecessary the question whether the village was under a liability; but held that the debtor was not liable.

guarantees performance of an agreement made by a married woman under common-law disability,²⁹ is not within the statute. The same has been held of guarantee that an infant should pay debts incurred by him.²⁹ But now that it is generally recognized³⁰ that an infant's contracts are not void but only voidable, the correct view seems to be that a guaranty of an infant's obligation is within the statute.³¹ So, the statute is inapplicable, "where the effect of the new promise is to extinguish the liability of the original party before the obligation of the new promise attaches, as in the case of a promise to pay the debt if the promisee will discharge the primary debtor from a *capias ad respondendum*. In such event the discharge from the writ by operation of law, destroys the debt, so that there is nothing to which the new assumption can stand as collateral. In cases of this class it has been repeatedly decided that the statute did not apply."³² It seems immaterial in

²⁹ *King v. Summitt*, 73 Ind. 312, 315, 38 Am. Rep. 145. But see *Maggs v. Ames*, 4 Bing. 470. If the married woman had a separate estate which equity would charge for payments of the debt, a promise by another to guarantee payment is within the statute. *Connerat v. Goldsmith*, 6 Ga. 14. See also *Re Hoyle*, [1893] 1 Ch. 84, 99.

³⁰ *Harris v. Huntbach*, 1 Burr. 373; *King v. Summitt*, 73 Ind. 312, 315, 38 Am. Rep. 145; *Roche v. Chaplin*, 1 Bail. (S. C.) 419.

³¹ See *supra*, § 226.

³² This was so held in *Dexter v. Blanchard*, 11 Allen, 365. The Massachusetts case has been criticized by text writers, *Browne on Statute of Frauds* (3d ed.), § 156 (the learned author retracted his criticism in the 4th Ed.); 1 *Brandt on Suretyship* (3d Ed.), § 69, n. 73, on the ground that the infant's obligation is voidable and therefore gives no real remedy to the creditor. But the Massachusetts case is supported by other cases. *Baldwin v. Hiers*, 73 Ga. 739; *Scott v. Bryan*, 73 N. C. 582; *Brown v. Far-*

mors, etc., *Nat. Bank*, 88 Tex. 265, 31 S. W. 285, 33 L. R. A. 359, and, on principle, the practical worthlessness of the creditor's remedy on the primary obligation, whether because the principal debtor has no funds, or is outside the jurisdiction, or because of any other reason the claim cannot be collected, seems immaterial so long as there is what the law recognizes as a primary obligation. To this effect is *Browne on the Statute of Frauds* (4th and 5th Eds.), § 156. The contrary view would involve a curious difficulty if the infant should ratify his obligation. Surely then, on any view, the guarantor's promise would be to answer for the debt of another, and if the ratification takes effect by relation, his promise would have to be treated as within the statute from the outset. Yet the infant by his ratification could hardly be allowed to affect the rights of third persons.

³³ *Cowenhoven v. Howell*, 36 N. J. L. 323, 327, citing: *Goodman v. Chase*, 1 B. & Ald. 297; *Fitzgerald v. Dressler*, 7 C. B. (N. S.) 374; *Kelsey v. Hibbs*, 13 Ohio St., 340; *Butcher v. Stuart*,

such a case whether the promisor engaged absolutely to pay or promised to pay if the primary debtor failed to do so. Though, as has been said, no question of the Statute of Frauds can arise where a promise is made by one who purports to make himself a surety if there is no primary obligation, yet in such a case for another reason the creditor may find himself unable to enforce a contract against the promisor. In a leading English case ³³ Willes, J., said: "The leading case upon the application of the Statute of Frauds has generally been considered to be *Birkmyr v. Darnell*,³⁴ "and in the note to Mr. Evans's edition of Salkeld's Reports it is stated, that, 'from all the authorities it appears, conformably to the doctrine in this case, that if the person for whose use the goods are furnished is liable at all, any other person's promise is void, except in writing.' I think that may be well modified: 'Or if his liability is made the foundation of a contract between the plaintiff and the defendant, and that liability fails, the promise is void:' so as to include the case which I put to Mr. Charles of persons wrongly supposing that a third person was liable, and entering into a contract on that supposition. If, in such a case, it turned out that the third person was not liable at all, the contract would fail, because there would be a failure of that which the parties intentionally made the foundation of the contract. The *lex contractus* itself would make an end of the claim, and not the application of the Statute of Frauds, whether the contract was in writing or not, and whether signed or not."

It is not, however, to be supposed that the failure of liability on the part of any principal debtor necessarily involves the conclusion that the promise of one who has promised to be responsible collaterally also fails. The latter may have made his promise to pay to meet precisely the contingency that perhaps no one else would be liable, and if the terms of the promise are wide enough to cover the situation which has arisen, evidence

³³ 11 M. & W. 857; *Meriden Britannia Co. v. Zingsen*, 48 N. Y. 247, 8 Am. Rep. 549. See also *Mallory v. Gillett*, 21 N. Y. 412, 424, 433; *Cooper v. Chambers*, 4 Dev. L. 261, 25 Am. Dec. 710.

³⁴ *Lakeman v. Mountstephen*, L. R. 7 Q. B. 196, aff'd, *sub nom.* *Mountstephen v. Lakeman*, L. R. 7 H. L. 17.

³⁵ 1 Salk. 27 (s. c. *Buckmyr v. Darnall*, 2 Ld. Ray. 1085).

of mutual mistake would need to be clear in order to excuse liability.³⁵

§ 455. No promise which differs in scope from that of another obligor is within the statute.

In order to be within the terms of the statute, the special promise must be to fulfil all or part of the obligation of the debtor.³⁶ Otherwise it will not be within the statute, even though having for its object to render it more certain that the original debt will be paid. Thus a promise to notify the creditor of a debt owing to the principal debtor, so that the creditor might garnishee it, is not within the statute.³⁷ Nor is a promise to execute a bail bond,³⁸ or to redeliver to an officer on demand property of a third person which had been attached,³⁹ or to guarantee dividends of a corporation if the promisee will subscribe for stock,⁴⁰ or to pay the value of stock given by a corporation as the purchase price of land, if the corporation failed to pay dividends,⁴¹ or that a debtor of the promisee is legally liable,⁴² or a promise to induce a third person to sign a guaranty;⁴³ and where property is actually transferred an agreement by the transferrer, that it shall be applied by the transferee in payment of a debt due the latter from a third person may be oral.⁴⁴ The most important and difficult application of the principle that the performance for which, either absolutely or conditionally, the surety is bound must be identical with that for which the principal is bound is where the new

³⁵ Such seem to have been the facts in *Lakeman v. Mountstephen*, L. R. 7 H. L. 17. So in *Kimball v. Newell*, 7 Hill, 116, a covenant by which the defendant undertook to become surety for the faithful performance of B's covenant to pay rent, made the defendant liable though B's covenant was void on account of coverture.

³⁶ A guaranty of part of a debt is within the statute. *Bennighoff v. Robbins*, 54 Mont. 66, 166 Pac. 687.

³⁷ *Towne v. Grover*, 9 Pick. 306.

³⁸ *Jarmain v. Alger*, 2 C. & P. 249.

³⁹ *Marion v. Faxon*, 20 Conn. 486.

⁴⁰ *Moorehouse v. Crangle*, 36 Oh. St. 130, 38 Am. Rep. 564; *Jepherson v. Hunt*, 2 Allen, 417.

⁴¹ *Clement v. Rowe*, 33 S. Dak. 499, 146 N. W. 700.

⁴² *E. g.*, a promise by the seller of a promissory note that the maker is liable. *King v. Summitt*, 73 Ind. 312, 38 Am. Rep. 145.

⁴³ *Bushell v. Beavan*, 1 Bing. n. c. 103. This case is criticised in *Carville v. Crane*, 5 Hill, 483, 485, but seems sound.

⁴⁴ *Johnson v. Bank of Sun Prairie*, 155 Wis. 603, 145 N. W. 178.

promisor engages to make a payment or render a performance (for which it is supposed that another person perhaps is, or may become, liable) whether such liability exist or not.

A promise by B that unless A shall pay \$100 the promisor B will do so, is not *in terms* identical in meaning with a promise by B that unless A shall pay whatever he owes (or whatever he owes not exceeding one hundred dollars) the promisor, B, will do so; even though in both cases A's debt is \$100; since in the former case B undertakes to pay whether A is liable or not, in the latter he promises only to pay if A is liable. The latter promise is clearly a guaranty and within the statute; the former may not be. At least where in fact A is not liable, the new promisor is undertaking an obligation of his own which has no counterpart in any previous debt.⁴⁵ But unless the scope of the statute is to be determined by the merest formality of words, it should be equally clear that if the purpose of a new

⁴⁵ In *Read v. Nash*, 1 Wilson, 305, the plaintiff's testator brought an action for assault against J, and the defendant being present promised the testator, if he would not proceed to trial, to pay him 50*l* and costs; whereupon the testator withdrew his record. The promise was held not within the statute because it did not appear that there was liability on the part of J, for if he had proceeded to trial he might have obtained a verdict. Here it will be noticed that the scope of the defendant's obligation was different, or might be different from that of the original debtor, and this possible difference must have been present to the minds of the parties.

In *Mountsephen v. Lakeman*, L. R. 7 H. L. 17, affirming L. R. 7 Q. B. 196, the defendant had requested the plaintiff to do certain work upon a sewer of which a Board of Health had charge. A question was raised by the plaintiff whether the Board would authorize the work or become responsible for its payment, and the defendant then said: "go on and do the work and I will see you paid." The Board repu-

diated any obligation and in fact was not liable. The court held that the jury was warranted in finding the defendant had entered into a personal and primary contract to pay for the work. Here, too, it will be noticed that on the construction of the court the defendant undertook to pay the claimant's claim whether the Board was liable or not. See also *Kimball v. Newall*, 7 Hill, 116. In *Sinkovitz v. Applebaum*, 56 N. Y. Misc. 527, 107 N. Y. S. 122, and in *Cooper & Polak Works v. Rosing*, 85 N. Y. Misc. 409, 147 N. Y. S. 241, it was held that an oral promise by one who owned or was interested as tenant in a building, to pay a sub-contractor for completing the work which he had engaged with a defaulting general contractor to do, was binding. Though the liability of the general contractor still continued, the promise of the owner was held original, being for a beneficial consideration and to pay the price irrespective of the contractor's liability. Cf. *Griffin v. Cunningham*, 183 Mass. 505, 67 N. E. 660; *Boorstein v. Moffatt*, 36 Nova Scotia, 81.

promise is to assure a performance which is supposed by the parties to be, and which in fact is identical with the debt of another and is made to ensure the discharge of that debt, the new promise is none the less within the statute because in terms it is a promise to pay a fixed amount which it is supposed by the parties that the original debtor owes, or will owe, and which he in fact does owe, rather in terms to pay whatever debt the principal debtor owes.⁴⁶ The most troublesome question is the intermediate one where the promise is in terms, or by proper construction, to pay a certain sum whether A owes it or not and, in fact, the parties have distinctly in mind the possibility that A may not be liable, but A does owe the sum promised.⁴⁷

§ 456. Whether a new promise to pay, irrespective of the liability of any original debtor is within the statute.

It may seem that a new promise to pay, at all events, a certain amount or a certain claim whether another person is liable for it or not, is a promise of such different scope from the original obligation as not to fall within the statute. But since a promise to pay a debt on a certain contingency is within the statute,⁴⁸ such a promise as the one in question seems also obnoxious to it, if in fact another person was liable for the debt. It is assumed that payment by the new promisor will operate as a discharge of this liability of the old obligor, and that in no event can the creditor have actual satisfaction both from the new promisor and from the old obligor. On this assumption the new promise amounts to this:—If the old obligor is liable the new promisor agrees to discharge that liability; while if there is no valid claim against another the new promisor, nevertheless, undertakes to pay. The latter portion of this promise is obviously not within the statute, but the first portion is, in terms, within it. Now if, in fact, the original obligor is liable that alternative of the new promise which amounts to an agreement to pay the debt of another is the only portion which is operative, and the new promise is, in legal effect, nothing more

⁴⁶ See *infra*, §§ 456, *ad fin.*, 457.

⁴⁷ See *infra*, n. 51.

⁴⁸ Thus a promise to pay the debt of

another when certain funds have been received is within the statute. *Walker v. Irwin*, 94 Ia. 448, 62 N. W. 785.

than a promise to pay the debt of another. On the other hand, if there was no liability on the original claim, the new promise in legal effect is to pay a new claim, not one which previously existed, and the statute is inapplicable. It is true that it is, or may be, unknown to the parties which contingency will be applicable; and it may be urged that it is absurd that a statute which requires a certain kind of contract to be in writing, should define the kind by a description which the creditor cannot identify. But the creditor should have in mind that there is at least a possibility that the original promisor was liable and he knows that the new promise was made on the assumption of that possibility. Under these circumstances a creditor who makes merely an oral bargain must be aware that he is taking chances. There are unquestionably many cases within the statute where the creditor has no more warning of the necessity of a writing.⁴⁹ If there is no previous obligation of another a promise which purports to be merely a guaranty is not within the statute.⁵⁰ Conversely a new promise to pay another's obligation is not saved from the statute by making in effect the addition, immaterial under the existing facts, that the promisor will pay even though there was no previous liability of another.⁵¹ If it were held that a promise to pay irrespective of another's liability was on that account withdrawn from the statute, many transactions understood by the parties to be guaranties, and treated by the courts as such would be withdrawn from the statute. Behind any question of the necessity of a writing is the principle of contracts that a promisor if held at all must be held according to the terms of his promise, and it is certainly true in a large number of cases where a guaranty is intended that the guarantor defines his undertaking not by any reference to the legal liability of the principal, but by reference to matter *in pais*. He guarantees "the price" of goods furnished the principal, "the rent" of a house leased to him, the payment of a fixed sum of money;

⁴⁹ See *infra*, §§ 470 *et seq.*

⁵⁰ See *supra*, § 454.

⁵¹ See further *infra*, § 468. In *Fairbanks v. Barker*, 115 Me. 11, 97 Atl. 3, the court apparently was of opinion

that a promise to pay a claim "if you don't get it any other way" was within the statute, another person being primarily liable.

and whether the parties contemplate that there is a great chance, a small chance or no chance that the principal debtor is under no legal liability seems immaterial.

§ 457. Promises to sign guaranties or negotiable accommodation paper.

An exception, in form at least, to the rule that the new promise must be identical in its terms with the original obligation exists in case of a promise subsequently to sign a guaranty of another's debt. Such a promise is within the statute, for it is regarded as the equivalent of undertaking an immediate obligation of guaranty.^{51a} Therefore a promise to a creditor to sign negotiable paper for the accommodation of his debtor either as an indorser,^{51b} maker,^{51c} or acceptor,⁵² must be in writing. It will be noticed that these promises are not only absolute in form, but that the obligation incurred by signing the instrument is not conditional on the liability of the principal debtor. The indorser of a note is not excused from liability because the maker has a defence or lacks capacity, if value was given for the indorsement.

A promise to the creditor to discount his debtor's commercial paper without recourse is similar in effect and must also be in writing.⁵³

§ 458. Obligations on negotiable paper are not within the statute.

It is obvious that the obligations incurred by all parties to a negotiable instrument except that of the party primarily liable, are obligations to answer for the debt of another. The matter may be looked at according to the tenor of the instrument, or according to the actual relations between the parties. If looked at in the former way, all parties secondarily liable

^{51a} *Hayes v. Burkam*, 51 Ind. 130.
See also *infra*, § 524a.

^{51b} *Smith v. Easton*, 54 Md. 138, 39 Am. Rep. 355; *Wills v. Shinn*, 42 N. J. L. 138; *Carville v. Crane*, 5 Hill, 483; *Bronson v. Stroud*, 2 McMull. 372; *Taylor v. Drake*, 4 Strob. 431, 53 Am. Dec. 680.

^{51c} *Dee v. Downs*, 57 Iowa, 589, 11 N. W. 2; *Wilson v. Roberts*, 5 Bosw. 100.

⁵² *Chapline v. Atkinson*, 45 Ark. 67, 55 Am. Rep. 531; *Williams v. Caldwell*, 4 S. Car. 100.

⁵³ *Mallet v. Bateman*, L. R. 1 C. P. 163; *Dougherty v. Bash*, 167 Pa. 429, 31 Atl. 729.

according to the tenor of the instrument are agreeing to answer for the debt of another. If looked at according to the actual relations of the parties inquiry would be necessary whether any of the parties had signed for accommodation. It is, however, the law that "neither a bill of exchange on its face, nor the indorsements are within the statute of frauds."⁵⁴ And the same is true of negotiable obligations on promissory notes.^{54a} The exception is made by force of mercantile custom. No difficulty in defining the extent of the exception is likely to arise except where acceptances are involved; for it is well settled that every other obligation must be on the instrument itself. But in the United States many jurisdictions have allowed validity to oral acceptances under certain circumstances;⁵⁵ and the Uniform Negotiable Instruments Law though requiring acceptances to be in writing, does not require them to be on the bill.⁵⁶ How far a written acceptance not on the bill itself might fall within the Statute of Frauds is not clear. It would seem that since the Negotiable Instruments Law provides that it is an acceptance, it must be dealt with as if written on the bill itself. So considered, it would not be within the statute, whether it was made for accommodation or not.

In regard to oral acceptances generally, however, the distinction seems to be taken that if the acceptor has funds of the drawer, the promise is not within the statute;⁵⁷ but otherwise if the acceptance is for accommodation,⁵⁸ unless the payee (or

⁵⁴ Parsons, C. J., in *Barker v. Prentiss*, 6 Mass. 430. See also *Edward Hines Lumber Co. v. Anderson*, 141 Ill. App. 527; *Spaulding v. Andrews*, 48 Pa. 411; *In re Goddard's Estate*, 66 Vt. 415, 29 Atl. 634. Cp. *Schafer v. Farmers', etc., Bank*, 59 Pa. 144, 98 Am. Dec. 323.

^{54a} *Lehman v. Levy*, 69 Ala. 48; *Nichols Co. v. Dedrick*, 61 Minn. 513, 63 N. W. 1110; *Frech v. Yauger*, 47 N. J. L. 157, 54 Am. Rep. 123; *Paul v. Stackhouse*, 38 Pa. 302; and see *supra*, § 221.

⁵⁵ See *infra*, § 1195.

⁵⁶ Neg. Inst. Law, Sec. 132, *infra*, § 1195.

⁵⁷ *Espalla v. Wilson*, 86 Ala. 487, 5 So. 867; *Spurgeon v. Swain*, 13 Ind. App. 188, 41 N. E. 397; *Lavell v. Frost*, 16 Mont. 93, 40 Pac. 146; *Dull v. Bricker*, 76 Pa. 255.

⁵⁸ "If the written request of Frink be regarded as a bill of exchange the result would not be different, as the verbal acceptance by the drawee of a bill of exchange, who holds no funds of the drawer, is no more than a parol promise to answer for the debt of another." *The Chicago Lumber Co. v.*

a subsequent holder in due course) received the acceptance in ignorance that the acceptor had no funds of the drawer. Against such a holder the statute cannot properly be invoked.⁵⁹ It may be urged that in either case the acceptor has promised to pay the drawer's debt. It is of the essence of an acceptance that the acceptor's promise shall be absolute. If it is a promise to pay only out of a particular fund, or is limited by the continued existence of the fund, there is no valid acceptance.⁶⁰

Accordingly unless the debt is the acceptor's own and the drawer has signed for accommodation, it may be said that the acceptance is a promise to answer for the debt of another. But by his acceptance the acceptor acquires the right to charge the drawer with the amount of the bill; and is therefore, cancelling one debt by the creation of another—an arrangement which is not within the statute.⁶¹ Though obligations on negotiable instruments are not within the statute, promises to enter into such obligations may be within its scope.⁶² It should be noticed too that the exception protecting negotiable instruments is confined to the negotiable obligations permitted by mercantile custom. A special contract like a guaranty is not withdrawn from the operation of the statute, merely because it is written on the back of a negotiable bill or note.⁶³ But a new promise by an indorser who has been discharged by the holder's lack of diligence is excluded from the operation of the statute, the promissory character of the undertaking being concealed by applying to it the name of waiver.⁶⁴

Miller, 219 Ill. 79, 82, 76 N. E. 52, citing: Browne on Frauds, 174, 2 Rob. Pr. 152; Quin v. Handford, 1 Hill, 82; Pike v. Irwin, 1 Sandf. 14; Manly v. Grogan, 105 Mass. 445; Plummer v. Lyman, 49 Me. 229; Wakefield v. Greenwood, 29 Cal. 597, 600; Walton v. Mandeville, 56 Iowa, 597, 41 Am. Rep. 123. See also Hill v. Wright, 144 Ky. 806, 139 S. W. 946. See also Ames' Cas. Suretyship, 106, 107n.

⁵⁹ Jarvis v. Wilson, 46 Conn. 90, 33 Am. Rep. 18; Lafin Co. v. Sinsheimer, 48 Md. 411, 30 Am. Rep. 472; but see cases cited in the preceding note.

⁶⁰ Neg. Inst. Law, Sec. 142. See *infra*, § 1196. See also cases holding that a promise by the assignee of property to pay a debt absolutely, taking the risk of sufficiency of funds transferred is within the statute. *Infra*, § 459.

⁶¹ See *infra*, §§ 477-479.

⁶² See *supra*, § 455.

⁶³ See *infra*, § 573.

⁶⁴ Uhler v. Farmers' Bank, 64 Pa. 406, and see cases cited *supra*, § 157. But see Peabody v. Harvey, 4 Conn. 119.

§ 459. No promise to perform an obligation imposed by law on the promisor is within the statute.

The words of the statute "special promise to answer for the debt, etc., of another" may fairly be supposed to have been used to distinguish the liability of one who had become a debtor irrespective of contract from the liability of one who had made himself liable in special assumpsit. The statute therefore does not invalidate obligations imposed by law, without a promise in fact, to satisfy the debt of another.⁶⁵

So where property has been put in the hands of another under an agreement to apply it to the payment of a debt or debts, a promise to the creditor to make such an application in his favor is not within the statute. The duty of the promisor is that of a trustee and does not depend upon a special promise.⁶⁶ If, however, the promisor undertakes not merely to apply the property in his hands, but taking the risk of its sufficiency promises the creditor absolutely to pay his claim, the case is none the less within the statute because the promisor expects to reimburse himself from the property in his hands.⁶⁷ Such

⁶⁵ *Sage v. Wilcox*, 6 Conn. 81, 85; *Allen v. Pryor*, 3 A. K. Marsh. 305, 306; *Pike v. Brown*, 7 Cush. 133, 136; *Peele v. Powell*, 156 N. C. 553, 557, 73 So. 234.

⁶⁶ *Andrews v. Smith*, 2 C. M. & R. 627; *Goddard v. Mockbee*, 5 Cranch, C. C. 666; *Hitchcock v. Lukens*, 8 Port. 333; *Woodruff v. Scaife*, 83 Ala. 152, 3 So. 311; *Lucas v. Payne*, 7 Cal. 92; *McIntire v. Schiffer*, 31 Col. 246, 72 Pac. 1056; *Hamill v. Hall*, 4 Colo. App. 290, 35 Pac. 927; *Ledbetter v. McGhees*, 84 Ga. 227, 10 S. E. 727; *Prather v. Vineyard*, 9 Ill. 40 (see also *Power v. Rankin*, 114 Ill. 52, 29 N. E. 185); *Hilton v. Dinsmore*, 21 Me. 410; *Mitts v. McMorran*, 64 Mich. 664, 31 N. W. 521, 85 Mich. 94, 48 N. W. 288; *Deal v. Bank*, 79 Mo. App. 262, 178 S. W. 258; *Dilts v. Parke*, 4 N. J. L. (1 South.) 219; *May v. National Bank*, 9 Hun, 108; *Phelps v. Rowe*, 75 Hun, 414, 27 N. Y. S. 89; *Scherzer v. Muirhead*, 84 N. Y. S. 159;

Draughan v. Bunting, 9 Ired. 10; *Mason v. Wilson*, 84 N. C. 51, 37 Am. Rep. 612; *Peele v. Powell*, 156 N. C. 553, 557, 73 So. 234; *Stoudt v. Hine*, 45 Pa. 30; *Dock v. Boyd*, 93 Pa. 92; *Smith v. Exchange Bank*, 110 Pa. 508, 1 Atl. 760; *Fehlinger v. Wood*, 134 Pa. 517, 524, 19 Atl. 746; *Peck v. Goff*, 18 R. I. 94, 25 Atl. 690; *Fullam v. Adams*, 37 Vt. 391; *Pirie v. Granite Sav. Bank & Trust Co.*, 91 Vt. 304, 100 Atl. 676; *Johnson v. Bank of Sun Prairie*, 155 Wis. 603, 145 N. W. 178. But see *contra* *Few v. Hilsman*, 18 Ga. App. 207, 89 S. E. 79.

⁶⁷ *Hughes v. Lawson*, 31 Ark. 613; *Temple v. Bush*, 76 Conn. 41, 55 Atl. 557; *Jackson v. Rayner*, 12 Johns. 291; *Belknap v. Bender*, 75 N. Y. 446, 31 Am. Rep. 476; *Ackley v. Parmenter*, 98 N. Y. 425, 50 Am. Rep. 693; *First Nat. Bank v. Chalmers*, 144 N. Y. 432, 435, 39 N. E. 331; *McKenzie v. Nat. Bank*, 9 Wash. 442, 37 Pac. 668. In *Becker v. Krank*, 75 N. Y. App. Div.

a case must be sharply distinguished from one where the new promisor has received property not simply as an indemnity against possible liability but has purchased it and has assumed as part of the price the obligation of paying certain debts of the grantor.⁶⁸ It is essential for the validity of an oral promise that it shall not exceed in scope the obligation which the law imposes upon the promisor irrespective of his promise. Accordingly a promise to perform immediately a duty which will rest upon the promisor only in the future is within the statute.⁶⁹

But a new promise which does not go beyond the trustee's legal duty, is outside the statute. If property has been turned over to the new promisor to hold upon trust and not simply upon a revocable agency, the fact that the trust contemplates that the property shall be reduced to cash before payment is made to the creditor who is the beneficiary of the trust, should not invalidate an oral promise to make payment according to the terms of the trust even though the promise is made prior to the liquidation of the property. An oral promise to pay in any event is within the statute unless the trustee has become liable; but such a promise to pay on a particular contingency if a trust existing at the time of the promise requires that the trustee shall pay on that contingency, is unobjectionable.⁷⁰

Indeed, even though the promisor has not received property of the debtor at the time he makes the promise, his undertaking

191, 194, the court said: "No case is cited, nor have I been able to find any, holding that a mere security by way of mortgage or otherwise given to indemnify one who promises to pay the debt of another in case he does pay it makes such promise an original undertaking between the creditor and promisor, so as to take the case out of the Statute of Frauds."

⁶⁸ As to such cases, see *infra*, § 478.

⁶⁹ In *Belknap v. Bender*, 75 N. Y. 446, 452, the court said: "Suppose a voluntary assignee of an insolvent debtor after he has taken possession of the property assigned, but before he has converted it into money, and before the duty to pay has arisen, promises without any further or new considera-

tion to pay the debt of one of the preferred creditors, could such a promise be enforced? Suppose one takes a conveyance of real estate from a debtor upon the agreement with him that he will rent it, and accumulate the rent for ten years, and then pay the net amount to his creditors, and the next day without any new consideration he promises at once to pay the creditors, could such a promise be enforced?" See also to the same effect *First Nat. Bank v. Chalmers*, 144 N. Y. 432, 435, 39 N. E. 331.

⁷⁰ *Hitchcock v. Lukens*, 8 Port. 333; *Armstrong v. First Nat. Bank* (Mo. App.), 195 S. W. 562; *Phelps v. Rowe*, 75 Hun, 414, 27 N. Y. S. 89; *Mason v. Wilson*, 84 N. C. 51, 37 Am. Rep. 612.

is not within the statute, if confined to paying from property which the promisor may receive applicable to the debt in question.⁷¹ The matter may be summarized by saying that when performance of the promise cannot involve a payment out of the promisor's own funds or property, the promise is not within the statute, for the promisor is not in any true sense agreeing to answer for the debt of another. On the other hand, a promise to apply towards the payment of a debt of another a particular fund belonging to the promisor is as fully within the statute as an absolute promise without reference to a fund.⁷²

Part § 460. To whom the promise must be made.

Though the words of the statute are in terms applicable to a promise made to any one to pay a debt of a third person, by construction of the courts, which have had in mind the mischief aimed at, the application of the act has been confined to promises made to the creditor himself. Accordingly oral promises made to the debtor to assume and pay his debt may be enforced by him,⁷³ as may an oral promise to lend him money with which to discharge his debts.⁷⁴

⁷¹ *Andrews v. Smith*, 2 C. M. & R. 627. See also *Woodruff v. Scaife*, 83 Ala. 152, 3 So. 311; *Aultman v. Fletcher*, 110 Ala. 452, 18 So. 215; *McKeenan v. Thissel*, 33 Me. 368; *Shaaber v. Bushong*, 105 Pa. 514, 517; *Pirie v. Granite, etc., Trust Co.*, 91 Vt. 304, 100 Atl. 676. See also *infra*, § 479.

⁷² *Fisher v. Donovan*, 57 Neb. 361, 77 N. W. 778, 44 L. R. A. 383.

⁷³ *Eastwood v. Kenyon*, 11 Ad. & E. 438; *Tuttle v. Armstead*, 53 Conn. 175, 22 Atl. 677; *Neagle v. Kelly*, 146 Ill. 460, 34 N. E. 947; *Tremayne v. McCaskey Register Co.*, 181 Ill. App. 398; *Bateman v. Butler*, 124 Ind. 223, 24 N. E. 989; *Patton v. Mills*, 21 Kans. 163; *Hubon v. Park*, 116 Mass. 541; *Pratt v. Bates*, 40 Mich. 37; *Clay Lumber Co. v. Hart's Branch Coal Co.*, 174 Mich. 613, 140 N. W. 912; *Goets v. Foos*, 14 Minn. 265, 100 Am.

Dec. 218; *Ware v. Allen*, 64 Miss. 545, 1 So. 738; *Grace v. Floyd*, 103 Miss. 201, 61 So. 694; *Howard v. Coshaw*, 33 Mo. 118; *Dent v. Arthur*, 156 Mo. App. 472, 137 S. W. 285; *Patrick v. Barker*, 78 Neb. 823, 112 N. W. 358; *Fiske v. McGregory*, 34 N. H. 414; *Smart v. Smart*, 97 N. Y. 559; *Rice v. Carter*, 11 Ired. 298; *Van Gilder v. Bullen*, 159 N. C. 291, 74 S. E. 1059; *Staver Carriage Co. v. Jones*, 32 Okla. 713, 123 Pac. 148; *Brown v. Brown* (Tex. Civ. App.), 155 S. W. 551; *Hawkins v. Western Nat. Bank* (Tex. Civ. App.), 145 S. W. 722; *Randall v. Kelsey*, 46 Vt. 158; *Bicknell v. Henry*, 69 Wash. 408, 125 Pac. 156; *Handsaker v. Pedersen*, 71 Wash. 218, 128 Pac. 230. See also *Murphy v. Hanna*, 37 N. Dak. 156, 164 N. W. 32. In *Sharp v. Levan*, 236 Pa. 374, 84 Atl. 915, however, the court held a promise by one

⁷⁴ *Murphy v. Hanna*, 37 N. Dak. 156, 164 N. W. 32.

A situation arises in the United States, where in many jurisdictions a creditor is allowed to sue on a promise to pay his claim made to the debtor, which has not arisen in England, where only the promisee is ever allowed to sue on a contract.

Where it is held, whether reasonably or not, that a promise to the debtor creates a new and direct right in favor of the creditor, it would seem that in legal effect the promise is dealt with as if made directly to the creditor. Of the jurisdictions which hold that such a direct right arises, a few hold that the right of the creditor under such a promise is based on an assumed novation offered by the promisor and promisee and accepted by the creditor.⁷⁵ On such an assumption, evidently the promise is not within the statute, since the original obligation is extinguished by the later promise; and whenever this is the case, a new promise is not within the statute.⁷⁶

Where the promise to the debtor is held to give the creditor a direct right against the new promisor without destroying his right against the original debtor, the case is identical in legal effect and should be regarded as identical for purposes of the statute with a case where the promise is made directly to the creditor in return for consideration furnished by the debtor, and where the liability of the original debtor still persists.^{76a}

§ 461. Promises made prior to the creation of the principal debt.

Mr. Justice Story said in a leading case:^{76b} "Whether by the true intent of the statute, it was to extend to cases where the collateral promise (so-called) was a part of the original agree-

shareholder of a bank to another that if the latter would sign an agreement to contribute to a reorganization fund and pay an assessment the former would make the necessary payments on his behalf, was within the statute because the promisor had no greater personal interest than other shareholders in the matter. No authorities were cited in support of the conclusion, and the decision must be regarded as wrong.

⁷⁵ See *supra*, § 393.

⁷⁶ See *infra*, § 478. This reasoning was followed, and such a promise to the debtor held not within the statute in *Aldrich v. Carpenter*, 160 Mass. 166, 170, 35 N. E. 456 (applying R. I. law); *Lang v. Henry*, 54 N. H. 57; *Wood v. Moriarity*, 15 R. I. 518, 9 Atl. 427, 16 R. I. 201, 14 Atl. 855.

^{76a} See *infra*, § 478.

^{76b} *D'Wolf v. Rabaud*, 1 Pet. 476, 479, 7 L. Ed. 672.

ment, and founded on the same consideration moving at the same time between the parties, or whether it was confined to cases where there was already a subsisting debt and demand, and the promise was merely founded upon a subsequent and distinct undertaking, might, if the point were entirely new, deserve very grave deliberation." But, as the learned Justice remarked, the question has now been closed, for though once it was thought that unless a guarantor's promise to pay was made after the obligation of the principal debtor had been incurred, the statute was not applicable,⁷⁷ it is now settled that a "special promise" within the Statute may be made prior to or simultaneously with the creation of the principal obligation, and may be offered as an inducement to the creditor to enter into a contract with the principal debtor.⁷⁸

§ 462. Different tests proposed to distinguish promises within the statute.

Different tests have been suggested by the courts to determine when a promise is within the statute. The lack of one single universally recognized test is itself a clear indication of the unsatisfactory nature of most of those which have been proposed; and shows what is also true, that no test which can

⁷⁷ See *Jones v. Cooper*, Cowp. 227; *Perley v. Spring*, 12 Mass. 297, 299; *Rogers v. Kneeland*, 13 Wend. 114, 121; *Matthews v. Milton*, 4 Yerg. 576, 26 Am. Dec. 247; *Mead v. Watson*, 57 Vt. 426.

⁷⁸ *Parsons v. Walter*, 3 Doug. 14 n. (c.); *Peckham v. Faria*, 3 Doug. 13; *Matson v. Wharam*, 2 T. R. 80; *Anderson v. Hayman*, 1 H. Bl. 120; *Keate v. Temple*, 1 Bos. & P. 158; *Webb v. Hawkins Co.*, 101 Ala. 630, 14 So. 407; *Harris v. Frank*, 81 Cal. 280, 22 Pac. 856; *Southern Coal Co. v. Randall*, 141 Ga. 48, 80 S. E. 285; *Ruggles v. Gatton*, 50 Ill. 412; *Wills v. Ross*, 77 Ind. 1; *Langdon v. Richardson*, 58 Ia. 610, 12 N. W. 622; *Blake v. Parlin*, 22 Me. 395; *Moses v. Norton*, 36 Me. 113, 58 Am. Dec. 738; *Conolly* ¹

v. Kettlewell, 1 Gill, 260; *Norris v. Graham*, 33 Md. 56; *Cahill v. Bigelow*, 18 Pick. 369; *Bugbee v. Kendrioken*, 130 Mass. 437; *Welch v. Marvin*, 36 Mich. 59; *Hagadorn v. Stronach Co.*, 81 Mich. 56, 45 N. W. 650; *Cole v. Hutchinson*, 34 Minn. 410, 26 N. W. 319; *Maurin v. Fogelberg*, 37 Minn. 23, 32 N. W. 858, 5 Am. St. Rep. 814; *Gill v. Reed*, 55 Mo. App. 246; *Walker v. Richards*, 39 N. H. 259; *Cowdin v. Gottgetreu*, 55 N. Y. 650; *Whitehurst v. Pidgett*, 157 N. C. 424, 73 S. E. 240; *Leland v. Creyon*, 1 McC. 100, 10 Am. Dec. 654; *Taylor v. Drake*, 4 Strob. 431, 53 Am. Dec. 680; *Matthews v. Milton*, 4 Yerg. 576, 26 Am. Dec. 247; *Mead v. Watson*, 57 Vt. 426; *Cutler v. Hinton*, 6 Rand. 509; *Ware v. Stephenson*, 10 Leigh, 155.

be proposed will harmonize all the decisions. The most commonly suggested tests are:—

(1) A promise which is in form a guaranty performable only on default by a principal debtor is within the statute. A promise not in this form is not within the statute.

(2) A promise which is in terms to pay a debt of another for which that other continues liable, is within the statute; otherwise it is not.

(3) The governing distinction is the purpose of the promisor whether to gain an advantage for himself or to secure it for another.

(4) A promise which amounts in substance to a promise to pay the debtor's own debt is said to be within the statute; but otherwise if the promise is to pay the debt of another.

(5) Whether a new and beneficial consideration has been received by a new promisor is made vital.

(6) A test quoted in recent English cases with approval⁷⁹ is laid down in a note to Williams' Saunders Reports,⁸⁰ making the applicability of the statute depend "not on the consideration for the promise but on the fact of the original party remaining liable, coupled with the absence of any liability on the part of the defendant or his property, except such as arises from his express promise."

(7) The test which it is submitted is the accurate one, is whether a promisor is, to the actual or presumed knowledge of the creditor, a surety; if so, his promise is within the statute.

These tests obviously overlap one another, but they are not identical. Some of them are expressly confined to the situation which arises where the defendant's promise was made after a debt on the part of another had previously come into existence. It is only such cases which give rise to any considerable difficulty in determining whether on given facts the statute is applicable. It is desirable, therefore, before considering in detail the validity of the tests suggested, to consider the sim-

⁷⁹ *Green v. Cresswell*, 10 A. & E. 453; *Fitzgerald v. Dressler*, 7 C. B. (N. S.) 374; *Davys v. Buswell*, [1913] 2 K. B. 47.

⁸⁰ The passage is quoted from Vol. I,

Williams' Notes to Saunders' Reports, p. 233, but the substance of it is contained in the earlier editions of Williams' notes to *Forth v. Stanton*, 1 Williams' Saunders, 210.

pler situation where the promise in question was made as an offer prior to the creation of any debt. Also, the meaning of the words "original and collateral" which are constantly used in the discussion of the subject should be defined.

§ 463. Distinction between original and collateral promises.

A promise which is within the statute is often said to be collateral, if not within the statute it is called original. "The terms collateral or original promise did not occur in the statute, and have been introduced by courts of law to explain its objects and expound its true interpretation."⁸¹

In truth the use of these terms clearly antedates the Statute of Frauds. They were part of the terminology of the law governing the action of debt; an original promise being such a promise as would give rise to an action of debt because a *quid pro quo* had been received by the defendant; whereas a collateral promise though it might be a binding contract upon which assumpsit would lie because a detriment had been incurred by the plaintiff at the defendant's request, could not be the basis of debt.⁸² Though the illustrations of collateral

⁸¹ *D'Wolf v. Rabaud*, 1 Pet. 476, 490, 7 L. Ed. 672. In *Nelson v. Boynton*, 3 Met. 396, 400, 37 Am. Dec. 148, Shaw, C. J., said: "The terms original and collateral promise, though not used in the statute, are convenient enough to distinguish between the cases where the direct and leading object of the promise is to become the surety or guarantor of another's debt, and those where although the effect of the promise is to pay the debt of another, yet the leading object of the undertaker is to subserve or promote some interest or purpose of his own."

⁸² In *Roser v. Roser*, 2 Vent. 36, an action of indebitatus assumpsit was brought for goods sold and delivered to J. S. at the request of the defendant and for which the defendant promised to pay. The court arrested judgment, saying: "Admitting there were a promise; yet it being collateral it did not

make a debt, but should have been brought as an action upon the case." In *Sands v. Trevilian*, Cro. Car. 107, 194, A desired B to be attorney for J. S. and undertook to pay him his fees, and such fees as he should give to counsel. Debt was brought and the plaintiff obtained judgment in the lower court, but on writ of error to the King's Bench it was held that no action of debt would lie. Professor Ames thus comments on these cases: (*Cases on Suretyship*, page 9, n.) "But in *Haines v. Finch*, Alleyn 6, Rolle, C. J., who had been of counsel for the plaintiff in *Sands v. Trevilian*, is reported as saying of that case that 'the judgment was not reversed upon the roll, and his opinion was that the judgment was good.' In *Ambrose v. Rowe*, 2 Show. 421, Skin. 217, s. c., Lord Jeffries, C. J., said, 'that he thought Rolle's argument in that case of *Sands v. Trevilian* not

promises as distinguished from debts are always promises to be answerable only on default of a principal debtor, there seems no reason to doubt that an absolute promise of a surety to pay the debt of one who received the *quid pro quo* and who also was absolutely liable, is a collateral promise, with reference both to the action of debt and to the Statute of Frauds.⁸³

At the present day the use of the terms original and collateral is not very helpful because they are not clearly defined. But it is well to remember that the early adoption of these words as defining the cases which Parliament intended to fall within or outside the statute must have been based on the assumption that the old distinction between debt and assumpsit was the equivalent of the new distinction introduced by the statute. One who bears this in mind will recognize that an original promise should not be treated as necessarily implying priority in time; and that a collateral promise does not mean necessarily a promise conditional on the default of another.

§ 464. A promise may be original though the promisor does not receive the benefit of the consideration.

In early times debt would not lie unless the goods, services, or money which formed the basis of the action had been received by the defendant; but subsequently "it became a settled rule that whatever would constitute a *quid pro quo*, if rendered to the defendant himself, would be none the less a *quid pro quo*, though furnished to a third person, provided that it was furnished at the defendant's request, and that the third person incurred no liability therefor to the plaintiff."⁸⁴ It followed from this, and is still true, that a contract is not brought within

to be answered.' Rolle had argued that 'there was a difference where one is retained generally for another with such a promise to pay his fees and as much as he should expend in the suit, there debt lies: but if I retain one to be attorney for another and promise if the other doth not pay, that I will pay, there if the party for whom the retainer is doth not pay, an action of the case lies against me upon my promise,

and not an action of debt.' In confirmation of this sound distinction see *Woodhouse v. Bradford*, 2 Roll. R. 76, Cro. Jac. 520; *Sanborn v. Merrill*, 41 Me. 467; *Hodges v. Hall*, 29 Vt. 209; *Murphey v. Gates*, 81 Wis. 370, 51 N. W. 573."

⁸³ See, e. g., *Richardson Press v. Albright*, 224 N. Y. 497, 121 N. E. 363.

⁸⁴ Ames, *Lectures Legal History*, 93.

the statute by the mere fact that some one other than the promisor has received the benefit of the consideration. Thus, a contract to pay for goods delivered to a third person,⁸⁵ or to pay the board of a third person,⁸⁶ or to pay for services rendered to a third person,⁸⁷ or to repay money paid at the promisor's

⁸⁵ *Jones v. Cooper*, Cowp. 227; *Croft v. Smallwood*, 1 Esp. 121; *Faires v. Lodanc*, 10 Ala. 50; *Clark v. Jones*, 87 Ala. 474, 6 So. 362; *Cameron v. Haas Bros. Packing Co.*, 3 Ala. App. 520; *Day v. Adcock* (Ala. App.), 66 So. 911; *Millsaps v. Nixon*, 102 Ark. 435, 144 S. W. 915; *Loomis v. Smith*, 17 Conn. 115; *S. J. Cordner Co. v. Manevets* (Conn.), 103 Atl. 842; *Baldwin v. Hiers*, 73 Ga. 739; *Crowder v. Keys*, 91 Ga. 180, 16 S. E. 986; *Cordray v. James*, 19 Ga. App. 156, 91 S. E. 239; *Williams v. Corbet*, 28 Ill. 262; *Owen v. Stevens*, 78 Ill. 462; *Hartley v. Varner*, 88 Ill. 561; *Granite City, etc., Co. v. Board of Education*, 203 Ill. App. 134; *Board of Commissioners v. Cincinnati, etc., Co.*, 128 Ind. 240, 27 N. E. 612, 12 L. R. A. 502; *Collins v. Stanfield*, 139 Ind. 184, 38 N. E. 1091; *Benbow v. Soothsmith*, 76 Ia. 151, 40 N. W. 693; *Calahan v. Ward*, 45 Kans. 545, 26 Pac. 53; *Elder v. Warfield*, 7 Har. & J. 391; *Walker v. Hill*, 119 Mass. 249; *Larson v. Jensen*, 53 Mich. 427, 19 N. W. 130; *Hake v. Solomon*, 62 Mich. 377, 28 N. W. 908; *Amort v. Christofferson*, 57 Minn. 234, 59 N. W. 304; *Wallace v. Wortham*, 25 Miss. 119, 57 Am. Dec. 197; *Stokes v. Mills*, 171 Mo. App. 638, 154 S. W. 455; *Barras v. Pomeroy Co.*, 38 Neb. 311, 56 N. W. 890; *Nesbit v. Pioche, etc., Co.*, 22 Nev. 260, 38 Pac. 670; *Walker v. Richards*, 41 N. H. 388; *Hazeltine v. Wilson*, 55 N. J. L. 250, 26 Atl. 79; *Herendeen Mfg. Co. v. Moore*, 66 N. J. L. 74, 48 Atl. 525; *Gallagher v. McBride*, 66 N. J. L. 360, 49 Atl. 582; *Fitzgerald v. Kelly*, 83 N. J. L. 626, 85 Atl. 1134; *Chase v. Day*, 17 Johns. 114; *Maddock v. Root*,

72 Hun, 98, 25 N. Y. S. 396; *Fitzgerald v. Tiffany*, 9 N. Y. Misc. 408, 30 N. Y. S. 195; *Mackey v. Smith*, 21 Oreg. 598, 28 Pac. 974; *Jefferson Co. v. Slagle*, 66 Pa. 202; *Merriman v. McManus*, 102 Pa. 102; *Mease v. Wagner*, 1 McC. 395; *Fox v. Laney*, 107 S. Car. 318, 92 S. E. 1044; *Hasen v. Bearden*, 4 Sneed, 48; *Carlisle v. Frost Llewellyn Lumber Co.* (Tex. Civ. App.), 196 S. W. 733; *Whitman v. Bryant*, 49 Vt. 512; *Davies v. Carey*, 72 Wash. 537, 130 Pac. 1137; *Security Bank Note Co. v. Shrader*, 70 W. Va. 475, 74 S. E. 416, Ann. Cas. 1914 A. 488; *Champion v. Doty*, 31 Wis. 190; *Treat Lumber Co. v. Warner*, 60 Wis. 183, 18 N. W. 747. It is immaterial that the seller agreed with the promisor to conceal from the person to whom the goods were furnished that they were not furnished on his credit and to get payment from him if possible. *Spriek Bros. Ins. Co. v. Whipple*, 33 Dak. 287, 145 N. W. 559.

⁸⁶ *Brown v. Harrell*, 40 Ark. 429; *McTighe v. Herman*, 42 Ark. 285; *Chicago, etc., Coal Co. v. Liddell*, 69 Ill. 639; *Geelan v. Reid*, 22 Ill. App. 165; *Kernodle v. Caldwell*, 46 Ind. 153; *Lessenich v. Pettit*, 91 Iowa, 609, 60 N. W. 192; *Marr v. Burlington, etc., R. Co.*, 121 Ia. 117, 96 N. W. 716; *Downs v. Perkins*, 207 Mass. 409, 93 N. E. 645; *Grant v. Wolf*, 34 Minn. 32, 24 N. W. 289; *Sinclair v. Bradley*, 52 Mo. 180; *Bushee v. Allen*, 31 Vt. 631. See also *Fairbanks v. Barker*, 115 Me. 11, 97 Atl. 3.

⁸⁷ *Darnell v. Tratt*, 2 C. & P. 82; *Gleason v. Thaw*, 205 Fed. 505, 123 C. C. A. 573; *Zimmerman v. Holt*, 102 Ark. 407, 144 S. W. 222; *Milliken v.*

request to a third person,⁸⁸ is original and enforceable though oral.

§ 465. Whether a promise prior to the creation of a debt is primary or collateral is a question of construction.

It is not helpful to try to establish what special words constitute a promisor who induces the creation of a debt by his promise a primary debtor, and what words indicate merely a collateral obligation to pay the debt of another. The same words in different connections and under different circumstances may warrant opposite conclusions as to which meaning the promise bears. As to words, often the subject of litigation an English judge has said: "The words, 'I will see you paid,' as it seems to me, may mean either one thing or the other. 'I will see you paid,' that is, 'I will pay you,' or 'You shall be paid'. But I do not think these words are necessarily to be taken in the sense Mr. Cole contended for, as meaning, 'I will see that somebody else pays you,' or that 'your principal debtor pays you; and if he does not, I will be the surety for payment.' I do not think that phrase, 'I will see you paid,' has any hard and fast meaning of that kind; it must depend on the other facts of the case."⁸⁹ The same principle is applicable to other

Warner, 62 Conn. 51, 25 Atl. 450; Crowder v. Keys, 91 Ga. 180, 16 S. E. 986; Brandner v. Krebs, 54 Ill. App. 652; Lake View Hospital Assoc. v. Nicholson, 202 Ill. App. 205; Gabbert v. Evans, 184 Mo. App. 283, 166 S. W. 635; Lohmeyer v. Young (Mo. App.), 195 S. W. 507; Peyson v. Conniff, 32 Neb. 269, 49 N. W. 340; Hazeltine v. Wilson, 55 N. J. L. 250, 26 Atl. 79; Barrett v. Johnson, 77 Hun, 527, 28 N. Y. S. 892; Boston v. Farr, 148 Pa. 220, 23 Atl. 901; Eddy v. Davidson, 42 Vt. 56; Runnion v. Morrison, 71 W. Va. 254, 76 S. E. 457; Murphey v. Gates, 81 Wis. 370, 51 N. W. 573.

⁸⁸ Butcher v. Andrews, Comberbach, 473; Harris v. Huntbach, 1 Burr. 373; Davis v. Tift, 70 Ga. 52; Stoltenberg v. Johnson, 163 Ill. App. 422; Rubey Trust Co. v. Weidner, 174 Mo. App.

692, 161 S. W. 333; Dux v. Spielberg, 140 N. Y. S. 410; Richardson v. Parker, 33 Okla. 339, 125 Pac. 442; Uvalde Nat. Bank v. Brooks (Tex. Civ. App.), 162 S. W. 957; Drovers' Deposit Nat. Bank v. Tichenor, 156 Wis. 251, 145 N. W. 777.

⁸⁹ Pigott, B., in Mountstephen v. Lakeman, L. R. 7 Q. B. 196, 205. To the same effect, see Mulholland v. Jones, 83 N. J. L. 604, 83 Atl. 875. As to similar words the Florida court said in West v. Grainger, 46 Fla. 257, 35 So. 91, 94; "The language used by Cassels imports *prima facie* a collateral engagement; that is, that West, Wiggs & Co. would see that Bardin paid his debt to Grainger for services rendered or to be rendered, or that they would pay it if Bardin did not. It is true that circumstances may exist which will

language. Unless the determination of the matter depends solely upon the construction of a written contract, the question should be submitted to the jury.⁹⁰ The question to be determined is first whether the defendant promised absolutely; if so, whether any other absolute obligation arose simultaneously. If the defendant alone promised, unquestionably his promise is without the statute; and so it is if any other promise which was made was conditional on the defendant's prior default. If more than one promised absolutely, the matter will be governed by the principles stated in the next section. Evidence that the original charge was to one person or the other, though strongly tending to prove the creditor's intention that the primary obligation should rest upon that person, is not conclusive;⁹¹ nor is the fact that a promise is called by the

show that an engagement in the language used by Cassels was intended to be original, and not collateral, *Craft v. Kendrick*, 39 Fla. 90, 21 So. 803; *Davis v. Patrick*, 141 U. S. 479, 12 Sup. Ct. 58, 35 L. Ed. 826; *Grant v. Wolf*, 34 Minn. 32, 24 N. W. 289; *Amort v. Christofferson*, 57 Minn. 234, 59 N. W. 304; but the circumstances under which the promise was made in this case do not, in the opinion of the court, affect this result here. *Wagner v. Hallack*, 3 Colo. 176; *Rose v. O'Linn*, 10 Neb. 364, 6 N. W. 430; *Morrissey v. Kinsey*, 16 Neb. 17, 19 N. W. 454; *Walker v. McDonald*, 5 Minn. 455 (Gil. 368); *Payne v. Baldwin*, 14 Barb. 570; *Walker v. Richards*, 41 N. H. 388; *Brown v. Weber*, 38 N. Y. 187; *Robertson v. Hunter*, 29 S. C. 9, 6 S. E. 850; *Pettit v. Braden*, 55 Ind. 201; *Haverly v. Mercur*, 78 Pa. 257; *Lewis v. Lewis Lumber Mfg. Co.*, 156 Pa. 217, 27 Atl. 20; *Hall v. Woodin*, 35 Mich. 67." See also *Day v. Adcock*, 11 Ala. App. 471, 66 So. 911; *Corcoran v. Huey*, 231 Pa. 441, 80 Atl. 381.

⁹⁰ *Day v. Adcock*, 11 Ala. App. 471, 66 So. 911; *Lusk v. Throop*, 189 Ill. 127, 59 N. E. 529; *Fairbanks v. Barker*, 115 Me. 11, 97 Atl. 3; *Stone v. Walker*, 13 Gray, 613; *Downs v. Perkins*, 207

Mass. 409, 93 N. E. 645; *McGowan Commercial Co. v. Midland Coal, etc., Co.*, 41 Mont. 211, 108 Pac. 655; *Chesebrough v. Tirrill*, 61 N. J. L. 628, 41 Atl. 215; *Whitehurst v. Padgett*, 157 N. C. 424, 73 S. E. 240; *Lorick v. Caldwell*, 85 S. Car. 94, 67 S. E. 143; *Security Bank Note Co. v. Shrader*, 70 W. Va. 475, 74 S. E. 416, Ann. Cas. 1914 A. 488.

⁹¹ *Clark v. Jones*, 87 Ala. 474, 6 So. 362; *Lusk v. Throop*, 189 Ill. 127, 59 N. E. 529; *Myer v. Grafflin*, 31 Md. 350, 100 Am. Dec. 66; *Stone v. Walker*, 13 Gray, 613; *Walker v. Hill*, 119 Mass. 249; *Larson v. Jansen*, 53 Mich. 427, 19 N. W. 130; *Wittenberg v. Fisher*, 183 Mo. App. 347, 166 S. W. 1106; *McGowan Commercial Co. v. Midland Coal, etc., Co.*, 41 Mont. 211, 108 Pac. 655; *Walker v. Richards*, 41 N. H. 388; *Gallagher v. McBride*, 66 N. J. L. 360, 49 Atl. 582; *Foster v. Persch*, 68 N. Y. 400; *White v. Tripp*, 125 N. C. 523, 34 S. E. 686; *Kesler v. Cheadle*, 12 Okla. 489, 72 Pac. 367; *Mackey v. Smith*, 21 Oreg. 598, 28 Pac. 974; *Repair v. Krebs Lumber Co.*, 73 W. Va. 139, 80 S. E. 140. But see *Millsaps v. Nixon*, 102 Ark. 435, 144 S. W. 915; *Rottman v. Fix*, 25 Mo. App. 571.

parties a guaranty conclusive that the promise is not original," though such is the natural meaning which will be given to the word if there are no controlling facts.⁹³

§ 466. Debts originally incurred as joint or joint and several obligations.

The words of the statute require the existence of a debt independent of the obligation created by the "special promise." Therefore, a joint promise which is in law a single liability is not within the statute, though one of the joint debtors entered into the obligation as a matter of accommodation to the other.⁹⁴ And an agreement to convert a separate into a joint debt by way of novation, thereby securing the liability of a new party and discharging the several liability of the original debtor, is also not within the statute.⁹⁵

As a matter of logical analysis of contracts there seems no reason to doubt that a several original obligation may be entered into by each of two or more persons simultaneously for the same performance; but to permit two original debts to arise simultaneously from one *quid pro quo*, would violate a rule established in the action of debt. "It is an indispensable condition of the defendant's liability in debt in cases where another person received the actual benefit, that this other person should not himself be liable to the plaintiff for the benefit received. For in that event the third person would be the

⁹³ Esberg-Bachman L. T. Co. v. Heid, 62 Fed. 962, 963; Gaster v. Ashley, 1 Ark. 325, 333; Packer v. Benton, 35 Conn. 343, 348, 95 Am. Dec. 246; Thayer v. Wild, 107 Mass. 449, 452; McGowan Commercial Co. v. Midland Coal, etc., Co., 41 Mont. 211, 108 Pac. 655; Delsman v. Friedlander, 40 Or. 33, 66 Pac. 297, 298; Drovers' Deposit Nat. Bank v. Tichenor, 156 Wis. 251, 145 N. W. 777, 779.

⁹⁴ Southern Coal, etc., Co. v. Randall, 141 Ga. 48, 80 S. E. 285.

⁹⁵ Perry v. Jarman, 125 Ark. 240, 188 S. W. 544; Boyce v. Murphy, 91 Ind. 1; Oldenburg v. Dorsey, 102 Md. 172, 179, 62 Atl. 576; Gibbs v. Blanchard, 15

Mich. 292; Rottman v. Fix, 25 Mo. App. 571; Mitchell v. Davis (Mo. App.), 190 S. W. 357; Hetfield v. Dow, 3 Dutch. 440; Peele v. Powell, 156 N. C. 553, 557, 73 So. 234; Whitehurst v. Padgett, 157 N. C. 424, 73 S. E. 240; Olson v. McQueen, 24 N. Dak. 212, 139 N. W. 422; Waldock v. First Nat. Bank, 43 Okla. 348, 143 Pac. 53; Wainwright v. Straw, 15 Vt. 215, 40 Am. Dec. 675; Eddy v. Davidson, 42 Vt. 56, 60. See also McGill v. Dowdle, 33 Ark. 311; Strickland v. Hamlin, 87 Me. 81, 32 Atl. 732. But see *contra* Matthews v. Milton, 4 Yerg. 576, 26 Am. Dec. 247.

⁹⁶ *Ex parte* Lane, 1 De Gex, 300.

debtor, and one *quid pro quo* cannot give rise to two distinct debts,"⁹⁶ and this rule still persists. Though two obligations may arise from the transfer of a single *quid pro quo*; but one of them can be an original debt; the other must be a special promise to answer for the debt.⁹⁷ There is no such limitation, however, on the power of parties to make special contracts. Where there is sufficient consideration the parties may make any promises which they choose. Therefore, it is evident that both of two obligations incurred on the transfer of a *quid pro quo*, may by special contract be absolute and unconditional promises to pay the price. One of the obligations must be

⁹⁶ Ames's Lectures on Legal Hist. 94. "There cannot be a double debt upon a single loan." *Per curiam*, in *Marriott v. Lister*, 2 Wils. 141, 142.

⁹⁷ This seems generally assumed in the cases, and in *Hetfield v. Dow*, 3 Dutch. 440, 451. Whelpley, J., said: "How can two persons be liable, as original principal debtors, upon a parol contract, not in writing, for the entirety of the same debt? To state the proposition seems its best refutation. If the liability of the one is complete by itself, and not dependent upon or collateral to the other, then payment by one would not be payment for both, and the fortunate possessor of such an undertaking might enforce double satisfaction for the same debt. If the undertakings be not independent, one must be collateral to the other, and that which is thus collateral must be subject to the operation of the statute." So in *Welch v. Marvin*, 36 Mich. 59, the court said: "Under no theory of this case, could Cook and Welch both be responsible to plaintiff severally, at his option. If Cook was liable for the meats furnished after the arrangement with Welch was made, then clearly Welch's liability could not be an original one. It is equally clear that if Welch's promise was an original promise, and the debt his debt, then Cook could not be held liable thereon."

And so Kent states: "If the whole credit be not given to the person who comes in to answer for another, his undertaking is collateral and must be in writing," 3 Kent, Comm. 323, and this passage is often quoted with approval in terms or in substance. See *Pake v. Wilson*, 127 Ala. 240, 28 So. 665; *Shepherd v. Butcher Tool, etc., Co.*, (Ala. 1916), 73 So. 498; *Cordray v. James*, 19 Ga. App. 156, 91 S. E. 239; *Swift v. Pierce*, 13 Allen, 136, 138, and *O'Connell v. Mt. Holyoke College*, 174 Mass. 511, 55 N. E. 460; *Cole v. Hutchinson*, 34 Minn. 410, 26 N. W. 319; *Frissell v. Williams*, 87 Mo. App. 518; *Mueller v. Woodson* (Mo. App.), 198 S. W. 1134; *McGowan Commercial Co. v. Midland Coal, etc., Co.*, 41 Mont. 211, 108 Pac. 655; *Waldock v. First Nat. Bank*, 43 Okla. 348, 143 Pac. 53; *Matteson v. Moone*, 25 R. I. 129, 54 Atl. 1058; *Mankin v. Jones*, 63 W. Va. 373, 60 S. E. 248; *Security Bank Note Co. v. Shrader*, 70 W. Va. 475, 74 S. E. 416, Ann. Cas. 1914 A. 488; *Rietzloff v. Glover*, 91 Wis. 65, 64 N. W. 298. It will be seen, however, that if taken literally, this statement would be inconsistent with the cases cited *supra*, n. 94, which are unquestionably sound, holding a joint liability not within the statute. To this extent modification of the statement is necessary.

collateral under the law of debt and of the Statute of Frauds, but need not be conditional on prior default of the primary obligation, though doubtless, generally, it is; nor need it be to pay the "debt" of the original obligor as distinguished from the price of the *quid pro quo*. The modern application of the old law of debt to the Statute of Frauds is this:—the consideration for several absolute promises made by two must have enured to the benefit of one of them, of both of them, or of neither of them. If it enured to the benefit of one only, the other is a surety and his promise is within the statute.⁸⁸ If the consideration enured to the benefit of both or neither of them, the liability should be joint, as the enjoyment or lack of enjoyment, of the consideration, is equally joint, and the statute is inapplicable.

In the case of contracts by specialty, there is not the same difficulty in two persons becoming severally liable for the same debt. No *quid pro quo* had to be received by either of them; the specialty itself gave rise to the debt.⁸⁹ For this purpose negotiable instruments are to be regarded as mercantile specialties, though open to defences unless some value was received by the maker or given by a holder.¹ And joint and several, or several obligations given in return for a *quid pro quo* furnished to one of the obligors on such instruments are not within the statute as to any of them.² In some of the decisions this result is explained by saying that a consideration is presumed, and that therefore the note furnished a sufficient memorandum. But if the note was given for a particular consideration, and the local law requires the consideration in a memorandum to be stated, no memorandum can be accurate and sufficient which does not state that very consideration.

⁸⁸ See cases in the preceding note. But see *Mitchell v. Davis* (Mo. App.), 190 S. W. 357, with which *cf.* *Mueller v. Woodson* (Mo. App.), 198 S. W. 1134.

⁸⁹ Ames, *Lectures on Legal History*, 88, 90, 95, 122.

¹ As to the right of the holder of negotiable paper to sue in debt upon it,

see 2 Ames' *Cas. Bills and Notes*, 520 *et seq.*

² *Davidson v. Rothschild*, 49 Ala. 104; *Nichols & Shepard Co. v. Dedrick*, 61 Minn. 513, 63 N. W. 1110; *Frech v. Yawger*, 47 N. J. L. 157, 54 Am. Rep. 123; *Casey v. Brabason*, 10 Abb. Pr. 368; *Paul v. Stackhouse*, 38 Pa. 302; *Wainwright v. Straw*, 15 Vt. 215, 40 Am. Dec. 675.

The result of the cases can, therefore, properly be reached on the theory that the promises in negotiable paper as they do, obligations under the custom of merchant not within the statute.

The same result may be reached where only on simultaneous obligations is a specialty, the other being a parol promise. Thus where a bank discounted notes of a corporation, on receiving a promise by certain stockholders that they would pay the notes at maturity, according to tenor, a several obligation was thereby created simultaneously in favor of the bank. Though the court held the stockholder's promise was original and not conditional on default of the makers of the notes, there could be no doubt that the bank likewise acquired the absolute obligation of the makers of the notes.³

What the effect may be on the technical doctrine of joint and several obligations arising by contract from the same transaction, of the common statute provision making all joint liabilities joint and several, is an inquiry to which the cases as yet give little answer.⁴

If joint and several liability may be orally created, it is difficult to see why several liability may not be.

§ 467. New promise in form a guaranty.

It is not infrequently assumed or stated that a person may promise to pay a debt or perform a duty if another person fails to do so, is within the statute, but that a promise may be made

³ *Drovers' Deposit Nat. Bank v. Tichenor*, 156 Wis. 251, 145 N. W. 777. See also *Guild v. Conrad*, [1894] 2 Q. B. 885. So in *Kelsey v. Munson*, 198 Fed. 841, 117 C. C. A. 483, an agreement by two copartners, A and B, with C & D to induce them to sign as sureties a note made by B which was to be discounted at a bank, that the note should be a partnership debt, was held not within the statute because made to secure capital for the partnership; and the sureties having paid the note were allowed to prove it in bankruptcy

against the partnership estate. It should be observed that this is in effect a promise of several liability to C & D to indemnify them, created at the time the note was discounted, for A & B pro se as a firm and B was continuous individually by his signature on the note.

⁴ In *Bennington Lumber Co. v. Tawney* (Okla.), 158 Pac. 566, held that a joint and several obligation was unaffected by the Statute of Frauds.

if it is absolute in terms to pay the debt of a person primarily liable irrespective of any prior default by the latter. It is probably true that a promise conditional on the prior default of a primary debtor is generally within the statute, for if the transaction were such that the promisor could be properly called in any sense an original debtor, he would naturally undertake absolutely to pay a debt, the burden of which he has assumed as his own; and there are expressions by able judges which seem to indicate that they regarded this test as final.⁵

⁵ In *Peckham v. Faria*, 3 Doug. 13, 14, Lord Mansfield said: "In *Jones v. Cooper*, [1 Cowp. 227] the court was of opinion, that whenever a man is called upon only in the second instance, he is within the statute; otherwise, where he is to be called upon in the first instance.

In *Guild v. Conrad*, [1894] 2 Q. B. 885, 892, Lindley, L. J., said: "If it was a contract to pay if the Demerara firm did not pay, then it is void under the Statute of Frauds as not being in writing. But if, on the other hand, it was a promise to put the plaintiff in funds in any event, then it is not such a promise as is within the Statute of Frauds," and the other members of the court make the same distinction.

In *Davys v. Buswell*, [1913] 2 K. B. 47, Vaughan Williams, L. J., seemed to regard the test as affording but a *prima facie* indication of whether the promise is within the statute, saying: "As I understand it, in any case where in substance and in fact, an obligation has been undertaken by a person to the creditor to pay a debt due from another person, for which that other remains responsible, in the event of his making default, *prima facie* that is a guarantee, and the case comes within the fourth section of the Statute of Frauds." And the test laid down in *Wms. Saund.* 211 e, quoted in this case as accurate (see *supra*, § 462, *infra*, § 474), is inconsistent with a rule which would make the absolute or conditional character of the promise a conclusive test. In

Brown v. Weber, 38 N. Y. 187, 189, the court said:

"The language shows that the test to be applied to every case is, whether the party sought to be charged is the principal debtor, primarily liable, or whether he is only liable in case of the default of a third person; in other words, whether he is the debtor, or whether his relation to the creditor is that of surety to him for the performance, by some other person, of the obligation of the latter to the creditor. In the former case the promise is not within the statute, because the party promising is not undertaking for the performance by another, of some duty owing by the other, but for the performance of his own obligation; but, in the latter case, it is within the statute, because the liability is contingent upon, whether another performs his obligation, for whose performance the party sought to be charged has undertaken. There has never been any dispute as to the above principles, but the difficulty has been in determining to which class the cases that have been adjudged belonged."

But the cases the court supposes do not cover the whole ground. One who promises absolutely may be a surety.

In *Davis v. Patrick*, 141 U. S. 479, 488, 35 L. Ed. 826, the court said, quoting from the opinion in *Emerson v. Slater*, 22 How. 28, 43, 16 L. Ed. 360: "Whenever the main purpose and object of the promisor is not to answer for

It is not, however, universally true that a guarantee conditional on another's default is within the statute.⁶ An assignment accompanied by a guarantee that the obligor of the assigned claim will pay it, is not within the statute;⁷ nor is the contract of a *del credere* factor with his principal.⁸ These cases must be regarded as exceptional and withdrawn from the operation of the statute for reasons of policy. But a promise in the form ✓ of a guarantee of performance by another is not within the

another, but to subserve some pecuniary or business purpose of his own, involving either a benefit to himself or damage to the other contracting party, his promise is not within the statute, although it may be in form a promise to pay the debt of another, and although the performance of it may incidentally have the effect of extinguishing that liability," and added, perhaps somewhat inconsistently (at p. 489), "Counsel for Davis place stress on the form of expression attributed by Patrick to Davis, to wit: 'I will be personally responsible; I will see you paid;' and contends that the import of such language is that of a collateral promise. There is force in this contention, as it implies that some one else was also bound, but the real character of a promise does not depend altogether upon the form of expression, but largely on the situation of the parties; and the question always is, what the parties mutually understood by the language, whether they understood it to be collateral or a direct promise." In *Warner v. Willoughby*, 60 Conn. 468, 471, 22 Atl. 1014, 25 Am. St. Rep. 343, the court said: "It seems to have been understood by the parties and the court alike that the defendant did not agree that, if the plaintiff would forbear proceedings to place a lien upon the premises described, the defendant would pay him the seven hundred dollars or any part thereof for which he had contracted to do the work. No such promise is alleged or testified to.

On the contrary the promise alleged and testified to is substantially the promise of which the court treated in its charges and instructed the jury to be a valid and binding one though not in writing, namely, a promise to see the plaintiff paid for his work, to pay if Mr. Humphrey did not. This is clearly not a direct undertaking to answer in the first instance. It was not understood by the parties that Humphrey was not liable to pay the plaintiff under the contract, or that his liability was affected by the undertaking of the defendant. Humphrey continued liable and in fact paid a large part of the contract price. The undertaking upon which the plaintiff relied was that of a person not before liable, for the debt or duty of another who continued liable to pay for the work performed under the contract. It was a collateral undertaking and within the statute of frauds." In *Lampson v. Hobart's Estate*, 28 Vt. 697, 700, it is said: "It is necessary, too, that a parol promise of this kind, to be binding, should be absolute, and not dependent on the failure of the debtor to pay, and such this is."

⁶ In *Westmoreland v. Porter*, 75 Ala. 452; *Raabe v. Squier*, 148 N. Y. 81, 42 N. E. 516, oral promises conditional on default of a debtor were held valid because made for beneficial consideration. The cases seem open to criticism.

⁷ See *infra*, § 484.

⁸ *Ibid.*

statute if the person whose performance is guaranteed is under no liability to the promisee,⁹ which indicates that it is not merely the form of the new promise, but the existence of a primary obligor which is important. It is, however, especially as a negative test that the form of guaranty is inadequate. Certainly a new promise to pay the debt of another is often, if not generally, within the statute though the new promise be not in terms conditional upon prior default by the person primarily liable.¹⁰ In most of the cases hereafter discussed of new promises to pay existing debts, the promises were in terms absolute, yet the court resorted to inquiries as to the purpose and consideration of these promises and whether they extinguished the original debt in order to decide whether the statute was applicable; and specifically promises to make or accept negotiable paper are within the statute,¹¹ though neither the promise to sign nor the obligation which would be incurred by signing are conditional on prior default.

§ 468. New promise in form to pay the debt of another.

Perhaps it might more plausibly be suggested that the applicability of the Statute depends upon whether the promise in question is in terms to pay the debt of another, so that the contract by its very language makes the measure of the promisor's liability identical with that of another, who as between the two is the one who should discharge the obligation.

In New York the rule has been stated as follows: "Where the primary debt subsists and was antecedently contracted, the promise to pay it is original when it is founded on a new consideration moving to the promisor and beneficial to him, and such that the promisor thereby comes under an independent duty of payment irrespective of the liability of the principal debtor."¹² Doubtless it is true that the new promise must

⁹ See *supra*, § 454.

¹⁰ "It cannot be that every absolute verbal promise to pay the debt of another upon some new consideration moving to the promisor is without the Statute of Frauds. The statute will not admit of that interpretation.

Martyn v. Arnold, 36 Fla. 446, 18 So. 791." *West v. Grainger*, 46 Fla. 257, 35 So. 91, 95. See also *Richardson Press v. Albright*, 224 N. Y. 497, 121 N. E. 463.

¹¹ See *supra*, § 457.

¹² *White v. Rintoul*, 108 N. Y. 222,

be identical in scope with the original obligation,¹³ may be this identity in fact though the terms of the promise do not expressly adopt the debt as a standard; authorities indicate that a promise which is in terms for an amount fixed by some other standard than the debt itself may still be within the statute. This is shown clearly by the cases holding promises to sign negotiable instruments for accommodation within the statute. In these cases the promisor should sign, he clearly might be liable for the debt by the instrument, though the supposed original debt is a defence.¹⁴ Conversely, it is true that a promise, the terms of which are fixed by the legal obligation of another, is necessarily within the statute.¹⁵

227, 15 N. E. 318. This quotation suggests the inquiry, what is to be said if the consideration was not beneficial to the promisor, but his promise was absolute in terms binding him to perform regardless of the liability of the other obligor, or if the consideration was beneficial and the promise in terms limited to the debt of the principal?

¹³ See *supra*, § 456.

¹⁴ See cases cited *supra*, § 457.

The same point may be found in other cases. In *Colman v. Eyles*, 2 Stark. 62, a landlord had given a warrant for distress on the tenant; the defendant took the plaintiff to the premises to keep possession of the distrained goods and promised to pay him. Lord Ellenborough held that since the landlord was responsible for the necessary expenses of the distress, the defendant's promise was within the statute. Yet here it is clear that the defendant promised to pay the plaintiff's charges, not merely to satisfy the landlord's liability for those charges.

¹⁵ In *Edwards v. Kelly*, 6 M. & S. 204, the defendants promised to pay the plaintiff "all such rent as shall appear to be legally due from him" from a third person. The court held

that the promise was not within the statute because made in consideration of the surrender of goods to the plaintiff. *Abbott, J.*, declared himself unable to distinguish the case from *Castling v. Aubert*, 2 East, 175, where the promise in question was clearly to pay a fixed sum.

In the following cases, also, the promises were held not within the statute because made in consideration of the surrender of goods to the plaintiff. In each case the consideration was by the promisor being held to pay the debt of another by an original obligation of the promisor. *Lamson v. Hobart*, 8 Vt. 697; *Cross v. Richardson*, 10 Vt. 641; *Green v. Hadfield*, 89 W. 310. More striking perhaps of the unimportance of distinguishing between a promise in terms to pay the debt of another as such, and one which is in terms a promise to pay a fixed sum assumed by the parties to be the debt of another, and which is in terms a promise to pay the debt, is the general failure of the courts in many decisions on this point to discuss any possible difference between these two cases, or to consider promises which come before the courts having one rather than the other of these meanings.

§ 469. Discharge of the original debt as a test.

It is often said that a new promise is presumptively within the Statute of Frauds unless the original debt is discharged. As all the authorities admit that there are cases where this presumption is inapplicable, the test is not valuable unless some rule can be given indicating when the presumption does not apply.

The importance of the discharge of the original obligation is this: If the new promisor as well as the original promisor is liable, whatever may be the form of the promisor in substance, one of these three situations must exist: (1) the new promisor must become surety for the old obligor, (2) the old obligor must have become surety for the new promisor, or (3) both parties must be beneficially interested so that each is surety for the other as to a portion of the obligation. Therefore, unless the original obligor falls back into the position of surety, the new promise is either in whole or in part to pay the debt of another, if the original obligation still exists.

It is submitted, therefore, that on principle the test whether the original debt is discharged should be applicable unless the new promisor has assumed the debt as his own; that is, unless he has come into the position of primary obligor and the original debtor has fallen into the position of a surety, the promise should be held within the Statute. In fact, the law both of England and of the United States has narrowed the boundaries of the statute somewhat more closely than this.

In England, the surrender of property by the creditor, and in many jurisdictions in the United States not only this but any new consideration beneficial to the new promisor and received by him, is sufficient to validate an oral promise, although the original debt has not been discharged.¹⁶

§ 470. The purpose of the promisor as a test.

Perhaps as common a test as any that has been suggested for distinguishing promises which fall within the statute from those which fall without its boundaries, is based on the supposed purpose or object of the promisor. Chief Justice Shaw,

¹⁶ See *infra*, § 472.

in a leading Massachusetts decision,¹⁷ said that "when the party promising has for his object a benefit which he did not before enjoy accruing immediately to himself," the promise is not within the statute; but where "the object of the promise is to obtain the release of the person or property of the debtor, or other forbearance or benefit to him, it is within the statute" and this becomes changed in a later Nebraska case,¹⁸ to the following: "Where the leading purpose of a person who agrees to pay the debt of another is to gain some advantage, or promote some interest or purpose of his own, and not to become a mere guarantor or surety of another's debt, and the promise is made on a sufficient consideration, it will be valid although not in writing." Similar statements may be found in other decisions.¹⁹ But the distinction thus suggested is easily subject to misapprehension. The purpose or object of the promisor is always to acquire the consideration for which the promise is exchanged; that is why he gives his promise, not because his promise itself has a purpose, and if he wants the consideration enough, he will give the kind of promise for it that the promisee desires. Therefore it is perfectly possible for a promisor to have as his leading purpose the "gaining of some advantage" or "promotion of some interest of his own"

¹⁷ *Nelson v. Boynton*, 3 Met. 396, 402, 37 Am. Dec. 148.

¹⁸ *Swayne v. Hill*, 59 Neb. 652, 655, 81 N. W. 855, quoted from *Fitzgerald v. Morrissey*, 14 Neb. 198, 15 N. W. 233.

¹⁹ In *Nugent v. Wolfe*, 111 Pa. St. 471, 480, 4 Atl. 15, 56 Am. Rep. 291, it is stated as a general rule that "When the leading object of the promise or agreement is to become guarantor or surety to the promisee, for a debt for which a third party is and continues to be primarily liable, the agreement, whether made before or after, or at the time with the promise of the principal, is within the statute, and not binding unless evidenced by writing. On the other hand, when the leading object of the promisor is to subserve some interest or purpose of his own, notwith-

standing the effect is to pay or discharge the debt of another, his promise is not within the statute." To the same effect are, *Emerson v. Slater*, 22 How. 28, 43, 16 L. Ed. 360; *Mine, etc., Supply Co. v. Stockgrowers' Bank*, 173 Fed. 859, 98 C. C. A. 229; *Guaranty Trust Co. v. Kœhler*, 195 Fed. 669, 115 C. C. A. 479; *Kelsey v. Munson*, 198 Fed. 841, 843, 117 C. C. A. 483; *Clifford v. Luhring*, 69 Ill. 401; *Frohardt v. Duff*, 156 Ia. 144, 135 N. W. 609, 40 L. R. A. (N. S.) 242; *Oldenburg v. Dorsey*, 102 Md. 172, 179, 62 Atl. 576; *Rice v. Hardwick*, 17 N. Mex. 73, 124 Pac. 800; *Crawford v. Edison*, 45 Oh. St. 239, 13 N. E. 80; *Fehlinger v. Wood*, 134 Pa. St. 517, 524, 19 Atl. 746; *Lorick v. Caldwell*, 85 S. Car. 94, 100, 67 S. E. 143; *Bellows v. Sowles*, 57 Vt. 164, 171, 52 Am. Rep. 118.

by becoming "a mere guarantor or surety of another's debt." The real distinction of purpose or object which it is sought to bring out is doubtless that between intending that the consideration for which the promise is given shall benefit the promisor himself, or shall benefit a third person, the co-debtor. This is apparent in the quotation from Shaw, but the idea has become blurred in the quotation from the Nebraska decision, and is generally indistinctly stated by those who make the purpose of the promisor the test. Even when the matter is carefully stated and understood it is to be observed that the promisor's intention with respect to the consideration can be distinguished only by considering whether the consideration was in fact to be received by and become advantageous to the promisor, or was to be received by and be beneficial to another. The nature of the consideration in fact given for a promise therefore furnishes more exactly and simply than the promisor's supposed purpose, the test presumably sought by those who inquire into that purpose. Thus understood, this test is open to the criticism made hereafter²⁰ of judicial dicta directly adopting as a test the beneficial character of the consideration.

A reason for the indistinctness with which the proposed test of the purpose of the promisor is often stated, may be found in the desire of courts to state a principle in such a way as to harmonize all decisions. There are doubtless certain lines of cases excluded from the operation of the statute for the reason that the main object of each of the contracting parties, and the main purpose of the contract have nothing to do with the payment of the debt of another, such payment if it occurs being merely incidental;²¹ but any attempt to make this principle account for the generality of decisions on the provision of the Statute of Frauds here in question, is doomed to failure.²²

²⁰ *Infra*, § 472.

²¹ See *infra*, § 484.

²² In *Harburg Comb Co. v. Martin*, [1902] 1 K. B. 778, 786, 787, Vaughan Williams, L. J., defined the extent of certain exceptional cases as follows: "Whether you look at the 'property cases' or at the 'del credere cases,' it seems to me that in each of them the conclusion arrived at really was that

the contract in question did not fall within the section because of the object of the contract. In each of those cases there was in truth a main contract—a larger contract—and the obligation to pay the debt of another was merely an incident of the larger contract. As I understand those cases, it is not a question of motive—it is a question of object. You must find what

§ 471. A new promise whereby the promisor makes of another his own.

An attempt is often made to distinguish new promises fall within the statute from those falling outside its limits by saying that where the new promisor makes the debt the promise is not within the statute. The difficulty with this definition is that it is liable to be misunderstood. If it is to mean that wherever the new promisor undertakes to give valid consideration to pay the debt, it becomes his own promise is not within the statute, the rule is not supported by the cases, for it is at least requisite that the promisee receive a consideration beneficial to himself in order that an oral promise by him binding, and it will in the next breath be argued that it is also necessary that the consideration be received as the equivalent of the promised debt, not as an equivalent merely of the risk the promisor may run of losing his money if the primary debtor cannot be compelled to perform his obligation. The emphasis, therefore, in stating the rule must be laid on the word "debt" becoming his own promise distinguished from a liability being incurred under a

it was that the parties were in fact dealing about. What was the subject-matter of the contract? If the subject-matter of the contract was the purchase of property—the relief of property from a liability, the getting rid of incumbrances, the securing greater diligence in the performance of the duty of a factor, or the introduction of business into a stockbroker's office—in all those cases there was a larger matter which was the object of the contract. That being the object of the contract, the mere fact that as an incident to it—not as the immediate object, but indirectly—the debt of another to a third person will be paid, does not bring the case within the section. This definition or rule for ascertaining the kind of cases outside the section covers both 'property cases,' and 'del credere cases.' . . . It was suggested that the true definition of cases which do not come within s. 4

should be, not those in which the promisee is bound to pay the debt of another incident to a larger contract, but those in which the main object is to secure the promisor's own personal interest. I think, if such a definition were adopted, there would be nothing left outside the section within s. 4, because in every case there must be a consideration for which the promisor bargains to come to the promisee. That is as true of forbearance as of anything else. It is to be observed, however, as a caution on the attempt made in the extract to bring the "property cases" within the scope of the suggestion, that in those cases the one main object of the creditor who transfers the property is to get his debt paid. The new promisor agrees to take the property, but he agrees to do it only if he gets the consideration which he just as well as does every surety or guarantor.

promise. Even if the statement is made in this form, however, it is open to possible misconstruction; for if it is taken to mean that the obligation must become exclusively that of the new promisor as distinguished from that of the original obligor, the cases are opposed to the rule. It is not requisite that the new promise shall be taken in discharge of the old indebtedness.²³ If, however, the meaning of the rule is understood to be that the new promisor must have become either (1) the sole debtor or (2) the principal debtor as between himself and the original debtor, or (3) that the creditor must be justified in so assuming, the rule is identical in substance with the less ambiguously stated rule, the correctness of which is hereafter urged.²⁴

§ 472. Whether the receipt of a new and beneficial consideration by a promisor takes his promise out of the statute.

C. It has been established by a line of cases that the surrender to a new promisor of property which was held by the creditor as security for his claim prevents the promise from falling within the statute. In some of these cases the property surrendered belonged to the new promisor subject to the creditor's lien thereon.²⁵ In other cases, however, this was not true, and

²³ See *infra*, § 478.

²⁴ *Infra*, § 475.

²⁵ *Fitzgerald v. Dressler*, 7 C. B. (N. S.) 374 (the plaintiff surrendered goods, on which he had a seller's lien, in consideration of a promise by the defendant, a sub-purchaser, to pay the price to the plaintiff, which was less than that which the sub-purchaser owed to his vendor); *Westmoreland v. Porter*, 75 Ala. 452 (the plaintiff surrendered a lien at the request of the defendant in consideration of the latter's promise to pay the debt. The defendant was a second lienor); *Luark v. Malone*, 34 Ind. 444 (the defendant, the owner of a building, promised to pay a construction debt in consideration of the surrender of a mechanic's lien on the building); *Crawford v.*

King, 54 Ind. 6 (surrender of a lien on property of defendant); *Parker v. Dillingham*, 129 Ind. 542, 29 N. E. 23 (promise in consideration of surrender of mechanic's lien on defendant's property, but held that the lien must have been actually obtained at the time of the promise, and that a promise in consideration of extension of time to the principal debtor and refraining from securing a lien, were insufficient); *Johnson v. Huffaker*, 99 Kan. 466, 162 Pac. 1150, L. R. A. 1917 D. 872 (promise by owner of equity in land to mortgagee in consideration of the mortgagee's forbearance to enforce immediately a mortgage imposed on the land by a prior owner); *Fish v. Thomas*, 5 Gray, 45, 66 Am. Dec. 348 (promise by owner of vessel in consideration of a

the advantage to be derived by the promisor from the surrender was something other than the restoration to him of property in which he previously had a right of ownership.²⁶

surrender of an admiralty lien); *Burr v. Wilcox*, 13 Allen, 269 (promise to pay a tax to free land in which the defendant was legally interested); *Manning v. Anthony*, 208 Mass. 399, 94 N. E. 466, 32 L. R. A. (N. S.) 1179 (promise by owner of equity to mortgagee in consideration of forbearance to foreclose); *Monroe Lumber Co. v. Bezeau*, 192 Mich. 307, 158 N. W. 880 (promise by owner of realty in consideration of forbearance to file a lien); *Hodgins v. Heaney*, 15 Minn. 185 (the defendant, a mortgagee of land, promised to pay the plaintiff in consideration of the surrender of a lien thereon which was prior to defendant's mortgage); *Landis v. Royer*, 59 Pa. 95 (the defendant, owner of a building, promised to pay a construction debt in consideration of the surrender of a mechanic's lien). *Weisel v. Spence*, 59 Wis. 301, 18 N. W. 1652 (release of superior lien to subordinate chattel mortgagee in consideration of promise by the latter).

²⁶ The leading case on this point is *Williams v. Leper*, 3 Burr. 1886. (Here the plaintiff, a landlord whose tenant was in arrears, was about to distrain the latter's goods. The tenant had assigned all his property for the benefit of his creditors who had employed the defendant as a broker to sell them. The defendant learning of the plaintiff's intention to distrain, promised to pay the rent if the landlord would desist.) *Castling v. Aubert*, 2 East, 325 (policies of insurance held by the plaintiff as security were surrendered to the defendant on his promise to pay acceptances for which they were held); *Edwards v. Kelly*, 6 M. & S. 204 (the defendants promised that if property on which the plaintiff was about to distrain were delivered to be sold by one of them for the tenants, the defendants

would pay the rent due); *Bampton v. Paulin*, 4 Bing. 264 (the defendant, an auctioneer, promised to pay the landlord rent in arrear if allowed to continue to sell goods at auction which were subject to distress); *Cassels v. Alabama City &c. R. Co.* (Ala.), 73 So. 494 (the defendant promised to pay the debt of another to the plaintiff in consideration of the plaintiff's turning over to the defendant property of the debtor on which plaintiff had a lien); *Borchsenius v. Canutson*, 100 Ill. 82 (the plaintiff had a lien on a policy of insurance on the life of the defendant's deceased husband. The defendant's promise to pay for the surrender of the policy was upheld since it enabled her to collect money for her widow's allowance); *Frohardt v. Duff*, 156 Ia. 144, 135 N. W. 609, 40 L. R. A. (N. S.) 242, Ann. Cas. 1915 B. 254 (the plaintiff at the defendant's request refrained from attaching the debtor's property on part of which the defendant had a chattel mortgage). In *Harburg Comb Co. v. Martin*, [1902] 1 K. B. 778, 790, *Stirling, L. J.*, said: "I do not forget that in *Williams v. Leper*, 3 Burr. 1886, a promise to pay rent was given by an auctioneer who had possession of property under instructions from the real owner to sell it; but, when the reasons assigned by the learned judges for their decision are examined, it appears to me that the auctioneer was treated by them as the agent of the owner, and as having authority from him to enter into a contract to pay the rent out of the proceeds of the sale. The promise must be taken to have been that of the owner, and, therefore, the case is brought within the statement of the law to which I have just referred."

In *Cowenhoven v. Howell*, 36 N. J. L.

These cases, some of which go somewhat beyond any general rule accepted in England, have furnished the foundation for an extension in the United States of the boundaries of the statute. It was even laid down by Chancellor Kent,^{28a} in words often quoted^{28b} that where "the promise to pay the debt of another arises out of some new and original consideration of benefit or harm moving between the newly contracting parties," it is not within the statute. This statement, however, unquestionably is too wide to be acceptable to-day in so far as it includes mere "harm" [to the promisee] as an adequate basis for a new original promise; and the same may be said of the suggested rule that there must be a "new and independent" consideration for a new oral promise to withdraw it from the statute.^{28c} Such rules would altogether nullify the statute so far as new promises to pay an already existing debt are con-

323, 325, the court said: "In case of a promise to become liable for an existing debt or obligation, there must, in order to sustain such promise, and render it unobjectionable in view of the statute, be a substantial consideration moving to such promisor. In such transactions, the simple fact that a good consideration for the assumption exists, is not sufficient; but superadded to this, such consideration must be apparently beneficial to the party undertaking to pay the debt and assume the obligation. By force of the statute, an unwritten promise to pay the debt of another, is inefficacious; the new assumption, consequently, if it is to have any legal obligation, must not have such an object in view as its primary purpose, but the primary purpose must be to promote the interest of him who takes the burthen upon himself. Hence it is, that in such transactions, a mere detriment to the promisee, the original obligation remaining unextinguished, will not support a promise of this character. Such a consideration would be good at common law, independently of the effect of the statute, because before the pas-

sage of the act, any legal agreement to pay the debt of another was valid, but now such an agreement must be in writing. The consequence is, that agreements which will have the effect to discharge the debt of another, must be founded in a motive of interest, selfish in the promisor. The distinction is between a promise, the object of which is to promote the interest of another, and one in which the object is to promote the interest of the party making the promise. The former is within the operation of the statute. The latter is unaffected by it."

^{28a} *Leonard v. Vredenburg*, 8 Johns. 29, 5 Am. Dec. 317.

^{28b} See *Chamberlin v. Ingalls*, 38 Ia. 300, 301; *Peele v. Powell*, 156 N. C. 553, 557, 73 So. 234.

^{28c} In *Brinkley & Co. Mfg. Co. v. Cook*, 110 Ark. 325, 161 S. W. 1065, however, the court applied this rule, enforcing a promise to pay another's debt though the consideration (surrender of a mechanic's lien on the debtor's property) apparently enured solely to the debtor's benefit. See also the following note, *ad fin.*

cerned, for recovery would be allowed on any promise if there was sufficient consideration; and even apart from the statute there could be no recovery on a promise with consideration—that is without “new and independent” consideration. Accordingly the *dictum* is now generally discredited.

But the courts of many jurisdictions, including the Supreme Court of the United States, hold that for any consideration which is beneficial to the promisor and desired by him for a business reason, an oral promise to pay the debt of another may be enforced.^{25e}

In England, however, the courts distinctly refuse to do so to this extent, and hold that even where security is surrendered by the creditor as consideration for the new promise, although the promisor desired the consideration for a business reason, and it was beneficial to him in a business sense, a promise is within the statute if the tangible consideration moved to the original debtor and not to the promisor.^{25f}

^{25d} See, e. g., *Mine & Smelter Supply Co. v. Stockgrowers' Bank*, 173 Fed. 859, 98 C. C. A. 229; *Dillaby v. Wilcox*, 60 Conn. 71, 80, 22 Atl. 491, 13 L. R. A. 643, 25 Am. St. Rep. 299; *White v. Rintoul*, 108 N. Y. 222, 225, 15 N. E. 318; *Conti v. Johnson*, 91 Vt. 467, 100 Atl. 874; *Mankin v. Jones*, 63 W. Va. 373, 60 S. E. 248, 15 L. R. A. (N. S.) 214, and cases *infra*, n. 13. In Arkansas and North and South Carolina, however, it is still accepted and applied. *Satterfield v. Kindley*, 144 N. C. 455, 461, 57 S. E. 145; *Marrow v. White*, 151 N. C. 96, 65 S. E. 746; *Ellis v. Carroll*, 68 S. Car. 376, 47 S. E. 679, and see the preceding note.

^{25e} *Emerson v. Slater*, 22 How. 28, 16 L. Ed. 360; *Davis v. Patrick*, 141 U. S. 479, 12 S. Ct. 58, 35 L. Ed. 826; *Mine & Smelter Supply Co. v. Stockgrowers' Bank*, 173 Fed. 859, 98 C. C. A. 229; *Zimmerman v. Holt*, 102 Ark. 407, 144 S. W. 222; *Holcomb v. Mashburn*, 10 Ga. App. 781; *Holt v. Smith*, 74 Iowa, 667, 39 N. W. 81; *Carraher v. Allen*, 112 Iowa, 168, 171,

83 N. W. 902; *Pratt v. Fisher*, Iowa, 642, 648, 96 N. W. 10; *Gerald v. Flanagan*, 155 Ia. N. W. 738; *Munroe v. Murray*, Ia. 707, 146 N. W. 819 (*cf.* *White v. Duff*, 156 Ia. 144, 135 N. W. 40 L. R. A. (N. S.) 242, Ann. C. B. 254); *Simpson v. Carr*, 25 Rep. 849, 76 S. W. 346; *Cassidy v. Chandler*, 36 Mich. 320, 24 A. 593; *Abbot v. Nash*, 35 Minn. 100, 1 N. W. 65; *Kansas City Com. v. Smith*, 36 Mo. App. 608; *McHaney*, 191 Mo. App. 686, 172 Mo. 258; *Rogers v. Empkie Hardware Co.*, 24 Neb. 653, 39 N. W. 844; *Oleson*, 90 Neb. 738; *Janvrian v. Janvrian* (N. H.), 104 Atl. 252; *Ludwig v. Watson*, 3 Oreg. 256; *Bailey v. Bailey*, 174 Pa. 602, 34 Atl. 326; *Levan*, 236 Pa. 374, 378, 84 A. 241; *Kirby v. Kirby*, 248 Pa. 117, 180 A. 874; *Spencer v. Nalle* (Tex. Civ. App.), 143 S. W. 991; *Lampson v. Hobbs*, Vt. 697; *Cross v. Richardson*, 100 W. Va. 641; *Templeton v. Basoom*, 33 Vt. 100.

^{25f} In *Harburg Comb Co. v. N*

ilarly in the United States it is held in many jurisdictions that unless the new promisor receives a consideration that moves directly to himself, as distinguished from being benefited by a consideration moving to the original debtor, the promise is within the statute.²⁰⁹ Therefore, a promise to the creditor to

[1902] 1 K. B. 778, a promise to pay a debt of a corporation made by a shareholder in the corporation because of his financial interest therein in consideration of the creditor's refraining from seizing its property, was held within the statute.

In *Davys v. Buswell*, [1913] 2 K. B. 47, this case was followed though the promisor was not only a shareholder but the holder of debentures which gave him a direct interest, it was urged, in the property of the corporation, since the assets of the corporation were mortgaged to secure the debentures.

²⁰⁹ *Murto v. McKnight*, 28 Ill. App. 238 (the court saying at page 246, that to be withdrawn from the statute a promise must be founded upon a valuable consideration received by the promisor himself); *Lowe v. Turpie*, 147 Ind. 652, 683, 44 N. E. 25, 47 N. E. 150 (reported on a later appeal in 158 Ind. 47, 62 N. E. 628). (The court said: "If the conveyance by Horner [the creditor] to appellant [the new promisor] had the effect to abandon any lien or interest in the Monon lots, yet appellant having no interest in, or title to said lots, subordinate to Horner's lien or interest therein, the rule urged would not apply to this case.") *Stewart v. Jerome*, 71 Mich. 201, 38 N. W. 895, 15 Am. St. Rep. 252 (a promise by a mortgagee to pay a supply bill in consideration of forbearance by the creditor to attach property not covered by the mortgage, was held within the statute); *Draggo v. West Bay City Sugar Company*, 144 Mich. 195, 107 N. W. 911 (a promise to pay rent of land leased to another though

made to promote promisor's business interest as he had a contract right to a share of the proceeds of the land, was held insufficient where he failed to receive directly the consideration. Cf. *Monroe Lumber Co. v. Besau*, 192 Mich. 307, 158 N. W. 880; *Citizens' Nat. Bank v. Abeel* (Tex. Civ. App.), 160 S. W. 609 (the defendant's promise that the plaintiff should lose nothing if it cashed a draft for a produce company in which the defendant was financially interested, was held within the statute). In *Westmoreland v. Porter*, 75 Ala. 452, 459, Somerville, J., said, "The old rule was that a verbal promise to pay another's debt would be supported by a mere surrender of a lien on the property of the original debtor, whether made for his benefit, or that of the new promisor. Perhaps a case of this kind would come within the rule settled by our own decisions. But the great current of modern authority clearly sustains the view, that the new promisor must have an interest of some kind in the property to which the lien attached, so that its surrender will enure to his benefit. He thus becomes the purchaser of the lien, or of the interest of the promisee in the property thus encumbered at a price measured by the amount of the original debt, which he agrees to pay." In *Curtis v. Brown*, 5 Cush. 488, 491, the court said: "It is no sufficient ground, to prevent the operation of the Statute of Frauds, that the plaintiff has relinquished an advantage, or given up a lien, in consequence of the defendant's promise, if that advantage has not also directly enured to the benefit of the defendant, so as in effect to make

pay his claim in consideration of mere forbearance to sue his original debtor, is within the statute.^{26A} But forbearance by a

it a purchase by the defendant of the plaintiff. *Fish v. Hutchinson*, 2 Wils. 94; *Jackson v. Rayner*, 12 Johns. 291; *Nelson v. Boynton*, 3 Met. 396, 403, 37 Am. Dec. 148." To the same effect is *George Lawley and Son Corp. v. Buff*, 230 Mass. 21, 119 N. E. 186. In *Carleton v. Floyd*, 192 Mass. 204, 78 N. E. 126, the defendant's oral promise to pay a debt of a corporation in which he was a stockholder, and otherwise pecuniarily interested, was held within the statute. To similar effect is *Richardson Press v. Albright*, 224 N. Y. 497, 121 N. E. 362. In *Paul v. Wilbur*, 189 Mass. 48, 52, 75 N. E. 63, the court said: "That section does not apply where the promisor receives something from the promisee for his own benefit. The point is settled by a number of authorities beginning with *Alger v. Scoville*, 1 Gray, 391, and ending with *Stratton v. Hill*, 134 Mass. 27." And see—*Ribock v. Canner*, 218 Mass. 5, 105 N. E. 462. In *Corkins v. Collins*, 16 Mich. 478, 482, the court said: "When, by the release of property from a lien, the party promising to pay the debt is enabled to apply it to his own benefit, so that the release enures to his own advantage, it is quite easy to see that a promise to pay the debt in order to obtain the release may be properly regarded as made on his own behalf, and not on behalf of the original debtor, and any possible advantage to the latter is merely incidental and is not the thing bargained for. That promise is, therefore, in no proper sense a promise to answer for anything but the promisor's own responsibility, and need not be in writing. So when a person sells a claim and guarantees its payment, the guaranty is collateral to his own contract, and is not intended for the debtor's advantage. But where the entire transaction, both promise and consideration, is

intended and operates exclusively for the advantage and on behalf of the debtor whose debt is guaranteed, there seems to be no plausible ground for holding that the promise is anything but collateral." In *Goldie-Klenert Co. v. Bothwell*, 67 Wash. 264, 121 Pac. 60, the promise of the promoter, and principal stockholder of a corporation to indemnify and hold harmless "the seller of goods to the corporation" was held within the statute. To similar effect is *Hurst Hardware Co. v. Goodman*, 68 W. Va. 462, 69 S. E. 898, 32 L. R. A. (N. S.) 598, Ann. Cas. 1912 B. 218.

^{26A} *King v. Wilson*, 2 Stra. 873; *Fish v. Hutchinson*, 2 Wils. 94; *Tomlinson v. Gell*, 6 A. & E. 564; *Westmoreland v. Porter*, 75 Ala. 452; *Scott v. Thomas*, 2 Ill. 58; *Krutz v. Stewart*, 54 Ind. 178; *Jones v. Walker*, 13 B. Mon. 356; *Stewart v. Campbell*, 58 Me. 439 (overruling *Russell v. Babcock*, 14 Me. 138); *Thomas v. Delphy*, 33 Md. 373; *Dexter v. Blanchard*, 11 Allen, 365; *Musick v. Musick*, 7 Mo. 495; *Lang v. Henry*, 54 N. H. 57; *Duffy v. Wunsch*, 42 N. Y. 243, 1 Am. Rep. 514; *Roe v. Barker*, 82 N. Y. 431; *White v. Rintoul*, 108 N. Y. 222, 15 N. E. 222; *Gump v. Halberstadt*, 15 Oreg. 356, 15 Pac. 467; *Caston v. Moss*, 1 Bail. (S. Car.) 14; *Harrington v. Rich*, 6 Vt. 666; *Young v. French*, 35 Wis. 111; *Clapp v. Webb*, 52 Wis. 638, 9 N. W. 796. But held otherwise where the forbearance was desired for business reasons of the promisor in *Kirby v. Kirby*, 248 Pa. 117, 93 Atl. 874. And the mere detriment to the promisee of forbearing was thought sufficient in *Marrow v. White*, 151 N. Car. 96, 65 S. E. 746; *Ellis v. Carroll*, 68 S. Car. 376, 47 S. E. 679; *Enterprise Trading Co. v. Bank of Crowell* (Tex. Civ. App.), 167 S. W. 296.

creditor to seize his debtor's property or enforce a lien against it, has been held sufficient consideration in some jurisdictions when such forbearance enabled the promisor to obtain an advantage or benefit.³⁶ⁱ

As a matter of theory, the proposition cannot be accepted that the receipt by the promisor of a beneficial consideration should remove a promise from the statute. A typical case of a promise made for a beneficial consideration is that of a guaranty company to guarantee the debt of another in consideration of a premium (which supposedly may be paid either by the creditor or by the principal debtor). Nevertheless such a promise seems clearly within both the words of the statute and the mischief aimed at it.^{36j}

There seems no reason to believe that the promise by such a company for a premium would be withdrawn from the statute if the beneficial consideration given for the guaranty was property of the promisor previously held by the creditor as security; that is, if the creditor, in lieu of the security of property which he had theretofore held agreed to take as security the secondary liability of the owner of the property. Nor does it seem material if instead of being in terms conditional

³⁶ⁱ *Williamson v. Hill*, 3 Mackey, 100; *Fears v. Story*, 131 Mass. 47; *Stephen v. Yeomans*, 112 Mich. 624, 71 N. W. 159; *Carothers v. Connolly*, 1 Mont. 433; *Prime v. Koehler*, 77 N. Y. 91; *Alley v. Turck*, 8 N. Y. App. Div. 50, 40 N. Y. S. 433; *Arnold v. Stedman*, 45 Pa. St. 186; *Muller v. Riviere*, 59 Tex. 640, 46 Am. Rep. 291; *Kelley v. Schupp*, 60 Wis. 76, 18 N. W. 725.

^{36j} In *Ames v. Foster*, 106 Mass. 400, 8 Am. Rep. 343, the court said: "It is equally true that it is no sufficient ground for taking the case out of the statute, that the defendant has received some benefit from the consideration of his promise. If this were so, then every promise to guarantee the debt of another, made upon a pecuniary consideration paid by the promisee to the promisor, would be taken out of the statute."

In *Lang v. Henry*, 54 N. H. 57, 61, the court said: "Suppose A owes B \$100; B pays C \$10, in consideration of which C verbally promises to guarantee the payment of the debt. There are numerous decisions, some of which were pronounced by judges of high authority, going far enough to sustain an action upon this promise; yet it is very plain that this is squarely prohibited by the statute."

In *Brown v. Weber*, 38 N. Y. 187, 191, the court said: "Suppose A delivers property to B, in consideration of his promise to become surety to him for the payment of a debt owing to him by C; the case is within the statute, because B's obligation, although upon a consideration received by him, is that of a surety only that C shall perform." See also *Ames, Cas. Suretyship*, p. 86.

on the prior default of the principal debtor the promise was in form an absolute undertaking by the surety. If such promises are within the statute, it would seem that any similar promise must be within the statute where the relation of the parties is such that the promisor is merely a surety.^{20k}

§ 473. Importance of distinguishing whether the consideration for a new promise is received as the equivalent of a debt.

Attempts which have been made to differentiate new promises according to the character of the consideration given by the promisee have either been so broadly inclusive as to cover in effect all kinds of consideration which would be valid at common law; or have distinguished between beneficial consideration received by the new promisor, and other legal considerations; or have still further restricted the kind of consideration essential for the validity of an oral promise, to the release of property held by the creditor as security and released by him to the promisor.^{20l} But the distinction most vital in principle has not generally been observed. That distinction is between a consideration which is given and received as the equivalent of the debt, payment of which is promised; and, on the other hand, a consideration which is given merely as the equivalent for the risk which the promisor may run in being compelled to pay, either in the first place or ultimately, a debt due from another, and which that other, if

^{20k} In *McCord v. Edward Hines Lumber Co.*, 124 Wis. 509, 102 N. W. 334, the court said: "The promise is void unless in writing. There are many dicta and some decisions indicating that this result may be escaped if there is a new consideration for the guaranty, or if such consideration consist of benefit to the guarantor. The statute, however, recognises no such exception. There must, on general principles, be new consideration for the promise of indemnity in any event to render it valid, written or unwritten; hence to say that the existence of such consideration alone takes the promise out of the

statute is to deny the statute any force whatever. 1 Brandt, *Suretyship* (2d ed.), § 60. Again, there are statements in the cases to support evasion of the statute if the leading object of the promisor is to benefit himself, or if the creditor principally relies on the guarantor. All such statements are misleading. None of such considerations will of themselves prevent the application of the statute if the promise is really to answer for the debt of another." These words were quoted with approval in *Drovers' Deposit Nat. Bank v. Tichenor*, 200 Fed. 318, 320.

^{20l} See *supra*, § 472.

solvent, can be compelled to pay either to the creditor or to the new promisor, if the latter is first charged. This distinction may be illustrated by several kinds of bargains:

1. The new promisor may propose to purchase property or rights and in return for them pay the debt as the price. Such a bargain presupposes that the consideration received is the equivalent, or so regarded, of the debt. It is obvious that the creditor will never furnish consideration to this amount for a new promise. He already has the original promise, and if he is to furnish consideration equal in value to the amount of the debt, he will prefer to get not simply a new promise but the promise of a new debt, equal in amount to the old indebtedness. The debtor, however, or one acting in his interest, may be entirely willing to give the promisor consideration equal in value to the debt in return for the promisor's agreement to discharge it; and where such a bargain is made, the latter's promise to pay the debt may be, and as matter of fact is, sometimes made to the debtor, sometimes to the creditor, and sometimes to both. Promises of this type are not within the statute.^{26m}

^{26m} This line of thought was followed in the opinion in *Fullam v. Adams*, 37 Vt. 391, 401.

"It is not true that in every case where the promise is founded upon a new consideration moving wholly between the parties to the guaranty, the promise is taken out of the statute. It depends upon the transaction itself, the general object and purpose, or, as Lord Mansfield expressed it, on the *res gestas*. If the leading purpose and object be to guaranty, or become responsible for the payment of a third person's debt, then the promise is within the statute although it may be founded upon a consideration directly between the parties. It is almost impossible to imagine a case where a promise to pay the debt of another, for which he remains liable, upon a consideration moving wholly from the creditor and in which the debtor has no concern; where the leading object

and purpose can be any other than to make the promisor the surety or guarantor of the debt. In such case no duty or obligation is imposed on the promisor as between him and the debtor; his obligation is wholly to the creditor, and rests entirely upon his promise or contract with him. It is scarcely reasonable to suppose one would part with a consideration belonging wholly to himself, where the value was equal to the amount of a debt due him from another, even to obtain the promise of a third person to pay it. If the consideration for the promise is much less in value than the amount of the debt, it would afford a strong presumption that reliance was placed to some extent upon the chances that the debtor would pay it himself, and therefore the promisor not be called upon at all upon his undertaking. But the strong reason given why it is not a guaranty and a collateral prom-

2. It is equally possible, however, for a new promisor is seeking only his own business advantage, to promise the creditor the debt due him from another, for a small consideration advantageous to the promisor, if in thereto it is either agreed in fact or necessarily in matter of law that the new promisor on paying the debt become owner of a claim for that amount against the debtor. It is cases of this latter kind which give rise to the greatest difficulty.

(3) Finally, the new promisor may ask and receive consideration for his promise something which is of no advantage to himself, but which he desires in order to do some other.

Promises of which the consideration falls under the first heading are unquestionably outside the statute. Promises which fall within the third heading are equally clearly outside the statute. On principle it would seem that promises which fall in the second class are also promises to answer for the debt of another. It may be questioned whether the statute has been construed too narrowly in giving effect to any other promise of this type. Undoubtedly, however, most jurists do concede effect to some such promises: the requirement in some jurisdictions being that some beneficial consideration shall have moved directly to the promisor as distinct from

the promisee, that it should be treated as a purchase of the consideration, and when payment is made it is really paying for property purchased, or whatever else the consideration may be. But if so, then when he has made the payment he has only paid for what he received of the creditor, and the debt is just as much due as before, and may be collected by the creditor of the debtor, and neither would payment of the original debt by the debtor afford any protection to the party making the new promise from paying for what he has purchased of the creditor. But if the parties in entering into the new contract really contemplate a sale of property from one to the other, or the performance of services by one for the

other for a stipulated price to be paid, it is scarcely comprehensible why the contract should assume the form of a promise to pay the debt of another, especially where the amount of the debt is unknown and unlikely to be paid. As stated earlier in this opinion, if the promise was the real transaction it would have nothing to do with the statute. If the cause really it would have nothing to do with the debt of another. In such case the purpose and effect is clear to enter into a contract for a guaranty or answer for the debt of another, and what is paid or done as a condition is for that purpose simply, and may be called a purchase and sale is a perversion of those terms."

from the debtor; in other jurisdictions that the consideration, whatever its character, shall have been sought for the business advantage of the promisor.²⁶⁶

It is probable also that most jurisdictions would hold that any promise, where the consideration is of this sort, falls within the statute if it is in terms conditional on a prior default by the original debtor.

§ 474. Modern English test.

The test suggested in recent English cases²⁶⁷ making the application of the statute depend "not on the consideration for the promise, but on the fact of the original party remaining liable, coupled with the absence of any liability on the part of the defendant or his property, except such as arises from his express promise" is very unsatisfactory. In the first place it is contradictory in terms, in first denying that consideration is the important matter and then asserting that certain matters are vital which themselves depend on the character of the consideration. Thus, by the second part of the rule, if the original party does not remain liable the new promise is original, but this depends on whether the consideration for the new promise, or part of the consideration, was the release of the old obligation. That kind of consideration, then, does exclude the promise from the statute. Further the test, as stated seems to imply that the surrender by the creditor of property of the promisor which was liable for the debt would exclude from the statute a promise given in return for the surrender. This again is a question of the consideration for the promise. Finally, apart from its inartistic wording, the test is unsatisfactory as an explanation of the cases, or, as a reduction of the matter to an intelligible and reasonable principle. It is true that if the promisor is liable for some other reason than his express promise, the statute is inapplicable.²⁶⁸ It is also true that if a novation is made by means of the new promise, the statute is inapplicable.

²⁶⁶ See the cases collected in the preceding section.

²⁶⁷ *Green v. Cresswell*, 10 A. & E. 453; *Fitzgerald v. Dressler*, 7 C. B. (N. S.) 374; *Davys v. Buswell*, [1913]

2 K. B. 47. So in Canada—*Lee v. Mitchell*, 23 U. Can. 314; *Merner v. Klein*, 17 U. Can. C. P. 287; *Bond v. Treahey*, 37 U. Can. Q. B. 360, 365.

²⁶⁸ See *supra*, § 459.

But the English cases which hold that the surrender of property by the creditor to the promisor takes the case out of the statute are not confined to cases where the property surrendered was that of the promisor;²⁶² and it is difficult to see any reason why the surrender of the promisor's own property should be any more effectual to avoid the statute than the surrender to the promisor, for his own benefit, of an equal amount of another person's property. There is certainly nothing in the American cases warranting such a distinction.

§ 475. The true test of the validity of a new oral promise should be: Is the new promisor a surety?

Where two persons are originally bound for the payment of an obligation, it is immaterial for the purposes of the statute what the relation of the two to one another may be. The only important question is the relation which each assumes to the creditor.²⁶⁷ They may assume a joint original liability, though one is merely a surety for accommodation so far as his co-debtor is concerned. It is even possible that one who assumes a primary liability to the creditor may in fact be a surety in his relation with his co-debtor; and the latter, though between the co-debtors a principal, may by his contract with the creditor merely guarantee payment if his co-debtor (who makes to the creditor an original promise), fails to pay.²⁶⁸ Where,

²⁶² See *supra*, § 472.

²⁶⁷ In *Hetfield v. Dow*, 3 Dutch. 44, 454, Whelpley, J., said that "to settle the rights of the promisors *inter sese*—to ascertain, as between them, who is to pay the debt ultimately—is no part of the object of the act. It by no means follows that he who, by the arrangement between the promisors, ultimately may be bound to pay the debt is, as to the promisee, the principal debtor; that does not concern him." And another distinguished judge, quoting the foregoing passage with approval, added: "Where a party has been willing to put himself in the position of an original promisor (either jointly or severally) to a vendor for goods purchased for the benefit of, or

delivered to another, the vendor has a right conclusively to presume that such relations or arrangements exist between the two as to make it the duty of the party or parties promising, as between themselves, to pay according to the promise. And to allow the contrary to be shown to defeat the promise, would operate as a fraud upon the vendor." *Christiancy, J.*, in—*Gibbs v. Blanchard*, 15 Mich. 292.

²⁶⁸ This last reversal of the parties' real relations to one another is not common except in the making of accommodation negotiable paper. It is there not uncommon for the accommodating party to assume a primary liability, while the accommodated party assumes a secondary liability.

however, an original debt already exists, there is not the same possibility for reversing the natural position of the parties. There may indeed be an agreement between the debtor and the new promisor by which the new promisor as between either becomes the principal, and the original debtor merely a surety; but such a change of relation will not bring within the statute the obligation of the original debtor. A promise not within the statute when made cannot be brought within it subsequently. Unless, therefore, a complete novation with the creditor takes place,²⁶ the only promise which can be within the statute is that of the new promisor. If, as between himself and the original promisor the debt really ought to be paid by the latter, whatever may be the other elements of the transaction, the new promisor is on principle and in fact promising to answer for the debt or default of another. The fact that he is led to do this by considerations of his own advantage, do not make the ultimate fact that the debt is another's any the less true. On the other hand if, as between the original debtor and the new promisor, the latter ought to pay the debt, he is promising to answer for his own debt, not that of another. This would not be universally admitted in the United States. Jurisdictions which hold that a beneficial consideration received by a new promisor make his promise original are logically driven to the position that one who is a mere surety may yet be an original promisor.²⁷

²⁶ Conceivably a novation might be made by which the new promisor undertook the primary obligation, and the original debtor merely guaranteed it, but this would require the assent of the creditor as well as that of the other parties.

²⁷ In *Maxey v. Rideout*, 173 Fed. 172, 176, the court said of "a later parol engagement by the defendant to furnish the plaintiff with the necessary means to perfect his title" that "such obligation, although by parol, may be original in its nature, although the railway company was primarily liable." In *Home Nat. Bank v. Estate of Waterman*, 134 Ill. 461, 466, 29 N. E. 503,

the court said: "Assuming the transaction of August 10, 1882, to have been a direct and original promise by Waterman and his associates to pay the debt, yet it does not follow that the makers of that promise were not securities for the harvester company, and were not released by the subsequent extensions of time given to that company. It is manifest that, notwithstanding that promise, the debt, as between the company and the signers of the writing, continued to be the debt of the company, and that had such signers paid the debt to the bank, they would have had recourse for the amount so paid, upon the company." But if it is mani-

At first sight it may seem surprising that whether a new promise to the creditor is within the statute of frauds should depend not on the nature of the bargain with the creditor, but on the relation of the promisor to one who is not a party to the contract; but if the purpose of the statute is borne in mind, and if the statute is compared, for instance, with statutes protecting married woman from contracts of suretyship for their husbands, there will be less reason for surprise. That the relation of the new promisor to the debtor is vital is most clearly shown by the cases where the promisor assumes for sufficient consideration the obligation of the debtor.²⁸ Where by the bargain between the promisor and the original debtor the promisor is bound to pay, the debt is his own and not within the statute. Contrariwise if as between them the original debtor still ought to pay, the debt cannot be the promisor's own and he is undertaking to answer for the debt of another.

Thus if a partner orally promises to pay a debt of his firm he is a principal, since his promise is to pay his own debt and, therefore, not within the statute. But if the firm was not liable for the debt, but another person, as for instance an individual partner, was liable, the promise is within the statute; and this seems to be true whether the promisor or promisee was aware who was liable as the original debtor,²⁹ for certainly a surety may receive a beneficial consideration for his promise.³⁰ It is true that the creditor cannot be prejudiced by ignorance of the relation between the original debtor and the new promisor, but there is no reason why he should not be benefited; a promise cannot be held within the statute when the creditor was justified in supposing it an original promise, but a promise which the creditor might naturally have supposed within the statute may be proved to be primary by facts of which he was

fest that the debt continued to be the debt of the company, it should be equally manifest that the new promise was to answer for the debt of another. That the existence of a relation of principal and surety between the two debtors is the true test seems recognized, however, in *Rev. L. Okla.* (1910), § 1030.

²⁸ See *infra*, § 478.

²⁹ *Taylor v. Hillyer*, 3 Blackf. (Ind.), 33, 26 Am. Dec. 430, and note; *Wagon v. Clay*, 1 A. K. Marsh. (Ky.) 257; *Smith v. Sheridan*, 175 Mich. 391, 141 N. W. 684, 688; *Greenleaf v. Burbank*, 13 N. H. 454; *Davis v. Evans*, 39 Vt. 182.

³⁰ See *supra*, § 472.

ignorant. Thus, when goods are bought by one who promises to pay for them if X, to whom the goods are sent, does not, though in form there is a guaranty clearly within the statute; yet if X, who was supposed by the creditor to be an executor and liable for the goods as such, has never been appointed executor, this fact, though unknown to the creditor, will make the promise original.³¹ So in the case of a new promise, if the whole consideration was furnished by the creditor and was not the equivalent of the debt, and, as previously shown,³² it rarely will be, the creditor must know he is receiving a promise from one who stands in the position of a surety. On the other hand, if full consideration equivalent to the amount of the debt has been received from the debtor, it is immaterial whether the creditor knows it or not. If he knows the facts, he knows the new promisor is really the principal debtor; but if ignorant of the facts the new promisor is none the less the one primarily liable, and there is no reason why his oral promise should not bind him. Though the principles thus stated are too narrow to explain those cases in which it is held that the transfer of a beneficial consideration, or the surrender of security by the creditor makes a promise to pay the debt of another, original, it is believed that they are nevertheless the fundamental principles at the bottom of the subject, which have since the statute was enacted more or less clearly guided judicial decisions.

§ 476. From whom the consideration must move.

It has been held in Massachusetts, and a few other States, that an oral promise to a creditor is within the statute, though the promisor may have assumed the obligation to pay in consideration of a transfer to him by the debtor of property which is received by the promisor as the exchange or equivalent of the debt. It is said that to withdraw the promise from the statute the creditor must furnish the consideration.³³ These decisions,

³¹ See *supra*, § 454.

³² *Supra*, § 473.

³³ *Furbish v. Goodnow*, 98 Mass. 296. To the same effect are, *Clapp v. Lawton*, 31 Conn. 95; *Lowe v. Turpie*, 147

Ind. 652, 684, 44 N. E. 25, 47 N. E. 150, 37 L. R. A. 233 (reported on later appeal in 158 Ind. 47, 62 N. E. 628) *Curtis v. Brown*, 5 Cush. 488; *Brightman v. Hicks*, 108 Mass. 246; *Brown v.*

however, seem opposed to both principle and authority. As matter of principle, if the purpose of the statute is what has been suggested,³⁴ the defendant having received the full and beneficial equivalent for what he undertakes to pay, should be held. In a true sense it is his debt, not simply his special promise to pay another's debt. Indeed, it may be said that it would be far more proper to require that the consideration for the new promise must move from the debtor than to require that it must move from the creditor. As has been seen,³⁵ consideration received from the creditor will almost never be received as the equivalent of the amount of the debt. It will be received as the reward for taking the risk of being called on to pay as surety, or the risk of being able to collect from the principal debtor after having made payment. On the other hand, though it is possible for consideration received from the debtor to be given in payment for risk of that sort, yet the consideration is far more likely to be given as the equivalent of the amount of the debt which is thereupon assumed by the new promisor as a principal debtor. If compelled to pay, he will have received a *quid pro quo* for his payment without being forced to seek a remedy over against the original debtor.

On authority, the numerous cases which hold that one who assumes payment of a debt on the transfer by the debtor to him of property mortgaged or liable for the debt, is bound without a writing,³⁶ are opposed to the cases which are here criticised.

§ 477. A new promise which discharges the original obligation is not within the statute.

Where a third person promises a creditor to discharge a debt due from another to the latter, the arrangement may conceivably take one of three forms:

1. The new promisor may undertake a several obligation

Hasen, 11 Mich. 219; Halsted v. Francis, 31 Mich. 113; Shoemaker v. King, 40 Pa. 107, s. c. 1 Pearson, 206; Maule v. Bucknell, 50 Pa. 39. But see Townsend v. Long, 77 Pa. 143, 18 Am. Rep. 438; Taylor v. Preston, 79 Pa. 436;

Fehlinger v. Wood, 134 Pa. 517, 19 Atl. 746.

³⁴ See *supra*, § 452.

³⁵ See *supra*, § 473.

³⁶ See *infra*, § 478.

either absolute, to pay the debt in any event, or conditional, to pay it if the original debtor makes default.

2. The new promisor may, with the concurrence of the original debtor and on his behalf, make his promise in substitution for the obligation of the original debtor. This arrangement when accepted by the creditor will effect a novation.

3. The new promise may be made as in 2, except that the original debtor does not assent thereto. As a debtor's obligation can be discharged at law only by himself or by his authorized agent³⁷ such an agreement does not create a legal novation; but since a creditor who had agreed to the substitution would not be allowed by equity to enforce his claim against the original debtor,³⁸ the transaction may be called an equitable novation. If the agreement is of the second kind, and the debt of the party primarily liable is thereby discharged, the new promisor who thus assumes the obligation in consideration of the discharge of the original debtor, is binding though oral.³⁹ The

³⁷ See *infra*, § 1857.

³⁸ See *infra*, § 1860.

³⁹ *Goodman v. Chase*, 1 B. & Ald. 297; *Butcher v. Steuart*, 11 M. & W. 857; *Gull v. Lindsay*, 4 Exch. 45, 52; *Carlisle v. Campbell*, 76 Ala. 247; *Aultman v. Fletcher*, 110 Ala. 452, 458, 18 So. 215; *Beitman v. Birmingham Paint & Glass Co.*, 185 Ala. 313, 64 So. 600; *McLaren v. Hutchinson*, 22 Cal. 187; *Welch v. Kenny*, 49 Cal. 49; *Baxter v. Chico Const. Co.*, 31 Calif. App. 492, 160 Pac. 1084; *Dillaby v. Wilcox*, 60 Conn. 71, 22 Atl. 591, 13 L. R. A. 643, 25 Am. St. Rep. 299; *Buchanan v. Moran*, 62 Conn. 83, 25 Atl. 396; *Karr v. Porter*, 4 Houst. 297; *Sapp v. Faircloth*, 70 Ga. 690; *Harris v. Jones*, 140 Ga. 768, 79 S. E. 841; *Johnson v. Cothorn*, 12 Ga. App. 258, 77 S. E. 207; *Williams v. Garrison (Ga. App.)*, 93 S. E. 510; *Casey v. Miller*, 3 Idaho, 567, 32 Pac. 195; *Runde v. Runde*, 59 Ill. 98; *Lindley v. Simpson*, 45 Ill. App. 648; *Hopkins v. Carr*, 31 Ind. 260; *Bowen v. Kurts*, 37 Iowa, 239; *Lester v. Bowman*, 39 Iowa, 611; *Harris Emery Co. v. How-*

erton, 154 Ia. 472, 134 N. W. 1068; *Frohardt v. Duff*, 156 Ia. 144, 135 N. W. 609, 40 L. R. A. (N. S.) 242; *Brant v. Johnson*, 46 Kans. 389, 26 Pac. 735; *Daniels v. Gibson*, 20 Ky. L. Rep. 847, 47 S. W. 621; *Day v. Cloe*, 4 Bush, 563; *Whittemore v. Wentworth*, 76 Me. 20; *Webster v. LeCompte*, 74 Md. 249, 22 Atl. 232; *Walker v. Penniman*, 8 Gray, 233; *Wood v. Corcoran*, 1 Allen, 405; *Langdon v. Hughes*, 107 Mass. 272; *Eden v. Chaffee*, 160 Mass. 225, 35 N. E. 675; *Griffin v. Cunningham*, 183 Mass. 505, 67 N. E. 660; *McNulty v. Cruff*, 211 Mass. 489; *Mulcrone v. American Co.*, 55 Mich. 622, 22 N. W. 67; *Wilhelm v. Voss*, 118 Mich. 106, 76 N. W. 308; *Yale v. Edgerton*, 14 Minn. 194; *Wright v. McCully*, 67 Mo. 134; *Wilson v. Vass*, 54 Mo. App. 221; *Beall v. Board*, 164 Mo. App. 186; *First Nat. Bank v. Dohm*, 52 N. J. L. 363, 19 Atl. 258; *Meriden Britannia Co. v. Zingsen*, 48 N. Y. 247, 8 Am. Rep. 549; *Booth v. Eighmie*, 60 N. Y. 238, 19 Am. Dec. 171; *First Nat. Bank v. Chalmers*, 144 N. Y. 432, 39 N. E. 331; *Stanly v. Hendricks*, 13 Ired. 86;

discharge of the old debt at the request of the new promisor is as adequate a *quid pro quo* for the creation of a new original debt as the payment by the creditor of an amount of money equal to the old debt would be. And the novation may relate to part only of the debt, and need not become effective at the time of the defendant's new promise.⁴⁰ So the new promisor need not extinguish his whole liability to the debtor but may assume the latter's entire debt in partial discharge of his own obligation.⁴¹ There seems no reason to doubt that the new promise in what has been called an equitable novation would be equally without the statute.

§ 478. Promise to debtor to assume and pay the latter's debt though enforceable by creditor is not within the statute.

As has been seen the application of the statute has been confined to promises made to the creditor;⁴² but under a rule generally prevailing in this country⁴³ the contract of a third person with a debtor to pay his debt may be enforced by the creditor and the creditor is often held to acquire a new and

Peele v. Powell, 156 N. C. 553, 557, 73 So. 234; *Estabrook v. Gebhart*, 33 Oh. St. 415; *Miller v. Lynch*, 17 Oreg. 61, 19 Pac. 845; *Allshouse v. Ramsay*, 6 Whart. 331, 37 Am. Dec. 417; *Whitaker v. Greene* (R. I.), 103 Atl. 779; *Corbett v. Cochran*, 3 Hill (S. C.), 41, 1 Riley L. 44, 30 Am. Dec. 348; *Warren v. Smith*, 24 Tex. 484, 76 Am. Dec. 115; *McCreary v. Van Hook*, 35 Tex. 631; *Watson v. Jacobs*, 29 Vt. 169; *Williams v. Little*, 35 Vt. 323; *Bates v. Sabin*, 64 Vt. 511, 24 Atl. 1013; *Noyes v. Humphreys*, 11 Grat. 636; *McKay v. Northern Bank & Trust Co.*, 69 Wash. 186, 124 Pac. 372; *Willard v. Bosshard*, 68 Wis. 454, 32 N. W. 538; *Rietzloff v. Glover*, 91 Wis. 65, 64 N. W. 298; *Jones v. Burgess*, 39 N. Brunswick, 603, 634.

⁴⁰ In *Aultman v. Fletcher*, 110 Ala. 452, 18 So. 215, the defendant promised that if the plaintiff would sell a saw mill to Williams, the defendant in

satisfaction *pro tanto* of the price would pay to the plaintiff whatever should be thereafter due to Williams from the defendant. The court said (p. 458); "It is true that no action could have been maintained upon the promise of the defendant, until Williams carried out his agreement to do the sawing, yet when that was done the defendant's promise became capable of legal enforcement. . . . The reduction of the debt Williams owed the . . . plaintiff would not depend upon the actual payment by the defendant to the plaintiff of the amount, but upon the performance by Williams of his part of the agreement, and as soon as he did the sawing for Fletcher his debt became *pro tanto* extinguished."

⁴¹ *Griffin v. Cunningham*, 183 Mass. 505, 67 N. E. 660.

⁴² *Supra*, § 460.

⁴³ See *supra*, § 381.

direct right against the new promisor. Where this is the law the promise to the debtor must be regarded as in effect a promise to the creditor, and the application of the statute must be considered as if a new promise had been made directly to the creditor. So looking at the matter a promise to assume and pay an existing debt is not within the statute if it operates like a novation to extinguish the liability of the original debtor. In a few jurisdictions such is held to be the effect of the promise, and in these jurisdictions, the same reasoning is followed as in any case of novation.⁴⁴

In most American jurisdictions, however, the creditor is held to retain his right against his original debtor as well as to acquire a direct right against the new promisor.^{44a} Even in such jurisdictions the new promise is outside the scope of the statute, if by virtue of the promisor's contract with the original debtor, he has become as between the two the principal debtor. He has, then, received consideration equivalent to the amount of the debt, and the debt is primarily his. The principle is applied in a variety of cases. Thus where the grantee of mortgaged property assumes the mortgage, his obligation to the creditor is not within the statute.⁴⁵ So where an interest as a partner, is bought or sold, and as part of the consideration the buyer agrees to pay firm debts, the right thereby acquired in most States by creditors is not dependent on the agreement being in writing.⁴⁶ And in any case where the purchaser of

⁴⁴ This reasoning is followed in *Aldrich v. Carpenter*, 160 Mass. 166, 170, 35 N. E. 456 (applying Rhode Island law); *Lang v. Henry*, 54 N. H. 57; *Wood v. Moriarty*, 15 R. I. 518, 9 Atl. 427, 16 R. I. 201, 14 Atl. 855.

^{44a} See *supra*, § 393.

⁴⁵ *Mulvany v. Gross*, 1 Col. App. 112, 27 Pac. 878; *Tuttle v. Armstead*, 53 Conn. 175, 22 Atl. 677; *Lowe v. Hamilton*, 132 Ind. 406, 31 N. E. 1117; *Lamb v. Tucker*, 42 Ia. 118; *Fisher v. Spillman*, 85 Kans. 552, 118 Pac. 65; *Flint v. Winter Harbor Land Co.*, 89 Me. 420, 36 Atl. 634; *Dobyns v. Rice*, 22 Mo. App. 448; *Provenchee v. Piper*, 68 N. H. 31, 36 Atl. 552; *Huyler v.*

Atwood, 26 N. J. Eq. 504, *affd.* in 28 N. J. Eq. 275; *Urquhart v. Brayton*, 12 R. I. 169; *Beitel v. Dobbin* (Tex. Civ. App.), 44 S. W. 299; *Thompson v. Cheeseman*, 15 Utah, 43, 48 Pac. 477; *Bicknell v. Henry*, 69 Wash. 408, 125 Pac. 156; *Morgan v. South Milwaukee, etc., Co.*, 97 Wis. 275, 72 N. W. 872. So where the buyer of chattel property under a conditional sale, assigned the property to one who assumed payment of the remainder of the price. *Pembroke's Appeal*, 117 Me. 396, 104 Atl. 630.

⁴⁶ *Vanness v. Dubois*, 64 Ind. 338; *Dickson v. Conde*, 148 Ind. 279, 46 N. E. 998; *Poole v. Hintrager*, 60 Iowa,

property agrees as part of the price to pay the seller's debt to a third person, or perform a contract with a third person, the same principle is applicable.⁴⁷ Indeed in any case where the promisor for valid consideration assumes the payment of a debt, the same principle applies,—for the promisor becomes the principal debtor;⁴⁸ but this is not true where the new promisor owed nothing to the original debtor and received nothing from him or from the creditor.⁴⁹

§ 479. A promise to pay the promisor's own debt to his creditor's creditor is not within the statute.

Nor is the principle different where a promisor previously indebted undertakes for sufficient consideration to pay the debt, or part of it, to a creditor of his own creditor. Here, too, the promisor is undertaking merely to pay his own debt, he

180, 14 N. W. 223; *Pratt v. Fishwild*, 121 Ia. 642, 96 N. W. 1089; *Bartlett v. Smith*, 5 Neb. Unoff. 337, 98 N. W. 687; *Smart v. Smart*, 97 N. Y. 559; *Lyon v. Clochessy*, 43 N. Y. Misc. 67, 86 N. Y. S. 245; *Townsend v. Long*, 77 Pa. St. 143, 18 Am. Rep. 438; *Braze v. Woods*, 35 Tex. 302; *Brown v. Brown* (Tex. Civ. App.), 155 S. W. 551; *Gay v. Pemberton* (Tex. Civ. App.), 44 S. W. 400. See also *Stover v. Stevens*, 21 Cal. App. 261, 131 Pac. 332; *Bracken v. Dillon*, 64 Ga. 243.

^a *Weinhard v. R. R. Thompson Est.*, 242 Fed. 315, *affd. sub nom. R. R. Thompson Est. v. Weinhard*, 247 Fed. 951, 160 C. C. A. 376; *La Duke v. Barbee*, (Ala. 1916), 73 So. 472; *Ford v. Finney*, 35 Ga. 258; *Cowart v. Singletary*, 140 Ga. 435, 79 S. E. 196, 47 L. R. A. (N. S.) 621 *Lowe v. Turpie*, 147 Ind. 652, 44 N. E. 25 (reported on later appeal in 158 Ind. 47, 62 N. E. 628); 37 L. R. A. 233; *Johnson v. Knapp*, 36 Ia. 616; *Blair Town Lot Co. v. Walker*, 39 Ia. 406; *Morrison v. Hogue*, 49 Iowa, 574; *Plano Mfg. Co. v. Burrows*, 40 Kans. 361, 19 Pac. 809; *Mudd v. Carico*, 104 Ky. 719, 47 S. W. 1080, 20 Ky. L. Rep. 898; *Stariha v. Greenwood*, 28 Minn. 521, 11 N. W.

76; *Lee v. Newman*, 55 Miss. 365; *Clopper v. Poland*, 12 Neb. 69, 10 N. W. 538; *Berry v. Doremus*, 30 N. J. L. 399; *Satterfield v. Kindley*, 144 N. C. 455, 57 S. E. 145; *Swihart v. Shaum*, 24 Ohio St. 432; *Feldman v. McGuire*, 34 Oreg. 309, 55 Pac. 872; *Miller v. Beck*, 72 Oreg. 140, 142 Pac. 603; *Taylor v. Preston*, 79 Pa. 436; *Elkin v. Timlin*, 151 Pa. 491, 25 Atl. 139; *Morris v. Gaines*, 82 Tex. 255, 17 S. W. 538; *Traders' Nat. Bank v. Clare*, 76 Tex. 47, 13 S. W. 183; *Hoile v. Bailey*, 58 Wis. 434, 17 N. W. 322. But see *Cox v. Baltimore, etc., R. Co.*, 180 Ind. 495, 103 N. E. 337, 50 L. R. A. (N. S.) 453.

^a *Bartlett v. Fireman's Fund Ins. Co.*, 77 Ia. 155, 41 N. W. 601 (a contract of reinsurance); *French v. French*, 84 Ia. 655, 51 N. W. 145, 15 L. R. A. 300; *Van Cappellan v. Chicago &c. R. Co.*, 126 Minn. 251, 148 N. W. 104; *Moore v. Kirkland*, 112 Miss. 55, 72 So. 855; *Repair v. Krebs Lumber Co.*, 73 W. Va. 139, 80 S. E. 140. *Egan v. Fireman's Ins. Co.*, 27 La. Ann. 368, is a solitary decision to the contrary.

^a *Manley v. Geagan*, 105 Mass. 104. See also *Walton v. Mandeville*, 56 Ia. 597, 9 N. W. 913, 41 Am. Rep. 123.

is not making himself surety for the debt of another, and it is immaterial that there is no novation.⁵⁰ So far as the new promisor's obligation to his promisee is concerned the situation is the same as if there were a complete novation.

§ 480. A promise to pay for the purchase of a claim is not within the statute.

Though a creditor's motive in selling his claim may be substantially the same that he has in endeavoring to get payment of it, the transaction is, nevertheless, an entirely different one. The purchaser does not promise to pay the debt; he promises to pay a price for it; and it is contemplated that the claim shall continue in existence. It is an accident if the amount which the purchaser promises to pay is identical with the amount of the debt. Accordingly a promise to buy a claim is not within the statute.⁵¹

§ 481. Application of principles to building contracts.

Cases have frequently arisen where a subcontractor or material man refuses to continue the performance of his contract because of the actual or prospective failure of the general contractor to make agreed payments; and to induce further performance by the subcontractor or material man the owner of the building promises to pay him for so doing. Where such a promise by the owner is absolute in terms and not conditional on default by the general contractor, the promise has almost universally been held original and not within the statute.⁵² On principle, however, distinctions should be observed.

⁵⁰ *Mine & Smelter Supply Co. v. Stockgrowers' Bank*, 173 Fed. 859, 98 C. C. A. 229; *Casey v. Miller*, 3 Ida. 567, 32 Pac. 195; *Beitman v. Birmingham Paint & Glass Co.*, 185 Ala. 313, 64 So. 600; *Indiana Mfg. Co. v. Porter*, 75 Ind. 428; *Colvin v. Newell*, 8 Ky. L. Rep. 959; *Clay Lumber Co. v. Hart's Branch Coal Co.*, 174 Mich. 613, 140 N. W. 912; *Holt v. Dollarhide*, 61 Mo. 433; *Woods v. Davis*, 1 Tex. App. Civ. Cas., § 952; *Repair v. Krebs Lumber Co.*, 73 W. Va. 139, 80 S. E. 140. See also *supra*, § 459.

⁵¹ *Anstey v. Marden*, 1 B. & P. N. R. 124; *Humphreys v. St. Louis, etc., R. Co.*, 37 Fed. 307; *Norman v. Bullock County Bank*, 187 Ala. 33, 65 So. 371; *Gist v. Harkrider* (Ark.), 15 S. W. 187; *Conger v. Cotton*, 37 Ark. 286; *Hayward v. Gunn*, 82 Ill. 385; *Collins v. Stanfield*, 139 Ind. 184, 38 N. E. 1091; *Hearing v. Dittman*, 8 Phila. 307; *Stillman v. Dresser*, 22 R. I. 389, 48 Atl. 1; *Lampson v. Hobart*, 28 Vt. 697; *Hoeflinger v. Stafford*, 38 Wis. 391.

⁵² *Sext v. Geisse*, 80 Ga. 698, 6 S. E.

In many of these cases the general contractor had at his contract, and the subcontractor or material man continuing performance no longer was performing by his contract with the general contractor, that contract justifiably abandoned. The new promise of the owner to build, in such a case, is not, so far as future work is concerned, to pay the debt of the general contractor. The latter has no debt for this performance; for it was not rendered in performance of the contract with him, and the promise of the owner is not to pay the debt of the general contractor, the amount of his own debt may be fixed by the obligation to build. The general contractor would have incurred had his contract not been abandoned.⁵³

Cases where recovery on an oral promise of the owner has been enforced are, however, not confined to those of the kind just indicated.

In many jurisdictions it seems to be held that even the contractor still remains liable for the performance subcontractor or material man, the latter may enforce a

174; *Clifford v. Luhring*, 69 Ill. 401; *Schoenfeld v. Brown*, 78 Ill. 487; *Gibson County v. Cincinnati Steam Heating Co.*, 128 Ind. 240, 27 N. E. 612, 12 L. R. A. 502; *Cedar Valley Mfg. Co. v. Starbard (Iowa)*, 89 N. W. 14; *Walker v. Hill*, 119 Mass. 249; *MoLaughlin v. Austin*, 104 Mich. 489, 62 N. W. 719; *Wilhelm v. Voss*, 118 Mich. 106, 76 N. W. 308; *Abbott v. Nash*, 35 Minn. 451, 29 N. W. 65; *Fitzgerald v. Morrissey*, 14 Neb. 198, 15 N. W. 233; *Bayles v. Wallace*, 56 Hun. 428, 10 N. Y. S. 191; *Parkes v. Stafford*, 16 N. Y. S. 756; *Snell v. Rogers*, 70 Hun. 462, 24 N. Y. S. 379; *Schultz v. Cohen*, 13 N. Y. Misc. 638, 34 N. Y. S. 927; *Sinkovitz v. Applebaum*, 56 N. Y. Misc. 527, 107 N. Y. S. 122; *Crawford v. Edison*, 45 Ohio St. 239, 13 N. E. 80; *Jefferson County v. Slagle*, 66 Pa. St. 202; *Corcoran v. Huey*, 231 Pa. 441, 80 Atl. 881; *Green v. Dallahan*, 54 Tex. 281; *Howell v. Harvey*, 65 W. Va. 310, 64 S. E. 249, 22 L. R. A. (N. S.)

1077; *Young v. French*, 35 1
Petrie v. Hunter, 2 Ont. 233.
Raabe v. Squier, 148 N. Y.
N. E. 516; *Repair v. Krebs* Lun
73 W. Va. 139, 80 S. E. 140.
man v. Birmingham Paint
Co., 185 Ala. 313, 64 So. 60
v. Johnson, 91 Vt. 467,
874.

²² Cases where the general
tor abandoned the contract.
Clifford v. Luhring, 69 Ill. 401;
feld v. Brown, 78 Ill. 487; *W*
Voss, 118 Mich. 106, 76 N.
Yeoman v. Mueller, 33 Mo. A.
Kutzmeyer v. Ennis, 27 N. J.
(3 Dutch.); *Parkes v. Stafford*,
S. 756; *Schultz v. Cohen*, 1
Misc. 638, 34 N. Y. S. 927; *De*
Schenck, 36 N. Y. App. Div.
N. Y. S. 251; *Mannetti v. I*
N. Y. App. Div. 567, 62 N. Y.
Crawford v. Edison, 45 Ohio
13 N. E. 80; *Petrie v. Hunter*
233.

lute oral promise by the owner to pay for the work or materials. It should be observed in such a case that if the owner promises payment merely from whatever may be due by him to the general contractor, the promise is not within the statute.⁵⁴ To that extent the new promisor is a primary debtor. What he pays he would have no right to recover over from the general contractor; but if, as is often the case, the original contractor remains liable and the owner undertakes absolutely to pay the subcontractor or material man whatever the services or property of the latter may be worth, irrespective of any balance due the general contractor, the promise is on principle within the statute.⁵⁵

"S. R. H. Robinson & Son Contracting Co. v. Twin City Bank, 103 Ark. 219, 146 S. W. 523, and see *infra*, §§ 459, 479.

"This was so held in *Conti v. Johnson*, 91 Vt. 467, 100 Atl. 874. See also *Ribock v. Canner*, 218 Mass. 5, 105 N. E. 462; *Mankin v. Jones*, 63 W. Va. 373, 60 S. E. 248, 15 L. R. A. (N. S.) 214. The case is analogous to those cited *infra*, § 459, where one who receives property to be applied to the payment of certain indebtedness, undertakes absolutely to pay the debt, not merely to apply the property in his hands. In *Boorstein v. Moffatt*, 36 Nova Scotia, 81, 86, the court quoting *DeColyar* on the law of Guarantees, p. 109, said: "Moreover, the question to whom the credit was given, is not an infallible test by which to discover in all cases whether or not the promise falls within the 4th section of the Statute of Frauds. For sometimes it happens that credit is entirely given to the promisor, and yet the promise is within the 4th section of the Statute of Frauds. This is the case wherever the promise has not the effect of discharging the original debtor."

Lord Ellenborough in *Barber v. Fox*, 1 Stark. 270, said: "This was the inchoate business, and debt of another, and if the defendant had prom-

ised in writing, he would have made himself liable—without a promise in writing he is not liable."

In *Wilhelm v. Voss*, 118 Mich. 106, 107, 76 N. W. 308, the court said:

"The fact that Wilhelm had made a contract with Van Bogaert & Co. to do this work would not necessarily render invalid a subsequent contract with Voss to do the same work, but both of these alleged oral promises to pay for this work could not be valid at one and the same time. Unless the contract with Van Bogaert & Co. was abandoned by Wilhelm, so that there would remain no right to a claim for compensation for the work when done, as against them, the promise alleged of Voss was collateral, and void under the statute.

The right of the plaintiff to recover against the defendant must depend upon the actual state of affairs at the time the work was done. If it was done in pursuance of and under the contract with Van Bogaert & Co., the performance created an obligation against Van Boagert & Co., and not against Voss; while, if the plaintiff repudiated the contract made with that firm, so that, although he plastered the house, it was done under a different arrangement, and gave rise to no obligation upon the part of Van Bogaert & Co. to pay, the

A similar promise is not infrequently made to a subcontractor or a material man by some one other than the owner of the premises. Thus a surety for the general contractor, in order to save himself from direct liability to the owner, may promise to pay for work or materials when the general contractor has made default or is likely to do so. If the subcontractor or materialman in such a case retains a claim against the general contractor, the new promise, on principle, is a promise to pay the debt of another; since should the new promisor make the promised payment, he would be subrogated to a claim against the general contractor. If, however, the liability of the general contractor was abandoned before the consideration was furnished, the promise of the surety is not within the statute. So, if the new promise is only to make payment from securities in the promisor's hands to secure him from liability, an oral promise is valid.⁵⁶ The same reasoning is applicable where the new promise is given by a tenant,⁵⁷ or mortgagee⁵⁸ as where a

defendant would be liable for his promise to pay for the work, if he made such promise." See also *Conti v. Johnson*, 91 Vt. 467, 100 Atl. 874; *Bond v. Treahay*, 37 U. Can. Q. B. 360. But in *Almond v. Hart*, 46 N. Y. App. Div. 431, 433, 61 N. Y. S. 849, the court said: "The test is whether the person sought to be held liable is primarily so, or only in case of the default of another, and added. . . .

"The fact that the liability against Phippin, the contractor, may remain unaffected by the promise of the defendants does not bring this within the inhibition of the statute. *Clark v. Howard*, 150 N. Y. 232, 239, 44 N. E. 695; *Farley v. Cleveland*, 4 Cow. 432, 15 Am. Dec. 387; *Elkin v. Timlin*, 151 Penn. St. 491, 25 Atl. 139." See also *Repair v. Krebs Lumber Co.*, 73 W. Va. 139, 80 S. E. 140.

⁵⁶ The tendency in American cases is to hold the new promisor liable even if his promise is absolute in terms, since the consideration was beneficial to him. *Alley v. Turck*, 8 N. Y. App. Div. 50, 40 N. Y. S. 433; *Pizzi v. Nar-*

dello, 209 Pa. 1, 57 Atl. 1100. In *Hall v. Lincoln Savings & Trust Co.*, 220 Pa. St. 485, 489, 490, 69 Atl. 994, the court said:—

"If a special promise was made by the defendant to the plaintiffs, to see them paid for the performance of work which would be in relief of the obligation of the defendant upon its prior bond, and if this payment was to be made from a fund assigned to, and held by defendant for the payment of subcontractors, clearly, under the authorities, and as a matter of sound principle, the promise would not be within the statute of frauds."

⁵⁷ In *Cooper & Polak Works v. Rosing*, 85 N. Y. Misc. 409, 147 N. Y. S. 241, the promise of the tenant was held binding because it was not in terms identical with the obligation of the general contractor, but was to pay a fixed sum irrespective of the contractor's liability.

⁵⁸ In *Ribock v. Canner*, 218 Mass. 5, 105 N. E. 462, the promise of the mortgagee to pay the subcontractor what was due him from the general

surety for the general contractor is the promisor. All have a pecuniary interest in the consideration for their new promises, but all may nevertheless be merely promising to pay the debt of another.

§ 482. Promises to indemnify.

The greatest confusion exists in regard to the question whether promises to indemnify are within the statute. It has been pointed out⁵⁹ that part of the confusion is due to an attempt to treat all promises of indemnity alike, an attempt which is indicated in speaking of promises to indemnify, by emphasizing the word "indemnify" without consideration of the contingency against which the promisor undertook to indemnify. A promise to indemnify a creditor against loss if he sells goods to another,⁶⁰ or advances money to him,⁶¹ is certainly a promise to answer for the debt or default of another, and of course within the statute; yet the use of the word indemnify in such a transaction is entirely proper.⁶² It is therefore a primary question whether the promisor agrees, not merely to indemnify, but to indemnify for the debt, default, or miscarriage of another. If not, there can be no question of the statute. The promise to indemnify against loss by fire has obviously nothing to do with guaranty.⁶³ A promise to indemnify against loss from the act of a

contractor, was held within the statute. Cf. *Kleinman v. Auerbach*, 82 N. Y. Misc. 436, 143 N. Y. S. 1033, and *Merriman v. McManus*, 102 Pa. 102, where the general contractor had abandoned work before the promise was made by the mortgagee to pay for the work; and *Boeff v. Rosenthal*, 37 N. Y. Misc. 852, 76 N. Y. S. 988, where the mortgagee's promise was held to be taken in lieu of the contractor's liability, in all of which cases the new promise was rightly held not within the statute. See also *Merserau Co. v. Washburn*, 6 N. Y. App. Div. 404, 39 N. Y. S. 664.

⁵⁹ Brandt on Suretyship, § 70.

⁶⁰ *Green v. Menominee Tribe of Indians*, 46 Ct. Cl. 68.

⁶¹ *Bennighoff v. Robbins*, 54 Mont. 66, 166 Pac. 687.

⁶² In *Stratton v. Hill*, 134 Mass. 27, 30, Field, J., said: "It is sometimes said that a mere promise of indemnity is not within the statute. *Aldrich v. Ames*, 9 Gray, 76; *Wildes v. Dudlow*, L. R. 19 Eq. 198. But whatever the promise may be called, if it is 'a special promise to answer for the debt, default or misdoings of another,' and that is its principal object, it would seem that it is within the statute. *Cripps v. Hartnoll*, 4 B. & S. 414; *Dows v. Swett*, 120 Mass. 322." See also *Cheesman v. Wiggins*, 122 Ind. 352, 23 N. E. 945.

⁶³ An oral contract of insurance is valid. *Relief F. Ins. Co. v. Shaw*, 94

third person has equally little to do with guaranty if that third person was under no duty to the promisee to refrain from causing the loss or to make it good.⁶⁴ But a contract to indemnify an employer against loss from the dishonesty of an employee—a contract of fidelity insurance—is a contract to answer for the default of the employee's duty to his employer, and is within the statute.⁶⁵ On the other hand, no promise is within the statute by which the promisor agrees to assume the primary liability, not only as between himself and the promisee, but as between himself and any third persons.⁶⁶ An oral promise, therefore, to one who signs negotiable paper for the accommodation of the promisor that the latter will indemnify him, or save him harmless, is valid;⁶⁷ as is any other promise to indemnify the promisee for becoming surety for the promisor. It is in regard to

U. S. 574, 24 L. Ed. 291; *Insurance Co. of North America v. Bird*, 175 Ill. 42, 51 N. E. 686; *McQuaid v. Aetna Ins. Co.*, 226 Mass. 281, 115 N. E. 428; *Quinn-Shepherdson Co. v. United States Fidelity & Co. Co.* (Minn.), 172 N. W. 693; *Hicks v. British American Assur. Co.*, 162 N. Y. 284, 56 N. E. 743, 48 L. R. A. 424; *Hartford F. Ins. Co. v. Whitman*, 75 Ohio St. 312, 79 N. E. 459, 9 Ann. Cas. 218.

⁶⁴ As in *Patrick v. Barber*, 78 Neb. 823, 112 N. W. 358.

A contract by one insurance company to reinsure another is therefore not within the statute. *Bartlett v. Fireman's Ins. Co.*, 77 Iowa, 155, 41 N. W. 601; *Merchant v. O'Rourke*, 111 Ia. 351, 82 N. W. 759. The opposing decision of *Egan v. Fireman's Ins. Co.*, 27 Ia. Ann. 368, is indefensible.

⁶⁵ *Wainwright Trust Co. v. United States Fidelity & Co. Co.* (Ind. App.), 114 N. E. 470; *Commonwealth v. Hinson*, 143 Ky. 428, 136 S. W. 912, L. R. A. 1917 B. 139, Ann. Cas. 1912 D. 291. In *Quinn-Shepherdson Co. v. United States Fidelity & Co. Co.* (Minn.), 172 N. W. 693, the court while admitting the logical force of the preceding cases refused to follow them.

⁶⁶ A promise by a tobacco seller to reimburse one with whom the promisors dealt for any loss suffered from guaranteeing their tobacco on reselling it, is not within the statute. *Robertson v. Willhoite*, 157 Ky. 58, 162 S. W. 563.

So where a promise was made to a landlord, in order to induce him to cancel a lease, that the promisors would save him harmless from any loss of rent he might suffer. *Smith v. Schneider*, 84 N. Y. S. 238. See also *Bullock v. Lloyd*, 2 C. & P. 119; *Adams v. Dansey*, 6 Bing. 506; *Marcy v. Crawford*, 16 Conn. 549, 41 Am. Dec. 158; *Green v. Brookins*, 23 Mich. 48, 9 Am. Rep. 74; *Hull v. Brown*, 35 Wis. 652.

⁶⁷ *Howes v. Martin*, 1 Esp. 162; *Adams v. Dansey*, 6 Bing. 506; *Lerch v. Gallup*, 67 Cal. 595, 8 Pac. 322; *Marcy v. Crawford*, 16 Conn. 549, 41 Am. Dec. 158; *Goodspeed v. Fuller*, 46 Me. 141, 71 Am. Dec. 572; *Weld v. Nichols*, 17 Pick. 538; *Green v. Brookins*, 23 Mich. 48, 9 Am. Rep. 74; *Allaire v. Ouland*, 2 Johns. Cas. 52; *Evans v. Mason*, 1 Lea, 26; *Dorwin v. Smith*, 35 Vt. 69; *Hull v. Brown*, 35 Wis. 652.

promises to indemnify those who become sureties for the debts of third persons, given as an inducement to the sureties for entering into the obligation that the question has given rise to the greatest difficulty. In the first place it must be asked—Was the principal debtor also bound to indemnify the surety? If so, even though that promise is an implied one, the new promisor is entering into an identical obligation which should be subject to the same rule which governs all promises to satisfy the obligations of another. If that rule is that a new promise is within the Statute of Frauds, unless the original indebtedness is discharged or the new promisor receives such new and beneficial consideration as to make the obligation on his part primary, the inquiry must be made in each case—What consideration has the new promisor received for his promise to indemnify the surety? Was that consideration such as to make the duty of indemnity primarily his? In the cases which have arisen this will not generally be true, though under the broad rule sanctioned by the Supreme Court of the United States⁶⁸ some business advantage frequently accrues to the new promisor. On the other hand, if the test to be applied is whether the new promisor undertakes unconditionally to pay the debt of another, or merely agrees to pay if the principal debtor makes default in his duty to indemnify, the promise to indemnify the surety is not within the statute, since the promisor agrees to give such indemnity absolutely as soon as the surety suffers loss and not conditionally on the principal debtor making default in his duty to indemnify.⁶⁹ In this class of cases the English decisions clearly adopt the latter test.⁷⁰ How unsatisfactory this

⁶⁸ See *supra*, § 472.

⁶⁹ Confusion must not be caused by the fact that the obligation may be conditional on default by the principal debtor to the holder of the obligation. If the sureties are accommodation indorsers of a note, for instance, their liability is thus conditional; if they are accommodation makers, it is not. But, the question concerning the Statute of Frauds relates, not to a condition in the new promise of indemnity that it shall become effective only on

default of the principal debtor's obligation to the creditor, but to the existence of any condition in the new promise of indemnity that it shall become effective only on the principal debtor's default in his duty to indemnify his surety.

⁷⁰ The promise was held not within the statute in *Thomas v. Cook*, 8 B. & C. 728, but was held within the statute in *Green v. Cresswell*, 10 A. & E. 453, where the defendant had promised the plaintiff indemnity if the plaintiff

test is has already been seen;⁷¹ but the weight of authority in the United States supports the English decisions on promises to indemnify sureties, holding such promises not within the statute,⁷² though not adopting generally the same test of form.

would become surety on a bail bond in a civil case; Lord Denman, C. J., saying: "that the arrested debtor, who obtains his freedom by being bailed, undertakes to his bail to keep them harmless, by paying the debt, or surroundings." In *Cripps v. Hartnoll*, 4 B. & S. 414, the court said: "But there is a great distinction between that case [Green v. Cresswell], and the present. Here the bail was given in a criminal proceeding; and, where bail is given in such a proceeding, there is no contract on the part of the person bailed to indemnify the person who became bail for him. There is no debt, and with respect to the person who bails, there is hardly a duty; and it may very well be that the promise to indemnify the bail in a criminal matter should be considered purely as an indemnity, which it has been decided to be." But in later English cases, *Green v. Cresswell* seems overruled. *Batson v. King*, 4 H. & N. 739; *Wildes v. Dudlow*, L. R. 19 Eq. 198; *In re Bolton*, 8 Times L. R. 668; s. c. 36 Sol. J. 608; *Hoyle v. Hoyle*, [1893] 1 Ch. 84; *Guild v. Conrad*, [1894] 2 Q. B. 885. In the case last cited, the court rested its decision firmly on the distinction between promises to pay at all events, and promises to pay conditionally on default.

⁷¹ *Supra*, § 465.

⁷² *Godden v. Pierson*, 42 Ala. 370. [but see *Brown v. Adams*, 1 Stew. 51; *Posten v. Clem* (Ala.), 78 So. 883, 1 A. L. R. 381]; *Reed v. Holcomb*, 31 Conn. 360; *Smith v. Delaney*, 64 Conn. 264, 29 Atl. 496; *McCormick v. Boylan*, 83 Conn. 686, 78 Atl. 335, Ann. Cas. 1912 A. 882; *Wolthausen v. Trimpert* (Conn.), 105 Atl. 687 (but see *Clement's App.*, 52 Conn. 464);

Jones v. Shorter, 1 Ga. 294, 44 Am. Dec. 649; *Resseter v. Waterman*, 151 Ill. 169 (but see *Brand v. Whelan*, 18 Ill. App. 186); *Horn v. Bray*, 51 Ind. 555, 19 Am. Rep. 742; *Anderson v. Spence*, 72 Ind. 315, 37 Am. Rep. 162; Overruling *Brush v. Carpenter*, 6 Ind. 78); *Keesling v. Frazier*, 119 Ind. 185, 21 N. E. 552; *Mills v. Brown*, 11 Iowa, 314; *Patton v. Mills*, 21 Kans. 163; *Dunn v. West*, 5 B. Mon. 376; *Lucas v. Chamberlain*, 8 B. Mon. 276; *George v. Hoskins*, 17 Ky. L. Rep. 63, 30 S. W. 406; *Smith v. Sayward*, 5 Me. 504; *Alger v. Scoville*, 1 Gray, 391; *Aldrich v. Ames*, 9 Gray, 76; *Hawes v. Murphy*, 191 Mass. 469, 78 N. E. 109; *Boyer v. Soules*, 105 Mich. 31, 62 N. W. 1000 (but see *First Bank v. Bennett*, 33 Mich. 520); *Fidelity Co. v. Lawlor*, 64 Minn. 144, 66 N. W. 143; *Noyes v. Ostrom*, 113 Minn. 111, 129 N. W. 142; *Minick v. Huff*, 41 Neb. 516, 59 N. W. 795; *Holmes v. Knights*, 10 N. H. 175; *Demeritt v. Bickford*, 58 N. H. 523; *Apgar v. Hiler*, 24 N. J. L. 812; *Cortel-you v. Hoagland*, 40 N. J. Eq. 1; *Wilson v. Hendee*, 74 N. J. L. 640, 66 Atl. 413; *Chapin v. Merrill*, 4 Wend. 657; *Barry v. Ransom*, 12 N. Y. 462; *Sanders v. Gillespie*, 59 N. Y. 250; *Tighe v. Morrison*, 116 N. Y. 263, 22 N. E. 164, 5 L. R. A. 617 (overruling *Kingsley v. Balcome*, 4 Barb. 131); *Jones v. Bacon*, 145 N. Y. 446, 40 N. E. 216; *Rose v. Wollenberg*, 31 Oreg. 269, 44 Pac. 382, 39 L. R. A. 378; *Ferrell v. Millican* (Tex. Civ. App.), 156 S. W. 230; *Alphin v. Lowman*, 115 Va. 441, 79 S. E. 1029; *Handsaker v. Pedersen*, 71 Wash. 218, 128 Pac. 230; *Shook v. Vanmater*, 22 Wis. 532; *Vogel v. Melms*, 31 Wis. 306, 11 Am. Rep. 608; *Barth v. Grof*, 101 Wis. 27, 76 N. W. 1100.

The reasoning is generally very unsatisfactory. Frequently the courts do not even seem aware what obligation it is for which the indemnitor is asserted, to have become surety. It is often apparently supposed that the contention is that the indemnitor has undertaken to answer for the obligation upon which the indemnified surety puts his name.⁷³ Again it sometimes seems to be supposed that because the obligation of the principal debtor to save harmless or indemnify his surety is generally merely implied in fact or imposed by law rather than undertaken in express terms that a promise to become in effect surety for the performance of this obligation is not within the statute.⁷⁴ But as has been seen, a promise to answer for default in any kind of obligation is within the statute.⁷⁵ There can be no doubt, also, that the case is within the mischief which the statute seeks to remedy, if the purpose of the statute is what has been generally supposed.⁷⁶ The promisor, here, is receiving nothing of advantage to himself. The consideration enures to the benefit of the principal debtor and, in return for that consideration, the promisor undertakes to do something which the principal debtor ought to do himself.

The most plausible suggestion for supporting the numerous

⁷³ So able a writer as Bishop, *Laws of Contracts*, § 1216, falls into this error. He says—"On principle, this question is determinable by a very simple test. You promise James that, if he puts his name, as surety for John, on a bond running to Richard, you will hold him harmless; he does it; John makes default. All agree that, in this case, John is the 'another' of the statute. But Richard, to whom the debt is due, cannot sue you; John failing, his claim over is alone on James. Aside from difficulties as to the form of the action, your liability begins only when James has paid him. There remains now for adjustment only what you had promised to James, who is not 'another,' but the promisee himself,—the debt is yours to him, and there is nothing going out from you to any third person. Hence, the case is not

within the statute," and this passage is quoted as decisive in *Resseter v. Waterman*, 151 Ill. 169, 37 N. E. 875.

Of course it is true, as Bishop says, that "all agree that John is the 'another' of the statute," but the obligation of John, which is in question, is not John's obligation to Richard but his obligation to James, his surety, to save him harmless.

⁷⁴ Thus in *Resseter v. Waterman*, 151 Ill. 169, 37 N. E. 875, the court says—"It is clear that Severson [the principal debtor], at no time made default in not indemnifying Resseter, for he was under no contract obligation to indemnify him. Not having promised indemnity, Severson could not make default in any promise or undertaking with Resseter."

⁷⁵ See *supra*, § 453.

⁷⁶ See *supra*, § 452.

certain cases where the promise to pay the debt of another is wholly subordinate to other undertakings which form the main object of the contract, and where in consequence an exception has been made judicially to the Statute of Frauds; and in some jurisdictions apart from such a doctrine, an oral promise in consideration of goods or services presently furnished which includes an undertaking not only to pay for those goods, but also to pay for goods or services previously furnished to another and for which he is still indebted is enforced for the full amount.⁷⁹ Such decisions, however, seem indefensible on principle since they clearly allow the enforcement of a promise to answer for the debt of another, and the consideration received is the equivalent only for part of the agreed price. As to the goods or services previously furnished, the promisor is merely a surety. Decisions of at least equal weight uphold this view.⁸⁰

If it be granted that where the promisor's undertaking is in part to pay for the debt of another, that part at least is unenforceable; the question then arises, can the other part be enforced? If the promise is indivisible, since it cannot be enforced as a whole, it obviously cannot be enforced in any part. Generally in such cases, however, the promise is divisible. In such a case it is important for the plaintiff to sue only upon the portion of the promise which is outside of the statute; for should he sue on the whole promise, as he could not prove the contract declared on, he could not recover at all without amending his declaration.⁸¹

⁷⁹ *Clifford v. Luhring*, 69 Ill. 401; *Hill v. Bank of Seneca*, 100 Mo. App. 230, 73 S. W. 307; *Fitzgerald v. Morrissey*, 14 Neb. 198, 15 N. W. 233; *Morrissey v. Kinsey*, 16 Neb. 17, 19 N. W. 454; *Wills v. Cutler*, 61 N. H. 405; *Crawford v. Edison*, 45 Oh. St. 239, 13 N. E. 80; *Pizzi v. Nardello*, 209 Pa. 1, 57 Atl. 1100; *Muller v. Riviere*, 59 Tex. 640, 46 Am. Rep. 291.

Where as in *McLaughlin v. Austin*, 104 Mich. 489, 62 N. W. 719; *Abbott v. Nash*, 35 Minn. 451, 29 N. W. 65; *Downes v. Elmira Bridge Co.*, 82 N. Y. App. D. 639, 81 N. Y. S. 834; *Young v.*

French, 35 Wis. 111, the creditor gives up the possibility of acquiring a lien to secure the back debt, relying upon the new promise, a new element enters into the case, and the discussion *supra*, § 472, is applicable.

⁸⁰ *Andre v. Bodman*, 13 Md. 241, 71 Am. Dec. 628; *Gill v. Herrick*, 11 Mass. 501; *Ruppe v. Peterson*, 67 Mich. 437, 35 N. W. 82 (but see *McLaughlin v. Austin*, 104 Mich. 489, 62 N. W. 719); *Belknap v. Bender*, 75 N. Y. 446; *Birchell v. Neaster*, 36 Ohio St. 331.

⁸¹ See *Lexington v. Clarke*, 2 Vent. 223; *Chater v. Beckett*, 7 T. R. 201;

a note or claim against another to guarantee payment thereof, is held not within the statute.⁸⁷

In both these cases typical guaranties are given. The promises are withdrawn from the statute only because the transaction on both sides is concerned with a matter to which the guaranty is a mere incident.⁸⁸

40, as going to the very verge of the law, and he referred to the observations upon it made by Page Wood, V. C., in *Wickham v. Wickham*, 2 K. & J. 478, at p. 487."

⁸⁷ *Beaty v. Grim*, 18 Ind. 131 (but see *Hassinger v. Newman*, 83 Ind. 124); *Little v. Edwards*, 69 Md. 499; *Hunt v. Adams*, 5 Mass. 358, 4 Am. Dec. 68; *Huntington v. Wellington*, 12 Mich. 10; *Wilson v. Hentges*, 29 Minn. 102, 12 N. W. 151; *Barker v. Scudder*, 56 Mo. 272; *Cardell v. McNeil*, 21 N. Y. 336; *Milks v. Rich*, 80 N. Y. 269, 36 Am. Rep. 615; *Newell v. Chapman*, 74 Hun, 111; *Rowland v. Rorke*, 4 Jones L. 337; *Malone v. Keener*, 44 Pa. 107; *Hall v. Rogers*, 7 Humph. 536; *Hopkins v. Richardson*, 9 Gratt. 485; *Eagle, etc., Machine Co. v. Shattuck*, 53 Wis. 455, 10 N. W. 690, 40 Am. Rep. 780.

In the following cases notes were assigned by the payee without indorsement, but with a guaranty of payment: *Mobile Co. v. Jones*, 57 Ga. 198; *Smith*

v. Finch, 3 Ill. 321; *Adcock v. Fleming*, 2 Dev. & B. 225; *Ashford v. Robinson*, 8 Ired. 114; *Rowland v. Rorke*, 4 Jones (N. C.), 337; *Hall v. Rogers*, 7 Humph. 536; *Wyman v. Goodrich*, 26 Wis. 21. *Cf. Dows v. Swett*, 120 Mass. 322, 127 Mass. 364, 134 Mass. 140, 45 Am. Rep. 310, where the guarantee of another's note made payable to the creditor, and of which the guarantor had never been the holder, was held within the statute, though the whole transaction was entered into as a means of paying the guarantor's own debt. But see *Sheldon v. Butler*, 24 Minn. 513; *Crane v. Wheeler*, 48 Minn. 207, 50 N. W. 1033; *Eagle, etc., Machine Co. v. Shattuck*, 53 Wis. 455, 10 N. W. 690, 40 Am. Rep. 780.

⁸⁸ *Cf.* with these cases the decisions on divisible promises in the preceding section. In these cases, also, it is true that the guarantee related only to a portion of the contract on either side.

CHAPTER XVI

AGREEMENTS IN CONSIDERATION OF MARRIAGE; CONTRACTS OR SALES OF ANY INTEREST IN LANDS; AGREEMENTS NOT TO BE PERFORMED WITHIN A YEAR

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§ 485. Agreements in consideration of marriage.

The distinction must be drawn between agreements in contemplation of marriage and agreements in consideration thereof. The statute does not invalidate an oral promise merely because it is made in contemplation or marriage.¹

¹ *Riley v. Riley*, 25 Conn. 154; *Mo.* 24, 34 S. W. 489, 31 L. R. A. 810, *Railbolt v. East*, 56 Ind. 538, 26 Am. 54 Am. St. Rep. 663; *Larsen v. Johnson*, 78 Wis. 300, 47 N. W. 615, 23 Rep. 40; *Steen v. Kirkpatrick*, 84 Miss. 63, 36 So. 140; *Nowack v. Berger*, 133 Am. St. Rep. 404.

It is definitely established also that mutual promises to marry are withdrawn from the statute and are valid though oral.² It has been suggested in support of this conclusion that the consideration in such cases is not marriage, but the other party's reciprocal promise to marry. This distinction if valid would involve the conclusion that any oral bilateral agreement consisting on one side of a promise to marry is valid, but this conclusion cannot be accepted. There seems no doubt that except in the case of mutual promises to marry, an "agreement in consideration of marriage" includes an agreement where the consideration on one side or the other is a promise to marry.³ The exception from the statute, therefore, of mutual promises to marry must be explained merely on grounds of policy.

§ 486. Marriage settlements.

There can be no doubt of the sufficiency of marriage or of a promise to marry as consideration for an executory promise; nor is this point ever disputed. But if a promisor or grantor is insolvent his contract or conveyance, though valid between the parties, may be invalid against creditors.

To support a conveyance made when the grantor was insolvent, such consideration as would be sufficient for an executory promise is insufficient. The law here considers the adequacy and value of what is given in exchange for the conveyance, requiring some equivalence of values. It is well settled, however, that marriage is to be treated as a valuable consideration.⁴ Logically, this is indefensible; consideration having

² *Clark v. Pendleton*, 20 Conn. 495; *Blackburn v. Mann*, 85 Ill. 222; *Short v. Stotts*, 58 Ind. 29; *Caylor v. Roe*, 99 Ind. 1, 5; *Withers v. Richardson*, 5 T. B. Mon. 94, 17 Am. Dec. 44; *Morgan v. Yarborough*, 5 La. Ann. 316; *Ogden v. Ogden*, 1 Bland Ch. 284; *Wilbur v. Johnson*, 58 Mo. 600; *Barge v. Haslam*, 63 Neb. 296, 88 N. W. 516; *Derby v. Phelps*, 2 N. H. 515. But if not to be performed within a year such promises are obnoxious to another clause of the statute. See *infra*, § 501.

³ Thus a bilateral agreement to marry which includes as one of its terms a promise to make a marriage settlement, is within the statute. *Chase v. Fitz*, 132 Mass. 359. See also *Hunt v. Hunt*, 171 N. Y. 396, 64 N. E. 159, 59 L. R. A. 306, and cases on marriage settlements in the following section.

⁴ *Peachey on Marriage Settlements*, p. 62, *J. R. Leininger Lumber Co. v. Dewey*, 86 Neb. 659, 126 N. W. 87. A promise to marry also is good consideration, and if without fault on

the oral promise enforceable;⁹ and even though an oral agreement made before marriage is carried out after marriage by the execution of the agreed settlement, the transaction is regarded as no better than a gift, so far as creditors are concerned.¹⁰

Whether a gift, and therefore whether such a settlement after marriage, is valid depends upon the law of fraudulent conveyances. In most jurisdictions a voluntary conveyance which leaves the grantor with means sufficient in all reasonable probability to satisfy his creditors is valid.¹¹ In these jurisdictions, therefore, if an oral ante-nuptial settlement is executed without thereby rendering the settlor insolvent, or nearly so, the transaction is valid.¹² In a few jurisdictions, however, a voluntary conveyance by a debtor may be attacked by any creditor whose claim existed at the time of the settlement if the settlor subsequently becomes insolvent; although he was perfectly solvent for a time after the settlement was made.¹³ In such States, therefore, a post-nuptial settlement

⁹ See *infra*, § 533. The point is necessarily involved also in cases cited *supra*, n. 7. Cf. *infra*, § 504, as to a similar question under another clause of the statute, where the lack of enforceability of the promise depends on the nature of the promise, whereas under the present clause it depends on the nature of the consideration.

¹⁰ *Re Holland*, [1902] 2 Ch. 360; *Warden v. Jones*, 2 De G. & J. 76; *London v. G. L. Anderson Brass Works (Ala.)*, 72 So. 359; *Winn v. Albert*, 2 Md. Ch. 169, 5 Md. 66; *Deshon v. Wood*, 148 Mass. 132, 19 N. E. 1, 1 L. R. A. 518; *Borst v. Corey*, 15 N. Y. 505. Cf. with these decisions, cases holding that an oral, and therefore unenforceable trust, may be carried out by the trustee in spite of the objection of creditors or a trustee in bankruptcy. *Bailey v. Wood*, 211 Mass. 37, 97 N. E. 902. See also *VanSickle v. Wells, Fargo & Co.*, 105 Fed. 16; *Martin v. Remington*, 100 Wis. 540, 76 N. W. 614, 69 Am. St. Rep. 941; and cases which hold that a preference by an

insolvent debtor to one having a claim valid but unenforceable because of some rule of procedure like the Statute of Limitations or the rule prohibiting a wife from suing her husband is not a fraudulent conveyance. *Wright v. Wright*, 103 Fed. 580; *VanSickle v. Wells, Fargo & Co.*, 105 Fed. 16; *Vietor v. Swisky*, 87 Ill. App. 583; *Brookville Nat. Bank v. Kimble*, 76 Ind. 195; *City Bank v. Wright*, 68 Ia. 132, 26 N. W. 35; *Meredith v. Schaap (Ia.)*, 85 N. W. 628; *First Nat. Bank v. Eichmeir*, 153 Ia. 154, 133 N. W. 454; *Frost v. Steele*, 46 Minn. 1, 48 N. W. 413; *Dayton Co. v. Sloan*, 49 Neb. 622, 68 N. W. 1040; *Manchester v. Tibbetts*, 121 N. Y. 219, 24 N. E. 304, 18 Am. St. Rep. 816; *McConnell v. Barber*, 86 Hun, 360, 33 N. Y. S. 480; *McAfee v. McAfee*, 28 S. Car. 188, 5 S. E. 480.

¹¹ See Williston's *Cas. Bankruptcy* (2d ed.), p. 181 n. 1.

¹² *Ex parte Whitehead*, 14 Q. B. D. 419, and see cases cited in the following notes.

¹³ This is the rule laid down by Chan-

contract is made partly in consideration of marriage and partly for some other consideration, the whole contract necessarily becomes unenforceable.¹⁷

§ 487. Contracts for the sale of land distinguished from conveyances.

At common law corporeal hereditaments could be conveyed only by livery of seisin or by deed; and incorporeal hereditaments could be conveyed only by deed.¹⁸ Executory contracts, however, for the sale of land, are valid though oral except so far as statutes of frauds have enacted the contrary.¹⁹ The questions must, therefore, be kept distinct, what is essential for the conveyance of a given interest in property, and what is essential for an executory contract to convey it. The latter question only is appropriate here. The clause of the English Statute under consideration does indeed profess to include any contract *or* sale of land, but in view of the first section of the statute, which prohibits the transfer of real estate without writing, it is probable that contract *or* sale means in effect contract for sale—the words used in the seventeenth section.

ment. In such cases the authorities from other States are in hopeless conflict, and we have not heretofore had occasion to pass upon the subject. Among those cases holding such an instrument good are—*Moore v. Harrison*, 26 Ind. App. 408, 59 N. E. 1077; *Buffington v. Buffington*, 151 Ind. 200, 51 N. E. 328; *Cooper v. Wormald*, 27 Beav. 266; *Argenbright v. Campbell*, 3 Hen. & M. 144. To the contrary are—*McAnnulty v. McAnnulty*, 120 Ill. 26, 11 N. E. 397, 60 Am. Rep. 552; *Powell v. Meyers*, 23 Ky. L. Rep. 795, 64 S. W. 428; *Smith v. Greer*, 3 Humph. 118; *Borst v. Corey*, 16 Barb. 136." To the cases supporting such agreements may be added, *Winalow v. White*, 163 N. C. 29, 79 S. E. 258.

¹⁷ "It is true, marriage was not the sole consideration for the agreement, on the part of the intended wife, that she would not demand dower in case she survived her intended husband; his

agreement not to exercise the rights, in respect to her property, which the marriage would confer, constituted a additional consideration for the agreement on her part; but the agreement was entire; the intended marriage entered into, and formed a part of the entire consideration on both sides, and without it, the agreement would never have been made." *Henry v. Henry*, 27 Ohio St. 121, 128. Cf. *Larsen v. Johnson*, 78 Wis. 300, 47 N. W. 615.

¹⁸ *Mayberry v. Johnson*, 3 Green (N. J.), 116.

¹⁹ *Miller v. Wilson*, 146 Ill. 523, 528, 34 N. E. 1111, 37 Am. St. Rep. 186; *Mobile, etc., Ins. Co. v. McMillan*, 31 Ala. 711, 719; *Bell v. Breckenridge*, 1 A. K. Marsh. 563, 565; *McKennon v. Winn*, 1 Okla. 327, 33 Pac. 582. See as to Louisiana law—*Mason v. Towne*, 12 La. Ann. 194; *Barrett v. His Creditors*, 12 Robins. 74; *Bell v. Andrews*, 4 Dallas, 1: . . . L. Ed. 779.

§ 488. What is a contract for sale or purchase.

Any contract the purpose of which is to transfer to one of the parties an interest in land for a price paid or to be paid to the other party is within the statute. The price need not be payable in money; ²⁰ an agreement to exchange lands is as completely within the statute as a contract to sell them for a pecuniary consideration; ²¹ and so is an agreement by which an interest in land then conveyed is to be reserved to the grantor.²² Nor is it material that the conveyance is not to be made directly from one party to the contract to the other. A contract to convey to a third person is within the statute,²³ and though a contract in which one party promised to procure a conveyance to the other by a third person, would not be if the price for the land was to be paid by the grantee to the grantor, since such a contract would be merely a contract of agency, in which the agent guaranteed that he would successfully accomplish the business intrusted to him,²⁴ yet if the party promising to procure the conveyance is himself to pay whatever price is necessary to the grantor, and is to receive from his own co-contractor a price not for his services, but for the land, the conveyance of which he agrees to procure, the agreement is within the statute.²⁵ A contract in which one party agrees to buy land from a third person, taking the conveyance to himself, is within the statute if the land so bought is to be held for the benefit of the other party to the contract,²⁶ since the perform-

²⁰ *Baxter v. Kitch*, 37 Ind. 554; *Dowling v. McKenney*, 124 Mass. 478; *Cole v. Cole*, 99 Miss. 335, 54 So. 953, 34 L. R. A. (N. S.) 147, Ann. Cas. 1913 E. 332; *Slocum v. Wooley*, 43 N. J. Eq. 451, 11 Atl. 264; *Burlingame v. Burlingame*, 7 Cow. 92; *Jack v. McKee*, 9 Pa. St. 235; *Seifert v. Mueller*, 156 Wis. 629, 146 N. W. 787. Cf. *Gillfillan v. Schaller*, 33 S. D. 172, 144 N. W. 133.

²¹ *Purcell v. Miner*, 4 Wall. 513, 18 L. Ed. 435; *Welch v. Bigger*, 24 Idaho, 169, 133 Pac. 381; *Gordon v. Simmons*, 136 Ky. 273, 124 S. W. 273, Ann. Cas. 1912 A. 305; *Beckmann v. Mephram*, 97 Mo. App. 161, 70 S. W. 1094; *Sursa v.*

Cash, 171 Mo. App. 396, 156 S. W. 779; *Moss v. Culver*, 64 Pa. 414, 3 Am. Rep. 601; *Clegg v. Brannan* (Tex. Civ. App.), 190 S. W. 812.

²² *Lewis v. Brown*, 22 Cal. App. 38, 133 Pac. 331.

²³ *Wright v. Green* (Ind.), 119 N. E. 379.

²⁴ *Bannon v. Bean*, 9 Iowa, 395. See also *supra*, §§ 274, 276, *infra*, § 489.

²⁵ *Horsev. v. Graham*, L. R. 5 C. P. 9, 13; *Martin v. Wharton*, 38 Ala. 637; *Rawdon v. Dodge*, 40 Mich. 697. The case of *Cooley v. Osborne*, 50 Ia. 526, to the contrary cannot be supported.

²⁶ *Howland v. Blake*, 97 U. S. 624,

ance of such a contract involves the acquisition of an equitable interest in the land by one party and the transfer of such an interest to him by the other; but if the party agreeing to buy the land is to hold it when purchased for his own benefit, an oral agreement is valid.²⁷ Contracts to devise real estate by will, since they contemplate a transfer of real estate for a consideration, are also within the statute.²⁸ So an oral agreement by a widow to allow her community interest in real estate to pass under her husband's will, is unenforceable.²⁹ A defunct written agreement for the sale of an interest in land ordinarily cannot be orally revived,³⁰ so that an agreement that a mortgage formerly given to secure a debt which has been paid, shall stand as security for a new advance, must be in writing;³¹ but if the old writing accurately expresses every term of the new

24 L. Ed. 1027; *Stephenson v. Thompson*, 13 Ill. 186; *Heaton v. Gaines*, 198 Ill. 479, 487, 64 N. E. 1081; *Hocker v. Gentry*, 3 Metc. (Ky.) 463. In *McLennan v. Boutell*, 117 Mich. 544, 76 N. W. 75, an agreement by which one party was to convey land to a corporation in which the other parties to the contract were interested, was held within the statute.

²⁷ *Ambrose v. Ambrose*, 94 Ga. 655, 19 S. E. 980; *Little v. McCarter*, 89 N. C. 233.

²⁸ *Maddison v. Alderson*, 8 A. C. 467; *Horton v. Stegmyer*, 175 Fed. 756, 99 C. C. A. 332; *Quirk v. Bank of Commerce*, 244 Fed. 682, 157 C. C. A. 130; *Manning v. Pippen*, 95 Ala. 537, 11 So. 56; *Wallace v. Rappleye*, 103 Ill. 229, 252; *Wallace v. Long*, 105 Ind. 522, 5 N. E. 666, 55 Am. Rep. 222; *Wright v. Green* (Ind.), 119 N. E. 379; *Hamilton v. Thirston*, 93 Md. 213, 48 Atl. 709; *Gould v. Mansfield*, 103 Mass. 408, 4 Am. Rep. 573; *Ludwig v. Bungart*, 48 N. Y. App. Div. 613, 63 N. Y. S. 91; *Kling v. Bordner*, 65 Ohio St. 86, 61 N. E. 148; *Brown v. Golightly*, 106 S. Car. 519, 91 S. E. 869, Ann. Cas. 1918 A. 1185; *Goodloe v. Goodloe*, 116 Tenn. 252, 92 S. W. 767, 6 L. R. A.

(N. S.) 703; *Newcomb v. Cox*, 27 Tex. Civ. App. 583, 66 S. W. 338; *Henderson v. Davis* (Tex. Civ. App.), 191 S. W. 358; *Plunkett v. Bryant*, 101 Va. 814, 45 S. E. 742; *Swash v. Sharpstein*, 14 Wash. 426, 44 Pac. 862, 32 L. R. A. 796; *In re Edwall's Est.*, 75 Wash. 391, 134 Pac. 1041; *In re Sheldon's Est.*, 120 Wis. 26, 97 N. W. 524. Cf. *Horner v. Maxwell*, 171 Ia. 660, 153 N. W. 331; *Woods v. Dunn*, 81 Oreg. 457, 159 Pac. 1158; *Quinn v. Quinn*, 5 S. Dak. 328, 58 N. W. 808, 49 Am. St. 875. In *Gordon v. Spellman*, 145 Ga. 682, 89 S. E. 749, Ann. Cas. 1918 A. 852, performance of services during the promisor's life as consideration for the promise was held such part performance as to make the contract enforceable.

²⁹ *Herrick v. Miller*, 69 Wash. 456.

³⁰ *Smith v. Taylor*, 82 Cal. 533, 23 Pac. 217; *Davis v. Parish*, Litt. Cas. (Ky.) 153; *McConathy v. Lanham*, 116 Ky. 735, 76 S. W. 535; *Maxfield v. West*, 6 Utah, 327, 23 Pac. 754; *Williamson v. Paxton*, 18 Grat. 475; *Thompson v. Robinson*, 65 W. Va. 506, 64 S. E. 718.

³¹ *Ross v. Hodges*, 108 Ark. 270, 157 S. W. 391.

contract;³⁸ but the contract express or implied between the agent and principal as to the terms on which the authority should be exercised may also be enforced by one of them against the other, although the agency related to land, and the contract was not in writing;³⁹ unless the obligation of which enforcement is sought is to transfer an interest in land, in which case the obligation is unenforceable. Thus, if the agreed compensation of the agent was an interest in the land to which the agency related, he cannot recover it.⁴⁰

So "Where a man merely employs another person by parol as an agent to buy an estate, who buys it for himself and denies the trust, and no part of the purchase money is paid by the principal, and there is no written agreement, he cannot compel the agent to convey the estate to him, as that would be directly in the teeth of the Statute of Frauds," [either of the section invalidating oral trusts or that invalidating oral contracts to sell land].⁴¹

An oral agreement of partnership is valid though the intention of the partners is to own or deal in real estate,⁴² since the

bama, California, Colorado, Illinois, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, New York, North Dakota, Ohio, Pennsylvania, Rhode Island, West Virginia. See also *supra*, § 276.

³⁸ See *supra*, § 274.

³⁹ *Jackson v. Higgins*, 70 N. H. 637, 49 Atl. 574; *Abbott v. Hunt*, 129 N. C. 403, 40 S. E. 119.

⁴⁰ *Dunphy v. Ryan*, 116 U. S. 491, 29 L. Ed. 703, 6 S. Ct. 486; *Robbins v. Kimball*, 55 Ark. 414, 416, 18 S. W. 457, 29 Am. St. Rep. 45; *McDonald v. Maltz*, 78 Mich. 685, 44 N. W. 337; *Russell v. Briggs*, 165 N. Y. 500, 59 N. E. 303, 53 L. R. A. 556; *Harrison v. Bailey*, 14 S. Car. 334.

⁴¹ 2 Sugd. Vendors (14th ed.), 703. See also—*James v. Smith*, [1891] 1 Ch. 384; *Collins v. Sullivan*, 135 Mass. 461; *Allen v. Richard*, 83 Mo. 55; *Levy v. Brush*, 45 N. Y. 589; *Watson v. Erb*, 33 Ohio St. 35; *Nixon's Appeal*, 63 Pa. 279. Some decisions hold, however, that the obligation of the agent

to convey is imposed by law and is not within the statute. See *Boswell v. Cunningham*, 32 Fla. 277, 13 So. 354, 21 L. R. A. 54; *Rose v. Hayden*, 35 Kans. 106, 10 Pac. 554, 57 Am. Rep. 145, and cases therein cited.

⁴² *Dale v. Hamilton*, 5 Hare, 369; *Re De Nicola*, [1900] 2 Ch. 410; *McElroy v. Swope*, 47 Fed. 380, 386; *Bates v. Babcock*, 95 Cal. 479, 30 Pac. 605, 16 L. R. A. 745, 29 Am. St. Rep. 133; *Brown v. Spencer*, 163 Cal. 589, 126 Pac. 493; *VonTrotha v. Bamberger*, 15 Col. 1, 24 Pac. 883; *Lane v. Lodge*, 139 Ga. 93, 76 S. E. 874; *Morrill v. Colehour*, 82 Ill. 618; *Fitch v. King*, 279 Ill. 62, 116 N. E. 624; *Smith v. Hart*, 179 Ill. App. 98; *Holmes v. McCray*, 51 Ind. 358, 19 Am. Rep. 735; *Lewis v. Harrison*, 81 Ind. 278, 286; *Richards v. Grinnell*, 63 Ia. 44, 18 N. W. 668, 50 Am. Rep. 727; *Dudley v. Littlefield*, 21 Me. 418, 423; *Trowbridge v. Wetherbee*, 11 Allen, 361; *Wetherbee v. Potter*, 99 Mass. 354; *Lurie v. Pinanski*, 215 Mass. 229, 102 N. E.

§ 490. Contracts of partition or fixing boundaries.

In some States an anomalous position is given to contracts of partition and to contracts to settle a disputed boundary. It would seem on principle that an oral agreement for partition would be unenforceable, since it necessarily involves an attempted conveyance, or promise to convey; and so it is held in many jurisdictions;⁴⁶ but many of the United States hold the oral agreement valid, at least if acted upon, and the requirements generally observed in order to make executory oral contracts binding because of part performance⁴⁷ are not always considered.⁴⁸ So an agreement to settle a disputed boundary would seem necessarily to involve an agreement by one party, or both parties, to convey land unless the boundary agreed upon was in fact the actual boundary, which might be subsequently proved by a survey. If, as is sometimes said, the agreement does not aim to convey land, but when acted upon by the

⁴⁶ *Johnson v. Wilson*, Willes, 248; *Ireland v. Rittle*, 1 Atk. 541; *Whaley v. Dawson*, 2 Sch. & L. 367; *Bach v. Ballard*, 13 La. Ann. 487; *Duncan v. Sylvester*, 16 Me. 388; *Chenery v. Dole*, 39 Me. 162; *John v. Sabattis*, 69 Me. 473; *Porter v. Perkins*, 5 Mass. 233, 4 Am. Dec. 52; *Porter v. Hill*, 9 Mass. 34, 6 Am. Dec. 22; *Majors v. Majors*, 92 Neb. 473, 138 N. W. 574; *Ballou v. Hale*, 47 N. H. 347, 93 Am. Dec. 438; *Woodhull v. Longstreet*, 3 Har. 405; *Lloyd v. Conover*, 1 Dutch. 47; *Medlin v. Steele*, 75 N. C. 154; *Jones v. Reeves*, 6 Rich. L. 132. See also *Duncan v. Duncan*, 93 Ky. 37, 18 S. W. 1022; *Blanton v. Howard*, 148 Ky. 547, 146 S. W. 1089.

⁴⁷ See *infra*, § 494.

⁴⁸ *Long v. Dollarhide*, 24 Cal. 218; *Tuffree v. Polhemus*, 108 Cal. 670, 677, 41 Pac. 806; *Tomlin v. Hilyard*, 43 Ill. 300, 92 Am. Dec. 118; *Grimes v. Butts*, 65 Ill. 347; *Shepard v. Rinks*, 78 Ill. 188; *Gage v. Bissell*, 119 Ill. 298, 10 N. E. 238; *Lacy v. Gard*, 60 Ill. App. 72; *Foltz v. Wert*, 103 Ind. 404, 2 N. E. 950; *Moore v. Kerr*, 46 Ind. 468; *Bruce v. Osgood*, 113 Ind. 360, 14 N. E.

563; *Tate v. Foshee*, 117 Ind. 322, 20 N. E. 241; *Higginson v. Schaneback*, 23 Ky. L. Rep. 2230, 66 S. W. 1040; *Johnston v. Labat*, 26 La. Ann. 159; *Kunsie v. Nibbelink*, 199 Mich. 308, 165 N. W. 722; *Willey v. Bonney's Lessee*, 31 Miss. 644; *Pipes v. Buckner*, 51 Miss. 848; *Bompart v. Roderman*, 24 Mo. 385; *Jackson v. Harder*, 4 Johns. 202, 4 Am. Dec. 262; *Wood v. Fleet*, 36 N. Y. 499, 93 Am. Dec. 528; *Piatt v. Hubbell*, 5 Ohio, 243; *McKnight v. Bell*, 135 Pa. 358, 19 Atl. 1036; *Wolf v. Wolf*, 158 Pa. 621, 28 Atl. 164; *Rountree v. Lane*, 32 S. C. 160, 10 S. E. 941; *Meacham v. Meacham*, 91 Tenn. 532, 19 S. W. 757; *Stuart v. Baker*, 17 Tex. 417; *Smock v. Tandy*, 28 Tex. 130; *Mitchell v. Allen*, 69 Tex. 70, 6 S. W. 745; *Aycock v. Kimbrough*, 71 Tex. 330, 12 S. W. 71, 10 Am. St. Rep. 745; *Mass v. Bromberg*, 28 Tex. Civ. App. 145, 66 S. W. 468; *Whittemore v. Cope*, 11 Utah, 344, 40 Pac. 256; *Allen v. Allen (Utah)*, 166 Pac. 1169; *Brazee v. Schofield*, 2 Wash. Ty. 209, 3 Pac. 265. See also *Berry v. Seawall*, 65 Fed. 742, 13 C. C. A. 101.

§ 491. What is an interest in land.

The line which the decisions have drawn between goods, wares, and merchandise on the one side, and interests in land on the other side, is considered in connection with a later section of the statute.⁵² Any interest, however, which the law regards as real estate is within the statute, therefore an oral contract to mortgage or give security on real estate is unenforceable.⁵³ The common law regarded rent as "issuing from the land" and though the conception is artificial it is probably still law, and an agreement to transfer the right to rent must be in writing;⁵⁴ though a promise by an assignee of a lease to assume payment of the rent need not be.⁵⁵ A promise to give or take a lease,⁵⁶ a promise to assign a leasehold interest⁵⁷ or a statutory right of preëmption,⁵⁸ a promise of an easement or profit in real estate, such as the promise of a right to flood land,⁵⁹ to erect a dam,⁶⁰ to allow a roof to drip on adjoining land,⁶¹ to maintain a ditch,⁶² water pipe, or sewer,⁶³ a right

⁵² See *infra*, §§ 515-520.

⁵³ *Stringfellow v. Ivie*, 73 Ala. 209; *Marshall v. Livermore Water Co.* (Cal.), 5 Pac. 101; *Clabaugh v. Byerly*, 7 Gill, 354, 48 Am. Dec. 575; *Hackett v. Watts*, 138 Mo. 502, 40 S. W. 113; *Bernheimer v. Verdon*, 63 N. J. Eq. 312, 49 Atl. 732.

⁵⁴ In *Brown v. Brown*, 33 N. J. Eq. 650, an agreement to transfer rents which had been devised to the promisor was held within the statute. An oral agreement to make a charge upon rents was held invalid in *Ex parte Hall*, 10 Ch. D. 615. But an agreement by a tenant to pay an additional sum besides the rent is not within the statute unless charged upon the land. *Donellan v. Read*, 3 B. & Ad. 899.

⁵⁵ *Knight v. Blumenburg*, 111 Me. 190, 88 Atl. 474.

⁵⁶ *Mechelen v. Wallace*, 7 A. & E. 49; *Vaughan v. Hancock*, 3 C. B. 766; *Thursby v. Eccles*, 70 L. J. Q. B. (N. S.) 91; *Larkin v. Avery*, 23 Conn. 304; *Donovan v. Maloney*, 26 Del. 453, 84 Atl. 1032; *Matthes v. Wier* (Del. Ch.), 84 Atl. 878; *Strehl v. D'Evers*, 66

Ill. 77; *Bacon v. Parker*, 137 Mass. 309; *Smith v. Phillips*, 69 N. H. 470, 43 Atl. 183; *Dunckel v. Dunckel*, 56 Hun, 25, 8 N. Y. S. 888; *Jordan v. Greenboro Furnace Co.*, 126 N. C. 143, 35 S. E. 247, 78 Am. St. Rep. 644.

⁵⁷ *Buttemere v. Hayes*, 5 M. & W. 456; *Kingsley v. Siebrecht*, 92 Me. 23, 42 Atl. 249, 69 Am. St. Rep. 486; *Johnson v. Reading*, 36 Mo. App. 306; *Ware v. Chew*, 43 N. J. Eq. 493, 11 Atl. 746; *Tynan v. Warren*, 53 N. J. Eq. 313, 31 Atl. 596; *Potter v. Arnold*, 15 R. I. 350, 5 Atl. 379.

⁵⁸ *Lester v. White*, 44 Ill. 464.

⁵⁹ *Foote v. New Haven, etc., Co.*, 23 Conn. 214; *Clute v. Carr*, 20 Wis. 531, 91 Am. Dec. 442.

⁶⁰ *Moulton v. Faught*, 41 Me. 296; *Mumford v. Whitney*, 51 Wend. 380, 30 Am. Dec. 60.

⁶¹ *Tanner v. Volentine*, 75 Ill. 624.

⁶² *McReynolds v. Harrigfeld*, 26 Idaho, 26, 140 Pac. 1096; *Hitchens v. Shaller*, 32 Mich. 496.

⁶³ *Berwyn v. Berglund*, 255 Ill. 498, 99 N. E. 705; *Morse v. Lorenz*, 262 Ill. 115, 104 N. E. 237.

interest in land within the statute and a parol agreement by the mortgagor to sell it to a third person,⁷⁵ or to surrender it to the mortgagee,⁷⁶ is unenforceable. If an equitable interest in land has been created by a written contract, an oral rescission of the contract thereby restoring the equitable right to him who created it, seems as fully within the statute as if the equitable right had been conveyed, or contracted to be conveyed, to a third person, and so it has been held;⁷⁷ but there are also numerous decisions allowing the validity of an oral rescission,⁷⁸ many of which fail to recognize the point at issue, supposing apparently that all that is involved is the possibility of rescinding orally a contract which by statute must be in writing. Such oral rescission is unquestionably ordinarily possible.⁷⁹ The difficulty here is not merely that the original con-

Mo. 502, 40 S. W. 113; *Flinner v. McVay*, 37 Mont. 306, 96 Pac. 340; *Simms v. Killian*, 12 Ired. 252; *Society of Doukhobors v. Hecker*, 83 Oreg. 65, 162 Pac. 851; *Murphy v. Hubert*, 7 Pa. 420; *Meason v. Kaine*, 63 Pa. 335. See *infra*, §§ 927 *et seq.*, for some discussion of the nature of the buyer's interest.

⁷⁵ *Massey v. Johnson*, 1 Exch. 241, 255; *Haak Lumber Co. v. Crothers*, 146 Mich. 575, 109 N. W. 1066; *Odell v. Montross*, 68 N. Y. 499; *Vaughn v. Vaughn*, 100 Tenn. 282, 45 S. W. 677.

⁷⁶ *Borcherdt v. Faver*, 16 Col. App. 406, 413, 66 Pac. 251; *Montpelier Savings Bank v. Follett*, 68 Neb. 416, 94 N. W. 635; *Marble v. Marble*, 5 N. H. 374; *Clitus v. Langford* (Tex. Civ. App.), 24 S. W. 325. But see *Baxter v. Pritchard*, 122 Iowa, 590, 98 N. W. 372, 101 Am. St. Rep. 282, where the grantor in an absolute deed which was in fact executed as security, was held able to surrender by parol to the grantee the right of redemption; *Kaler v. Grady*, 18 Ky. L. Rep. 678, 37 S. W. 955, where a parol agreement not to redeem from an administrator's sale was upheld. Cf. *Boyd v. Stone*, 11 Mass. 342.

⁷⁷ *Barrett v. Durbin*, 106 Ark. 332, 153 S. W. 265; *Catlett v. Dougherty*, 21 Ill. App. 116, 119; *Dial v. Crain*, 10 Tex. 444; *Sanborn v. Murphy*, 86 Tex. 437, 25 S. W. 610. See also *Mallow v. Eastes*, 179 Ind. 267, 100 N. E. 836; *Gerard-Fillio Co. v. McNair*, 63 Wash. 321, 123 Pac. 462, 465.

⁷⁸ *Goss v. Nugent*, 5 B. & Ad. 58, 66 (see, however, *Harvey v. Grabham*, 5 A. & E. 61, 73); *Ely v. Jones*, 101 Kan. 572, 168 Pac. 1102; *Warden v. Bennett*, 145 Ky. 325, 140 S. W. 538; *Buel v. Miller*, 4 N. H. 196; *Miller v. Pierce*, 104 N. C. 389, 10 S. E. 554 (when accompanied by overt acts plainly showing an intention to abandon the contract); *Mahon v. Leech*, 11 N. Dak. 181, 90 N. W. 807; *Wadge v. Kittleson*, 12 N. Dak. 452, 97 N. W. 856; *Wisner v. Field*, 15 N. Dak. 43, 106 N. W. 38; *Boyce v. McCulloch*, 3 W. & S. 429, 39 Am. Dec. 35; *Brownfield's Ex. v. Brownfield*, 151 Pa. St. 565, 25 Atl. 92. See also *Baxter v. Pritchard*, 122 Iowa, 590, 98 N. W. 372, 101 Am. St. Rep. 282, stated *supra* n. 76; *Matthews v. Thompson*, 186 Mass. 14, 71 N. E. 93, 66 L. R. A. 421; *Correll v. Alspaugh*, 120 N. C. 362, 27 S. E. 85.

⁷⁹ See *infra*, §§ 592, 1828.

tract was in writing and required to be, but that an equitable estate in the land has been thereby created. It may indeed be argued that one who agrees to give up the equitable right of a contracting buyer does not by so doing transfer or convey anything to the contracting seller, but merely discharges the latter from an obligation which created an incumbrance on his land. Even under this argument it seems difficult to support an oral rescission in any jurisdiction having a section in its Statute of Frauds similar to section 3 of the English Statute which provides, among other things, that no interest in land shall be surrendered without writing.⁸⁰ But on analysis the situation seems to be more accurately expressed by saying that if ownership of land be regarded as the aggregate of certain rights and powers with reference to it, the owner who contracted to sell thereby parted with enough of these rights and powers to be called in themselves an interest in land, and that by the contract of rescission it was agreed that they should be restored to him.

§ 492. Contracts to sell or discharge mortgage debts.

It has been held in England that a contract for the sale of a debt secured by mortgage, even though the debt is represented by a negotiable bond or debenture, is a contract for the sale of an interest in land.⁸¹ Such decisions, however, fail to observe the distinction, which is believed to be vital, of a transaction on the one hand, not itself a sale of an interest in land but which by operation of law gives rise to such an interest and, on the other hand, a direct agreement for the transfer of an interest in land. Thus in a jurisdiction which allows to the vendor of

⁸⁰ See *supra*, § 449.

⁸¹ In *Toppin v. Lomas*, 16 C. B. 145, the court said, at page 160: "The obligee under such a bond stands in the position of a mortgagee, either directly or through the trustee; and in either case he has an interest in the land. When he agrees to sell his bond, he agrees to sell all his rights and remedies upon and incident thereto: the seller intends to sell, and the buyer to buy, the whole benefit of that bond.

A part of that benefit is, the security of the land upon which it is charged. I cannot entertain the smallest doubt that this is a contract for the sale of an interest in land." This decision was followed by the Court of Appeals in *Driver v. Broad*, [1893] 1 Q. B. 744, where a contract to sell debentures which were a floating charge on the assets of a company, was held within the statute because the company held some leasehold property.

real estate a lien for the price, a contract for the sale of land the memorandum of which did not specify that the vendor should have a lien would be valid and create a right to the lien; but if the agreement of the parties provided for a mortgage back of the property by the purchaser, this agreement would have to be in writing. It is probable that nowhere in the United States would a contract for the sale of a debt secured by mortgage be held within this section of the statute.⁸² So an oral agreement to assign a judgment which is a lien on the debtor's land is valid.⁸³ The distinction between a transfer of land by operation of law and by act of the parties is important also in relation to contracts to discharge encumbrances. A contract to pay a debt or to accept payment by way of accord and satisfaction, or otherwise, is not within the statute, though the effect of such payment may be to discharge a mortgage, and thereby retransfer an interest in land to the mortgagor.⁸⁴ On the other hand, an express promise by a mortgagee to surrender or discharge his mortgage, in so far as this involves anything more than accepting payment of the debt, is within the statute.⁸⁵ Whether an agreement by a mortgagee to discharge a mortgage means anything more in a particular case than a contract to accept satisfaction of his debt is a question of construction. In most States a mortgage is regarded as not only equitably an incident to the mortgage debt, but so completely an incident that an assignment of the debt makes the assignee the holder of the mortgage.⁸⁶ In such jurisdictions

⁸² *Rigney v. Lovejoy*, 13 N. H. 247; *Malins v. Brown*, 4 N. Y. 403, 410. But where choses in action are regarded as goods, wares and merchandise, or expressly included under the section of the statute relating to the sale of goods, such a contract concerning a debt, if the debt exceeded the statutory amount must be in writing. See *infra*, § 521.

⁸³ *Winberry v. Koonce*, 83 N. C. 351.

⁸⁴ *Post v. Gilbert*, 44 Conn. 9; *Ladd v. Holman*, 109 Me. 46, 82 Atl. 437; *Pike v. Brown*, 7 Cush. 133; *Carr v. Dooley*, 119 Mass. 294; *Fiske v. McGregory*, 34 N. H. 414; *Malins v.*

Brown, 4 N. Y. 403; *Green v. Randall*, 51 Vt. 67. So an agreement to pay taxes or assessments is not within the statute, though the payment will discharge an encumbrance on the land. *Preble v. Baldwin*, 6 Cush. 549; *Remington v. Palmer*, 62 N. Y. 31.

⁸⁵ *Leavitt v. Pratt*, 53 Me. 147; *Phillips v. Leavitt*, 54 Me. 405; *Hunt v. Maynard*, 6 Pick. *489; *Parker v. Barker*, 2 Metc. 324. So an agreement by the owner of a tax title to release his lien on payment of a certain sum is within the statute. *Osborne v. Waddell*, 176 Ala. 232, 57 So. 698.

⁸⁶ See 20 Cyc. 224.

it would seem that a contract by the mortgagee in discharge or assign a mortgage, involved nothing necessarily than an agreement to accept payment of the debt and to assign the debt.⁸⁷ But where it is held that the legal mortgage cannot be discharged or assigned without the execution of a transfer of the mortgagee's right in the property, the contrary result would be reached.⁸⁸ An oral contract between mortgagor and mortgagee that the latter should be to foreclose the mortgage and should pay a certain part of the proceeds to the mortgagor is not within the statute;⁸⁹ an oral agreement by the mortgagee to hold the premises subject to foreclosure still subject to redemption by the mortgagor is enforceable.⁹⁰

§ 493. Contracts relating to land but not for its sale within the statute.

It is only contracts for the sale of any interest in land

⁸⁷ In *Malins v. Brown*, 4 N. Y. 403, 409, Taylor, J., said: "It may well be doubted whether a parol agreement to discharge or release land from the imperfect lien of a mortgage, before foreclosure or foreclosure, affects such an estate or interest in, or trust or power over or concerning lands, or relating thereto," as is required by the statute to be in writing; for it has often been decided in this state, and such seems to be the established law, that 'a mortgage is not a conveyance of land within the statute of frauds, so as to require the assignment thereof to be in writing.'"

⁸⁸ In *Leavitt v. Pratt*, 53 Me. 147, 148, the court said:—"In Massachusetts and in this State, the interest of the mortgagee is held to be within the statute of frauds, and not to pass by delivery of the mortgage nor by parol assignment. *Vose v. Handy*, 2 Greenl. 322, 11 Am. Dec. 101; *Mitchell v. Burnham*, 44 Me. 286, 302; *Warden v. Adams*, 15 Mass. 233, 236. So, too, an oral promise, on sufficient consideration, made by a mortgagee to relin-

quish his claim to the land is void by the Statute of Frauds. *Franker v. Barker*, 2 Met. 423; *M. Hunt*, 5 Pick. 240; *Hunt v. M. Hunt*, 6 Pick. 489.

The law, however, on both points, has been held differently in some of the States. As, in New Hampshire, where it was decided that the interest of the mortgagee, being incident to the debt, was not within the Statute of Frauds. *Southwick v. Mendum*, 5 N. H. 420. So, in some of the States, it has been decided that a mortgagee may release his mortgage by a sufficient parol agreement, though the mortgage be unpaid and unpaid. *Wallis v. Long*, 738; *Howard v. Gresham*, 27 G. 288; *Ackla v. Ackla*, 6 Barr, 228. It has been seen, the decisions are variously been otherwise in this state and in Massachusetts."

⁸⁹ *Lane v. Flint*, 217 Mass. N. E. 570.

⁹⁰ *Downing v. Brennan* (Mass. N. E. 729).

are affected by the statute. Accordingly contracts which relate to land but do not involve agreement for its sale are not within the statute. A contract, though oral, that land shall be used or shall not be used in a particular way is enforceable⁹¹ unless the contract if enforced would give rise to a legal or equitable easement.⁹²

A contract for a license to use real estate which does not amount to an easement may be oral. Licenses are usually thought of as given without consideration and revocable, but it is possible to have a license promised for consideration, and if then revocable at all, it will not be revocable without subjecting the licensor to liability in damages. Also a contract to give board and lodging is not within the statute;⁹³ nor is a contract for the use of a hall on certain afternoons.⁹⁴ A contract giving a right of admission to a theatre is a contract for a license, and not for an easement,⁹⁵ as is a contract for a temporary and personal right to make bricks on the promisor's land with his clay and wood,⁹⁶ or to allow advertisements to be pasted on a wall.⁹⁷ Whether an agreement amounts to a contract for an easement or merely for a license is a difficult question, the answer to which cannot be attempted here, further than to say that it is important to determine whether the use contemplated is permanent and continuous on the one hand, or

⁹¹ *Smith-Powers Logging Co. v. Bernitt*, 237 Fed. 570; *Halbut v. Forrest City*, 34 Ark. 246; *Hall v. Solomon*, 61 Conn. 476, 23 Atl. 876, 29 Am. St. Rep. 218; *Pierce v. Woodward*, 6 Pick. 206; *Storms v. Snyder*, 10 Johns. 109; *Brown v. Morris*, 83 N. Car. 251; *Hamilton, etc., Co. v. Cincinnati Railroad*, 29 Ohio St. 341; *Leinaw v. Smart*, 11 Humph. 308. But see *Duncan v. LaBouisse*, 9 La. Ann. 49. So a promise by a landlord or tenant as to repairs or use of the demised premises may be oral. *Morgan v. Griffith*, L. R. 6 Ex. 70; *Angell v. Duke*, L. R. 10 Q. B. 174.

⁹² The following decisions held agreements in question within the statute. *Rice v. Roberts*, 24 Wis. 461 (contract between adjoining landowners that one

of them would not build flush with the street); *Sprague v. Kimball*, 213 Mass. 380, 100 N. E. 622 (contract by grantor to subject other lots to the same restriction as were in promisee's conveyance); and see cases of contracts for easements, *supra*, § 489.

⁹³ *Wright v. Stavert*, 2 El. & El. 721; *White v. Maynard*, 111 Mass. 250, 15 Am. Rep. 28; *Wilson v. Martin*, 1 Denio, 602. Though an oral contract to lease a room or part of a building would be unenforceable. *Edge v. Strafford*, 1 C. & J. 391.

⁹⁴ *Johnson v. Wilkinson*, 139 Mass. 3, 29 N. E. 62, 52 Am. Rep. 698.

⁹⁵ *Taylor v. Waters*, 7 Taunt. 374.

⁹⁶ *Brown v. Morris*, 83 N. C. 251.

⁹⁷ *King v. Allen*, [1916] A. C. 54.

temporary and occasional on the other hand, whether in terms of the promise would run with the land, or would impose a burden on one piece of land in favor of or would impose merely a personal duty on the promisee; and, also in the latter event, whether the duty would be enforceable in equity, not only against the promisor but also against one taking the land from him within the time of the agreement. In the last analysis, assuming that a contract, and not a mere permission without consideration existed, the question becomes one of how far the law shall permit incidents of ownership of land vested from the title and held either as a legal easement or means of specific performance as an equitable one.⁸⁸

Agreements to erect buildings or other structures which are not within the statute although the structures completed will be real estate.⁸⁹ So an agreement between owner and another by which the former is to pay the cost of planting trees or making other improvements,¹ as digging a ditch,² is valid though oral. Whether the case is of

⁸⁸ In *Norcross v. James*, 140 Mass. 188, 191, 2 N. E. 946, Holmes, J., said: "The question remains, whether, even if we make the further assumption that the covenant was valid as a contract between the parties, it is of a kind which the law permits to be attached to land in such a sense as to restrict the use of one parcel in all hands for the benefit of whoever may hold the other, whatever the principle invoked. For equity will no more enforce every restriction that can be devised, than the common law will recognize as creating an easement every grant purporting to limit the use of land in favor of other land. The principle of policy applied to affirmative covenants applies also to negative ones. They must 'touch or concern,' or 'extend to the support of the thing' conveyed. 5 Rep. 16 a, 24 b. They must be 'for the benefit of the estate.' *Cockson v. Cock*, Cro. Jac. 125. Or, as it is said more broadly, new and unusual

incidents cannot be attached by way either of benefit or burden. *Keppell v. Bailey*, 2 Myl. & Keen 169; *Ackroyd v. Smith*, 10 C. E. 101; *Tupper v. Tupper*, 2 H. & C. 121; *Jones v. Tankerville*, [1909] 1 Ch. 1; *Beasley v. Texas & Pacific Ry. Co.*, U. S. 492, 496, 24 Sup. Ct. L. Ed. 274.

⁸⁹ *Pitman v. Poor*, 38 N. H. 401; *Jackson v. Litch*, 62 Pa. 40; *Wiley v. Wiley*, 68 Vt. 39, 33 Atl. 101; *Bruns v. Spalding*, 90 N. H. 194.

¹ *Frear v. Hardenbergh*, 77 N. Y. 272; *Lower v. Winters*, 7 Vt. 101; *Fedell v. Ormand Min. Co.*, 97 S. E. 386. Cf. *Falmouth v. Falmouth*, 1 Cr. & M. 89, 108.

² *Plunkett v. Meredith*, 72 S. W. 600; *Croke v. American Bank*, 18 Co. App. 3, 70; *Haight v. Conners*, 149 Pa. 302.

the structure is to be erected on the boundary separating the estates of the contracting parties has given rise to some difference of opinion. It is argued that such an agreement necessarily involves the right to the use by each party of so much of the adjoining land as is necessary for the structure in question, and, therefore, involves the transfer of an interest in land. This has been so held in regard to a well on the line dividing the premises of the parties to the agreement.³ The same has been held in regard to an agreement to erect and maintain a portion of a partition fence without any stated limit of time.⁴ This argument, however, fails to take account of the distinction between a transfer effected by operation at law without any expression of the parties of such an intent, and a transfer directly created by act of the parties.⁵ The building of a fence does not transfer the boundary land to the use of several parties. The law generally requires this dedication. The fact that the erection of a boundary fence may result in the fence becoming real estate and may give each of the parties an interest in the fence and in the land under it, is accidental. It seems hard to suppose that a contract by a landowner to build a particular partition fence would be within the statute.⁶ Yet such a con-

³ In *Plunkett v. Meredith*, 72 Ark. 3, 7, 77 S. W. 600, the court said: "An agreement of appellant with appellee to dig a well on her lot is not a contract for an interest in land, is not within the statute of frauds, and need not be in writing. But a contract to dig a certain well on the dividing line between the lots of appellant and appellee, one half of which is on the lot of appellant and the other half is on the lot of appellee, deeper and until it affords a sufficient supply of water, and to allow appellee to use the same, is a contract for an interest in land, which is an easement, and should be in writing; and it cannot be enforced against the party pleading the statute of frauds in bar of the right to maintain an action thereon, unless it be in writing. Such a contract if enforced, would necessarily give to appellee the

right to use the land of appellant for a well."

⁴ *Knox v. Tucker*, 48 Me. 373. See also *Rudisill v. Cross*, 54 Ark. 519, 16 S. W. 575, 26 Am. St. Rep. 57; *DeMers v. Rohan*, 126 Iowa, 488, 102 N. W. 413. Cf. *Nelson v. Wilson*, 157 Ia. 80, 137 N. W. 1048.

⁵ In *Hutchinson Co. v. Gould* (Calif.), 181 Pac. 651, a contract for improvements was held not within the statute, even though it provided for a lien on land, since such a lien would have been created by law without an agreement for it.

⁶ Such was the contract in *Dodder v. Snyder*, 110 Mich. 69, 67 N. W. 1101, and *Berry v. Jones*, 106 Miss. 115, 63 So. 341. But even such a case was thought within the statute in *Tillis v. Treadwell*, 117 Ala. 445, 22 So. 983, which, however, involved an agree-

tract involves the same principle as a contract to fence for a season.⁷ The case should be the same if the agreement was to maintain a fence on the partition line, or of it, for an indefinite period, and many cases so have sometimes said or assumed that such a contract is revocable,⁸ but that must depend upon the terms of the contract. *Ex hypothesi* the promises are supported by consideration, and these promises more naturally than the arrangement shall continue for a reasonable time or on reasonable notice or even permanently than that it is at will. If indeed the agreement when properly construed means that the arrangement is to be permanent; it can be fairly argued that the undertaking is not a mere contract to maintain a fence but to impose upon one

an agreement concerning a party wall; and in *McManus v. Cooke*, 35 Ch. Div. 681, 682, Kay, J., held that the following contract was within the statute since the effect of the agreement would be to give to each party an easement of light over the other's land. "The Plaintiff and the Defendant, being desirous of rebuilding their respective premises, had several interviews in order harmoniously to arrange their new buildings so as not to interfere with each other's convenience. At one of such interviews it was verbally agreed between the Plaintiff and the Defendant in the presence of the Plaintiff's foreman, and upon drawings submitted shewing the intended construction of skylights, that the Plaintiff should at their joint expense pull down and rebuild a certain party-wall dividing the said premises, and also that each party should be at liberty to make a lean-to skylight resting on the said party-wall and running up to the sill of the first-floor window of his own building."

⁷ This was the form of contract in *Page v. Hodgdon*, 63 N. H. 53.

⁸ Such contracts were held not within the Statute of Frauds in *Guyer v. Stratton*, 29 Conn. 421; *Baynes v.*

Chastian, 68 Ind. 376; *Nelson v. Wilson*, 157 Ia. 80, 137 N. W. 1048; *McAfee v. Walker*, 82 Kan. 637, 27 L. R. A. 101; *Ivins v. Ackerson*, 38 N. D. 101; *Tupper v. Clark*, 43 Vt. 20; *Tuebert v. Sons*, 116 Minn. 101, 130 N. W. 986, Ann. C. 468. In *Ivins v. Ackerson* the court said at page 222 "and erroneous premise of this is, in assuming that if the part of the land, it follows that contracts cannot be made with respect to it. But the scope of the statute is by no means so broad as to forbid the transaction. The office is to interdict the transaction in the land by a contract put in writing. This is it and it goes no further. No contract to maintain that an agreement to build a fence, or to a building, or to work for wages upon land, is invalidated by the statute. Contracts may be said, taking them in the wide sense, to be contracts with respect to the land, but such is not the statutory words."

⁹ See, e. g., *Nelson v. Wilson*, 157 Ia. 80, 137 N. W. 1048; *Pitznig v. Nick*, 41 Wis. 676.

servitude subjecting its owner, whoever he may be, to the duty of fencing, and conveying to the owner of the other estate, whomsoever he may be, a corresponding easement.¹⁰ A parol agreement to this effect would be invalid.¹¹ Oral agreements between adjoining owners that there shall not be a fence between their premises,¹² or to locate a mining claim and do necessary assessment work¹³ have been sustained; and an agreement extending the time of redemption allowed by statute to an owner of land subject to encumbrances may also be oral;¹⁴ and so may a warranty of the quantity of land;^{14a} or an agreement by the purchaser to pay an additional price if the quantity of land conveyed exceeds a specified amount,¹⁵ or to pay an increased or diminished price or rental;¹⁶ or an agreement by a vendor that he would procure an abstract of his title, showing a good record title;¹⁷ or an assignment of a right to damage for an injury to land.¹⁸ A contract to pay the price of land actually conveyed is not within the statute. It is a unilateral obligation to pay a sum of money, and is not a contract either to buy or sell land. The sale has been made. Even though the contract originally was bilateral and was confessedly for the purchase and sale of land, it seems that the same consequence follows if the land is actually conveyed. There is then no longer a contract to sell but an actual sale, and the conveyance creates

¹⁰ As to easements of fencing, see—*Bronson v. Coffin*, 108 Mass. 175, 11 Am. Rep. 335; *Kellogg v. Robinson*, 6 Vt. 276, 27 Am. Dec. 550.

¹¹ See *supra*, § 489.

¹² *Bills v. Belknap*, 38 Iowa, 225.

¹³ *Clark v. Mitchell*, 35 Nev. 447, 130 Pac. 760; *Reagan v. McKibben*, 11 S. Dak. 270, 76 N. W. 943.

¹⁴ *Hamilton v. Terry*, 11 C. B. 954; *Schroeder v. Young*, 161 U. S. 334, 344, 40 L. Ed. 721, 16 S. Ct. 512; *Byers v. Locke*, 93 Cal. 493, 29 Pac. 119; *Cox v. Ratcliffe*, 105 Ind. 374, 5 N. E. 5; *Dow v. Bradley*, 110 Me. 249; *Gillespie v. Stone*, 70 Mo. 505. Cf. *Howland v. Blake*, 97 U. S. 624, 24 L. Ed. 1027.

^{14a} *Haviland v. Sammis*, 62 Conn. 44, 25 Atl. 394; *Currie v. Hawkins*, 118 N. C. 593, 24 S. E. 476; *Schrivver v.*

Eckenrode, 94 Pa. 456; *Garret v. Malone*, 8 Rich. (S. Car.), 335; *Davis v. Tisdale*, 4 Yerg. 173; *Cabot v. Christie*, 42 Vt. 121, 1 Am. Rep. 313. But if such a warranty is an indivisible part of a contract which is within the statute, the warranty is unenforceable. *Dyer v. Graves*, 37 Vt. 369.

¹⁵ *Seward v. Mitchell*, 1 Coldw. 87.

¹⁶ *Allen v. Rees*, 136 Ia. 423, 110 N. W. 583; *Nonamaker v. Amos*, 73 Ohio St. 163, 76 N. E. 949, 4 L. R. A. (N. S.) 980, 112 Am. St. Rep. 708.

¹⁷ *Owsley v. Jackson*, 163 Mo. App. 11, 144 S. W. 154; *McConnell v. Brainer*, 63 Mo. 461; *Seward v. Mitchell*, 1 Coldw. 87. See also *Nutting v. Dickinson*, 8 Allen, 540.

¹⁸ *Estes v. Chicago, etc., R. Co.*, 159 Ia. 666, 141 N. W. 49.

a debt for the price; so that whenever the land has been conveyed the obligation to pay the price may be enforced.¹⁹ This argument would probably not be wholly accepted in England. Though recovery would apparently be allowed if the transaction was originally unilateral,²⁰ if it were originally bilateral no recovery could be had on that contract though the seller performed his agreement.²¹ An agreement that the purchaser of land will share in some way the proceeds received from a resale of the premises, is not within the statute.²²

§ 494. Part performance of agreements for the sale of land.

From an early day courts of equity have excepted from the operation of the Statute of Frauds cases where there has been part performance, so called, of the agreement. Whether the basis of the doctrine originally was "that whenever acts had been done which were such as to be consistent only with the

¹⁹ *Estes v. Ballard*, 22 Cal. App. 334, 134 Pac. 361; *Neagle v. Kelly*, 44 Ill. App. 234 (affd. in 146 Ill. 460, 34 N. E. 947); *Delgarno v. Cement Co.*, 93 Kan. 654, 658, 145 Pac. 823; *Lewis v. Grimes*, 7 J. J. Marsh. 336; *Root v. Burt*, 118 Mass. 521; *Hurlburt v. Fitzpatrick*, 178 Mass. 287, 57 N. E. 464; *Lane v. Flint*, 217 Mass. 96, 104 N. E. 570; *Birch v. Baker*, 85 N. J. L. 660, 90 Atl. 297; *Bowen v. Bell*, 20 Johns. 338; *Negley v. Jeffers*, 28 Ohio St. 90; *Freed v. Richey*, 115 Pa. St. 361, 8 Atl. 626; *Ascutney Bank v. Ormsby*, 28 Vt. 721; *Spangler v. Ashwell*, 116 Va. 992, 83 S. E. 930. See also *Boston v. Boston*, 73 L. J. K. B. 17; *Holmwood v. Gillespie*, 11 Manitoba, 186; *Spencer v. Spencer*, 23 Manitoba, 461. Cf. *Coleman v. Chester*, 14 S. C. 286. In *Gillespie v. Battle*, 15 Ala. 276, the court sustained an action on a note for the purchase price of land of which the buyer was in possession. Though no conveyance had been made, the seller was not in default, and the court held that there was no failure of consideration. In *Birch v. Baker*, 85 N. J. L. 660, 90 Atl. 297, the convey-

ance was not made to the one who undertook to pay the price, but to his nominee. This was rightly held immaterial.

²⁰ *Angell v. Duke*, L. R. 10 Q. B. 174.

²¹ *Cocking v. Ward*, 1 C. B. 858. See also *Sanderson v. Graves*, L. R. 10 Ex. 234, 241.

²² *Hamilton v. Terry*, 11 C. B. 954; *Price v. Sturgis*, 44 Cal. 591; *Michael v. Foil*, 100 N. C. 178, 6 S. E. 264, 6 Am. St. Rep. 577; *McGinnis v. Cook*, 57 Vt. 36, 52 Am. Rep. 115. In *Alchin v. Hopkins*, 1 Bing. N. C. 99, however, an agreement for a composition with creditors which provided that the profits of the defendant's benefice should be collected by a receiver and a portion thereof applied in liquidation of the defendant's debts, was held to be within the statute. Similarly an oral agreement to repay a loan out of the future rent of a farm was held invalid in—*Ex parte Hall*, 10 Ch. Div. 615. English decisions seem to have gone very far in treating contracts relating to money secured by land within the statute. See *supra*, § 492.

existence of a contract, the case was taken out of the mischief of the statute and the only question was the sufficiency of the proof of what the contract was,"²³ or whether the injustice, amounting to a kind of fraud, of allowing the statute to be pleaded to an agreement which had already been partly performed,²⁴ or whether both of these reasons have been operative, it is at least certain that most courts of equity have not scrupled to enforce parol contracts for the sale of land, and sometimes even when the parties could be put substantially in *statu quo*, and when consequently the latter reason seems inapplicable. It is true that payment of a pecuniary consideration by the buyer is not generally held sufficient justification for enforcing specifically an oral contract to convey land,²⁵ the purchaser

²³ *Maddison v. Alderson*, 8 A. C. 467, by Lord Blackburn.

²⁴ In *Maddison v. Alderson*, 8 A. C. 467, Selborne, L. C., said: "In a suit founded on such part performance, the defendant is really 'charged' upon the equities resulting from the acts done in execution of the contract, and not (within the meaning of the statute), upon the contract itself. If such equities were executed, injustice of a kind which the statute cannot be thought to have had in contemplation would follow. Let the case be supposed of a parol contract to sell land, completely performed on both sides, as to everything except conveyance; the whole purchase money paid; the purchaser put into possession; expenditure by him (say in costly buildings) upon the property; leases granted by him to tenants. The contract is not a nullity; there is nothing in the statute to estop any court which may have to exercise jurisdiction in the matter from inquiring into and taking notice of the truth of the facts. All the acts done must be referred to the actual contract, which is the measure and test of their legal and equitable character and consequences. If, therefore, in such a case a conveyance were refused, and an action of ejectment brought by

the vendor or his heir against the purchaser, nothing could be done towards ascertaining and adjusting the equitable rights and liabilities of the parties, without taking the contract into account. The matter has advanced beyond the stage of contract; and the equities which arise out of the stage which it has reached cannot be administered unless the contract is regarded. The choice is between undoing what has been done (which is not always possible, or, if possible, just) and completing what has been left undone. The line may not always be capable of being so clearly drawn as in the case which I have supposed; but it is not arbitrary or unreasonable to hold that when the statute says that no action is to be brought to charge any person upon a contract concerning land, it has in view the simple case in which he is charged upon the contract only and not that in which there are equities resulting from *res geste* subsequent to and arising out of the contract." Consider in this connection the enforcement by equity of gifts of real estate because of improvements by the donee. See *supra*, § 139.

²⁵ *Maddison v. Alderson*, 8 App. Cas. 467, 478-479; *Humphreys v. Green*, 10 Q. B. D. 148, 159; *Purcell v. Minor*,

being left to his quasi-contractual remedy of recovering back what he has paid;²⁶ and the rule is not changed though the vendor is insolvent and the quasi-contractual remedy is therefore ineffectual.²⁷ Nor is the performance of services as consideration of a promise to convey land generally held sufficient to justify enforcement of a contract.²⁸ Nor will the preparation of

4 Wall. 513, 18 L. Ed. 435; Duff v. Hopkins, 33 Fed. 599, 607; Mialhi v. Lassabe, 4 Ala. 712; Underhill v. Allen, 18 Ark. 466; Fulton v. Jansen, 99 Cal. 587, 34 Pac. 331; Eaton v. Whitaker, 18 Conn. 222, 229; Neal v. Gregory, 19 Fla. 356; Black v. Black, 15 Ga. 445; Koenig v. Dohm, 209 Ill. 468, 479, 70 N. E. 1061; Johnston v. Glancey, 4 Blackf. 94, 28 Am. Dec. 45; Puterbaugh v. Puterbaugh, 131 Ind. 288, 30 N. E. 519; King v. Hartley (Ind. App.), 123 N. E. 728; Goddard v. Donaha, 42 Kans. 754, 22 Pac. 708; Guthrie v. Anderson, 47 Kans. 383, 28 Pac. 164; Green v. Jones, 76 Me. 563, 567; Hopkins v. Roberts, 54 Md. 321, 316; Washington County v. Carry (Md.), 24 Atl. 151; Thompson v. Gould, 20 Pick. 134; Glass v. Hulbert, 102 Mass. 24, 28, 3 Am. Rep. 418; De Moos v. Robinson, 46 Mich. 62, 8 N. W. 712, 41 Am. Rep. 144; Grinding v. Rehyl, 149 Mich. 641, 113 N. W. 290; Townsend v. Fenton, 32 Minn. 482, 31 N. W. 726; McGuire v. Stevens, 42 Miss. 724, 2 Am. Rep. 649; Parke v. Leewright, 20 Mo. 85; Boulder Co. v. Farnham, 12 Mont. 1, 29 Pac. 277; Baker v. Wiswell, 17 Neb. 52, 22 N. W. 111; Peters v. Dickinson, 67 N. H. 389, 32 Atl. 154; Brown v. Drew, 67 N. H. 569, 42 Atl. 177; Nibert v. Baghurst, 47 N. J. Eq. 201, 20 Atl. 252; Winchell v. Winchell, 100 N. Y. 159, 163, 2 N. E. 897; Cooley v. Lobdell, 153 N. Y. 596, 601, 47 N. E. 783; Russell v. Briggs, 165 N. Y. 500, 505, 59 N. E. 303, 53 L. R. A. 556; Woolley v. Stewart, 222 N. Y. 347, 118 N. E. 847; Sites v. Keller, 6 Oh. 483; Shahan v. Swan, 48 Ohio St. 25, 40, 29 Am. St.

Rep. 517; Weise's App., 72 Pa. 351, 355; Mims v. Chandler, 21 S. Car. 480; Humbert v. Brisbane, 25 S. Car. 506; Bradley v. Owsley, 74 Tex. 69, 72, 11 S. W. 1052; Maxfield v. West, 6 Utah, 327, 23 Pac. 754; Brown v. Pollard, 89 Va. 696, 701, 17 S. E. 6; Miller v. Lorrentz, 39 W. Va. 160, 19 S. E. 391; Summers v. Hively, 78 W. Va. 53, 88 S. E. 608; Brandeis v. Neustadt, 13 Wis. 142; Harney v. Burhans, 91 Wis. 348, 64 N. W. 1031. See also Kelly v. Fischer, 263 Ill. 184, 105 N. E. 21; Levy v. Yerbrough, 41 Okla. 16, 136 Pac. 1120. But see *contra*—Townsend v. Houston, 1 Harr. 532, 27 Am. Dec. 732; Houston v. Townsend, 1 Del. Ch. 416, 12 Am. Dec. 109; Query v. Liston, 92 Ia. 288, 60 N. W. 524 (statutory); Rohrbach v. Hammill, 162 Ia. 131, 143 N. W. 872 (statutory).

²⁶ See *infra*, § 534.

²⁷ Townsend v. Fenton, 32 Minn. 482, 21 N. W. 726; M'Kee v. Phillips, 9 Watts, 85; Bradley v. Owsley (Tex.), 19 S. W. 340.

²⁸ Quirk v. Bank of Commerce, 244 Fed. 682, 687, 157 C. C. A. 130 (Wisconsin law); Edwards v. Estell, 48 Cal. 194; Grant v. Grant, 63 Conn. 530, 29 Atl. 15; Mills v. Joiner, 20 Fla. 479; Cloud v. Greasley, 125 Ill. 313, 17 N. E. 826; Pond v. Sheean, 132 Ill. 312, 28 N. E. 1018, 8 L. R. A. 414; Wallace v. Long, 105 Ind. 522, 5 N. E. 666, 55 Am. Rep. 222; Austin v. Davis, 128 Ind. 472, 475, 25 N. E. 890, 12 L. R. A. 120, 25 Am. St. Rep. 456; Wright v. Green (Ind.), 119 N. E. 379; Renz v. Drury, 57 Kans. 84, 45 Pac. 71; Grinding v. Rehyl, 149 Mich. 641, 113 N. W. 290; Peters v. Dickinson, 67

deeds or giving instruction for their preparation validate the agreement.²⁹ And "an act which admits of explanation without reference to the alleged oral contract or a contract of the same general nature and purpose is not in general admitted to constitute a part performance."³⁰ But in many jurisdictions possession taken by the purchaser with the consent or acquiescence of the vendor is held to warrant specific enforcement of the contract.³¹ Since it is fundamental, however, as has been

N. H. 389, 32 Atl. 154; *Weeks v. Lund*, 69 N. H. 78, 45 Atl. 249; *Russell v. Briggs*, 165 N. Y. 500, 59 N. E. 303, 53 L. R. A. 556; *Howard v. Brower*, 37 Ohio St. 402; *Crabill v. Marsh*, 38 Ohio St. 331; *Moyer's App.*, 105 Pa. 432; *Ward v. Stuart*, 62 Tex. 333; *Wright v. Pucket*, 22 Gratt. 370; *Horn v. Ludington*, 32 Wis. 73; *Koch v. Williams*, 82 Wis. 186, 52 N. W. 257; *Kessler's Est.*, 87 Wis. 660, 59 N. W. 129; *Rodman v. Rodman*, 112 Wis. 378, 88 N. W. 218. A considerable minority of American decisions, however, hold the receipt of services as consideration especially if of such a character as not readily to be valued in money justification for a decree of specific performance against the vendor. *Chastain v. Smith*, 30 Ga. 96; *Gordon v. Spelman*, 145 Ga. 682, 89 S. E. 749, Ann. Cas. 1918 A. 852; *Warren v. Warren*, 105 Ill. 568; *Aldrich v. Aldrich*, 287 Ill. 213, 122 N. E. 472; *Chebak v. Battles*, 133 Ia. 107, 110 N. W. 330, 8 L. R. A. (N. S.) 1130, 12 Ann. Cas. 140; *Taylor v. Holyfield*, (Kans. 1919) 180 Pac. 208; *Taft v. Taft*, 73 Mich. 502, 41 N. W. 481; *Lloyd v. Hollenback*, 98 Mich. 203, 57 N. W. 110 [*cf.* *Grindling v. Rehyl*, 149 Mich. 641, 113 N. W. 290, 15 L. R. A. (N. S.) 466]; *Hall v. Harris*, 145 Mo. 614, 47 S. W. 506; *Fuchs v. Fuchs*, 48 Mo. App. 18; *Schutt v. Missionary Society*, 41 N. J. Eq. 115, 3 Atl. 398; *Pfuglar v. Pultz*, 43 N. J. Eq. 440, 11 Atl. 123; *Vreeland v. Vreeland*, 53 N. J. Eq. 387, 32 Atl. 3; *Brin-*

ton v. Van Cott, 8 Utah, 490, 33 Pac. 218.

²⁹ *Clerk v. Wright*, 1 Atkins. 12 (giving instructions for drawing conveyances); *Phillips v. Edwards*, 33 Beav. 440 (preparation of deed); *Nibert v. Baghurst*, 47 N. J. Eq. 201, 205, 20 Atl. 252. In *Gould v. Mansfield*, 103 Mass. 408, 4 Am. Rep. 573, and *In re Edwall's Estate*, 75 Wash. 391, 134 Pac. 1041, the simultaneous execution of mutual wills under agreement that they should be irrevocable, was held insufficient to render the agreement enforceable. See also *Grindling v. Rehyl*, 149 Mich. 641, 113 N. W. 290, 15 L. R. A. (N. S.) 466. So in *Welch v. Bigger*, 24 Ida. 169, 133 Pac. 381, an oral contract for the exchange of land was held not validated by one of the parties paying a mortgage on his own property and obtaining an abstract of title in order to put himself in position to perform.

³⁰ *Woolley v. Stewart*, 222 N. Y. 347, 118 N. E. 847, 848. See also *Biss v. Hygate*, [1918] 2 K. B. 315; *Kane v. Hudson*, 273 Ill. 350, 112 N. E. 683; *Sarkisian v. Teele*, 201 Mass. 596, 608, 88 N. E. 333. Therefore a conveyance of a piece of land in consideration of a cash payment and a conveyance of two lots, was thought not to justify the enforcement of an oral agreement, which formed part of the contract, to buy back the two lots. *McEvoy v. Brooks* (N. J. Eq.), 103 Atl. 403.

³¹ *Coles v. Pilkington*, L. R. 19 Eq. 174 (see also *Biss v. Hygate*, [1918]

said, that acts of part performance are ineffectual unless made in pursuance of the contract and referable to it, the continuance of a possession which existed prior to the agreement is insufficient.²² In a minority of the jurisdictions of the United States,

2 K. B. 315, and *cf.* *Ramsden v. Dyson*, L. R. 1 H. L. 129, 170; *Nelson v. Shelby Co.*, 96 Ala. 515, 522, 11 So. 695, 38 Am. St. Rep. 116 (changed by statute so as to require now, payment of at least some part of the price as well as transfer of possession); *Cooper v. Newton*, 68 Ark. 150, 157, 56 S. W. 867 (see also *Phillips v. Grubbs*, 112 Ark. 562, 167 S. W. 101, where there were also part payment and improvements); *Calanchini v. Branstetter*, 84 Cal. 249, 253, 24 Pac. 149 (see also *McGinn v. Willey*, 24 Cal. App. 303, 141 Pac. 49, where there were also payment and improvements); *Von Trotha v. Bamberger*, 15 Col. 1, 24 Pac. 883; *Van Epps v. Redfield*, 69 Conn. 104, 36 Atl. 1011 (see also *Verzier v. Convard*, 75 Conn. 1, 6, 52 Atl. 255); *Pleasanton v. Raughley*, 3 Del. Ch. 124; *Alderman v. Chester*, 34 Ga. 152; *Tibbs v. Barker*, 1 Blackf. 58; *Puterbaugh v. Puterbaugh*, 131 Ind. 288, 30 N. E. 519, 15 L. R. A. 341 (see also *Bastian v. Crawford*, 180 Ind. 697, 103 N. E. 792); *Anderson v. Simpson*, 21 Iowa, 399 [see also *Halligan v. Frey*, 161 Ia. 185, 141 N. W. 944, 49 L. R. A. (N. S.) 112]; *Baldwin v. Baldwin*, 73 Kans. 39, 84 Pac. 568, 4 L. R. A. (N. S.) 957 (see also *Taylor v. Taylor*, 79 Kans. 161, 99 Pac. 814; *Green v. Jones*, 76 Me. 563, 566; *Morris v. Harris*, 9 Gill, 19; *Bresnahan v. Bresnahan*, 71 Minn. 1, 73 N. W. 515; *Emmel v. Hayes*, 102 Mo. 186, 14 S. W. 209, 11 L. R. A. 323, 22 Am. St. Rep. 769; *Southmayd v. Southmayd*, 4 Mont. 100, 5 Pac. 318; *Brown v. Drew*, 67 N. H. 569, 42 Atl. 177; *Wharton v. Stoutenburgh*, 35 N. J. Eq. 266; *Kelley v. Stanberry*, 13 Ohio, 408; *Smith v. Smith*, 1 Rich. Eq. 130; *Parrill v. McKinley*, 9 Gratt. 1, 58

Am. Dec. 212; *Woods v. Stevenson*, 43 W. Va. 149, 27 S. E. 309; *Brown v. Western Md. Ry. Co.* (W. Va.), 99 S. E. 457; *Cutler v. Babcock*, 81 Wis. 195, 201, 51 N. W. 420, 29 Am. St. Rep. 882. See also *Read Drug & Co. v. Naltaus*, 129 Md. 67, 98 Atl. 158; *Putnam v. Tinkler*, 83 Mich. 628, 47 N. W. 687; *Atkinson v. Akin*, 197 Mich. 289, 163 N. W. 1024; *Rosenberger v. Jones*, 118 Mo. 559, 565, 24 S. W. 203; *Ross v. Alyea* (Mo.), 197 S. W. 268; *Stilling v. Stilling*, 67 N. H. 584, 42 Atl. 271; *Bowman v. Wolford*, 80 Va. 213; *Frede v. Pflugradt*, 85 Wis. 119, 55 N. W. 159.

²² *Smith v. Turner*, cited in *Seagood v. Meale*, Prec. in Ch. 561; *Brennan v. Bolton*, 2 Dr. & War. 349; *Ducie v. Ford*, 138 U. S. 587, 594, 34 L. Ed. 1091, 11 S. Ct. 417; *Winslow v. Baltimore & Co. R. Co.*, 188 U. S. 646, 23 S. Ct. 443, 47 L. Ed. 635; *Harman v. Harman*, 70 Fed. 894, 935, 17 C. C. A. 479; *Danforth v. Laney*, 28 Ala. 274; *Andrew v. Babcock*, 63 Conn. 109, 121, 26 Atl. 715; *Koch v. Nat. Ass'n*, 137 Ill. 497, 27 N. E. 530; *Johnston v. Glancey*, 4 Blackf. 94, 28 Am. Dec. 45; *Green v. Groves*, 109 Ind. 519, 10 N. E. 401; *Swales v. Jackson*, 126 Ind. 282, 26 N. E. 62; *King v. Hartley* (Ind. App.), 123 N. E. 728; *Recknagle v. Schmaltz*, 72 Ia. 63, 33 N. W. 365; *Allen v. Bemis*, 120 Ia. 172, 94 N. W. 560; *Hartshorn v. Smart*, 67 Kans. 543, 73 Pac. 73; *Rosenthal v. Freeburger*, 26 Md. 75; *Messmore v. Cunningham*, 78 Mich. 623, 44 N. W. 145; *Emmel v. Hayes*, 102 Mo. 186, 14 S. W. 209, 11 L. R. A. 323, 22 Am. St. Rep. 769; *Starks v. Garver Lumber Mfg. Co.*, 182 Mo. App. 241, 167 S. W. 1198; *Peters v. Dickinson*, 67 N. H. 389, 32 Atl. 154; *Cooley v. Lobdell*, 153 N. Y.

however, a stricter rule prevails than that hitherto stated. In some of these States payment of all or part of the consideration or improvements on the property must be made as well as possession taken in order to justify specific performance.³³ In Massachusetts the doctrine of part performance is limited perhaps as strictly as in any jurisdiction where the doctrine is recognized at all. To justify specific performance it is there held that not only must the premises have been occupied, but that improvements "have been induced by the contract and in reliance upon its performance, and such that adequate compensation could not be made for them by the defendant except by the conveyance of the premises."³⁴ A rule similar to that

596, 47 N. E. 783; *Railroad Co. v. West*, 57 Ohio St. 161, 168, 49 N. E. 344; *Roberts v. Templeton*, 48 Ore. 65; 3 L. R. A. (N. S.) 790, 80 Pac. 481; *Le Vee v. Le Vee*, (Oreg. 1919), 181 Pac. 351; *Ackerman v. Fisher*, 57 Pa. 457; *Poag v. Sandifer*, 5 Rich. Eq. 170; *Anthony v. Leftwich's Representatives*, 3 Rand. 238. Cf. *Eason v. Roe*, 185 Ala. 71, 64 So. 55; *Segers v. Williams*, 147 Ga. 219, 93 S. E. 215; *Morrison v. Herrick*, 130 Ill. 631, 22 N. E. 537. But in *Biss v. Hygate*, [1918] 2 K. B. 315, where a tenant under an oral lease went into possession before the time fixed for the beginning of the agreed term, his continuance in possession after that time was held to justify specific enforcement of the agreement. Possession which has already been abandoned has also been thought inadequate. *White v. Watkins*, 23 Mo. 423, 428. In *Purcell v. Minor*, 4 Wall. 513, 518, 18 L. Ed. 435, Grier, J., said that the requirement of delivery of possession "will not be satisfied by proof of a scrambling and litigious possession." These words were quoted with approval in *Ducie v. Ford*, 138 U. S. 587, 594, 34 L. Ed. 1091, 11 S. Ct. 417.

³³ *Nelson v. Shelby County*, 96 Ala. 515, 11 So. 695, 38 Am. St. Rep. 116 (statutory); *Storthz v. Watts*, 125 Ark.

393, 188 S. W. 1166; *Gorham v. Dodge*, 122 Ill. 528, 14 N. E. 44; *Wright v. Raftree*, 181 Ill. 464, 473, 54 N. E. 998; *Koenig v. Dohm*, 209 Ill. 468, 479, 70 N. E. 1061; *Corbly v. Corbly*, 280 Ill. 278, 117 N. E. 393; *Weir v. Weir*, 287 Ill. 495, 122 N. E. 868 (cf. *Aldrich v. Aldrich*, 287 Ill. 213, 122 N. E. 472); *Kinyon v. Young*, 44 Mich. 339, 6 N. W. 835; *Atkinson v. Akin*, 197 Mich. 289, 163 N. W. 1024; *Chapel v. Chapel*, 132 Minn. 86, 155 N. W. 1054 (see also *Lindell v. Lindell*, 135 Minn. 368, 160 N. W. 1031); *Sanberg v. Clausen*, 134 Minn. 321, 159 N. W. 752; *Haines v. Spanogle*, 17 Neb. 637, 24 N. W. 211; *Lipp v. Hunt*, 25 Neb. 91, 41 N. W. 143; *Miller v. Ball*, 64 N. Y. 286; *Dunckel v. Dunckel*, 141 N. Y. 427, 36 N. E. 405; *Gibbs v. Horton Co.*, 61 N. Y. App. Div. 621, 71 N. Y. S. 193; *Wallace v. Scoggins*, 17 Ore. 476, 21 Pac. 558, 17 Am. St. Rep. 749; *Peckham v. Barker*, 8 R. I. 17; *Griffith v. Abbott*, 56 Vt. 356; *Holmes v. Caden*, 57 Vt. 111; *Gove v. Gove's Adm.*, 88 Vt. 115, 92 Atl. 10. See also *Adams v. White*, 40 Okla. 535, 139 Pac. 514; *Bendon v. Parfit*, 74 Wash. 645, 134 Pac. 185.

³⁴ *Burns v. Daggett*, 141 Mass. 368, 6 N. E. 727, following *Glass v. Hulbert*, 102 Mass. 24, 3 Am. Rep. 418; *Potter v. Jacobs*, 111 Mass. 32. See also to the same effect—*Low v. Low*, 173 Mass.

adopted in Massachusetts is found in the decision of the other States, and of the Supreme Court of the United States. Almost always it is the buyer who seeks to enforce an oral contract on grounds of part performance, but it is settled that the seller also may enforce the buyer's promise if the circumstances are such that the buyer could not obtain a suit had the seller made default.³⁶ The doctrine of part performance by the seller will be rare where there has been no transfer of possession, such a situation seems to have been said in England—"If I agree with A without writing, that I will build a house on my land, and then will sell it to him at a stipulated price, and in pursuance of that agreement I build a house, this may afford a ground for compelling A to complete the purchase,"³⁷ and in the later case it was questioned whether this statement was accurate without further facts, it was held that where the seller had built a house for the buyer and the latter had visited the progress of the building and the site and made material alterations and improvements, which were made out by the seller, specific performance would be granted against the buyer.³⁸ In a few States the doctrine that part performance validates an oral contract is wholly

580, 54 N. E. 257; *Perkins v. Perkins*, 181 Mass. 401, 63 N. E. 926; *Traveler Shoe Co. v. Koch*, 216 Mass. 412, 103 N. E. 931.

³⁶ *Purcell v. Miner*, 4 Wall. 513, 18 L. Ed. 455 (*cf.* *Townsend v. Vanderwerker*, 160 U. S. 171, 183, 40 L. Ed. 383, 16 S. Ct. 258); *Sample v. Horlacher*, 177 Pa. 247, 35 Atl. 615; *Derr v. Ackerman*, 182 Pa. 591, 38 Atl. 475; *Morris v. Gaines*, 82 Tex. 255, 17 S. W. 538; *Weatherford, etc., Ry. Co. v. Wood*, 88 Tex. 191, 194, 30 S. W. 859, 28 L. R. A. 526. In *Sears v. Reddick*, 211 Fed. 856, 128 C. C. A. 234 (Kans.), the court said (citing Kansas decisions) that irreparable injury was the test, not possession or improvements.

³⁷ *Pyke v. Williams*, 2 Vern. 455; *Ducie v. Ford*, 138 U. S. 587, 594, 34 L. Ed. 1091, 11 S. Ct. 417; *Hodges v.*

Kowing, 58 Conn. 12, 18 L. R. A. 87; *Andrew v. E. Conn.* 109, 26 Atl. 715; *Witt* 98 Kans. 554, 158 Pac. 851; *v. Stoutenburgh*, 35 N. J. Harris v. Knickerbacker, 5 Reed v. Reed, 12 Pa. 117; *Puget Mill Co.*, 28 Wash. 5867; *Steenrod's Adm. v. W. Co.*, 27 W. Va. 1.

³⁸ *Caton v. Caton*, L. R. and this passage was referred out comment by Kay, J., in *v. Cooke*, 35 Ch. D. 681.

³⁹ *Dickinson v. Barron*, [18339, *Kekewich*, J.

⁴⁰ *Quirk v. Bank of Commerce* Fed. 682, 687, 157 C. C. A. (Tennessee law); *Usher v. Flood*, 8 Bullitt v. Eastern Kentucky 93 Ky. 324, 36 S. W. 16;

The doctrine is exclusively enforced by courts of equity powers.⁴⁰

§ 495. Agreements not to be performed within a year.

It is well settled that the oral agreements invalidated by the statute because not to be performed within a year include those only which cannot be performed within that period. A promise which is not likely to be performed within a year, and which in fact is not performed within a year is not within the statute if at the time the contract is made there is a possibility in law and in fact that full performance such as the parties intended may be completed before the expiration of a year.⁴¹

Humble, 154 Ky. 708, 159 S. W. 554; Niles v. Davis, 60 Miss. 750, 752; Washington v. Soria, 73 Miss. 665, 19 So. 485, 55 Am. St. Rep. 555; Barnes v. Brown, 71 N. C. 507; White v. Holly, 91 N. C. 67; Ridley v. McNairy, 2 Humph. 174; Goodloe v. Goodloe, 116 Tenn. 252, 92 S. W. 767, 6 L. R. A. (N. S.) 703.

⁴⁰ In *O'Herlihy v. Hedges*, 1 Sch. & Lef. 123, 130, Lord Redesdale said: "But this is a contract on which no action at law could be maintained, notwithstanding what Mr. Justice Buller says in one or two cases [*Brodie v. St. Paul*, 1 Ves. Jr. 326, 333], that part performance takes a case out of the statute, at law as well as in equity. That opinion will be found wrong; and I recollect Mr. Justice Buller, upon being pressed with the consequences of that opinion in case of a demurrer to evidence, being obliged to abandon the position. The ground on which a court of equity goes in cases of part performance is that sort of fraud which is cognizable in equity only." To the same effect, see *Cooth v. Jackson*, 6 Ves. 12, 39; *Quirk v. Bank of Commerce*, 242 Fed. 682, 687, 157 C. C. A. 130; *Henry v. Wells*, 48 Ark. 485, 3 S. W. 637; *Eaton v. Whitaker*, 18 Conn. 222, 44 Am. Dec. 586; *Dougherty v. Catlett*, 129 Ill. 431, 21 N. E. 932;

Chicago Co. v. Davis Co., 142 Ill. 171, 31 N. E. 438; *Leavitt v. Stern*, 159 Ill. 526, 42 N. E. 869; *Barickman v. Kuykendall*, 6 Blackf. 21, 24; *Norton v. Preston*, 15 Me. 14, 32 Am. Dec. 128; *Kidder v. Hunt*, 1 Pick. 328, 11 Am. Dec. 183; *Adams v. Townsend*, 1 Met. 483; *Bartlett v. Bartlett*, 103 Mich. 293, 61 N. W. 500; *Nally v. Reading*, 107 Mo. 350, 17 S. W. 978; *Lane v. Shackford*, 5 N. H. 130, 132; *Smith v. Phillips*, 69 N. H. 470, 43 Atl. 183; *White v. Poole*, 74 N. H. 71, 65 Atl. 255; *Russell v. Briggs*, 165 N. Y. 509, 59 N. E. 303, 53 L. R. A. 556; *Davis v. Moore*, 9 Rich. 215; *Brown v. Pollard*, 89 Va. 696, 701, 17 S. E. 6; *Kimmins v. Oldham*, 27 W. Va. 258. But see *contra*—*Follmer v. Dale*, 9 Pa. 83.

⁴¹ *Smith v. Neale*, 2 C. B. (N. S.) 67; *Ridley v. Ridley*, 34 Beav. 478; *McGregor v. McGregor*, 21 Q. B. D. 424 (overruling *Davey v. Shannon*, 4 Exch. D. 81); *Lavalette v. Riches*, 24 T. L. R. 336; *Nester v. Diamond Match Co.*, 143 Fed. 72, 74 C. C. A. 266; *American Fine Art Co. v. Simon*, 140 Fed. 529, 72 C. C. A. 45; *Quirk v. Bank of Commerce*, 244 Fed. 682, 157 C. C. A. 130; *Heflin v. Milton*, 69 Ala. 354; *Sweet v. Desha Lumber Co.*, 56 Ark. 629, 20 S. W. 514; *Graham v. Jonesboro, etc., R. Co.*, 111 Ark. 598,

Therefore, a contract of insurance for a term of years within a year, is not within the statute, since by the time the contract a contingency or contingencies may occur

- 164 S. W. 729; *Buckley v. Continental Gin Co.*, 113 Ark. 15, 166 S. W. 744; *Bonner v. Kimball-Lacy Lumber Co.*, 114 Ark. 42, 169 S. W. 242; *Bank of Orland v. Fennell*, 133 Cal. 475, 65 Pac. 976; *Woodall v. Davis-Cresswell Mfg. Co.*, 9 Col. App. 198, 48 Pac. 670; *Clark v. Pendleton*, 20 Conn. 495; *Sarles v. Sharlow*, 5 Dak. 100, 37 N. W. 748; *Devalinger v. Maxwell*, 4 Penne-will, 185, 54 Atl. 684; *Young Men's Christian Assoc. v. Estill*, 140 Ga. 291, 78 S. E. 1075, 48 L. R. A. (N. S.) 783, Ann. Cas. 1914 D. 136; *White v. Murtland*, 71 Ill. 250, 22 Am. Rep. 100; *Mutual Life Ins. Co. v. Ritscher*, 196 Ill. App. 27; *Straughan v. Indianapolis, etc., R. Co.*, 38 Ind. 185; *Durham v. Hiatt*, 127 Ind. 514, 26 N. E. 401; *Sutphen v. Sutphen*, 30 Kans. 510, 2 Pac. 100; *Aiken v. Nogle*, 47 Kans. 96, 27 Pac. 825; *Louisville, etc., R. Co. v. Offut*, 99 Ky. 427, 36 S. W. 181, 59 Am. St. Rep. 467; *Story v. Story*, 22 Ky. L. Rep. 1731, 1869, 61 S. W. 279, 62 S. W. 865; *Whitley v. Whitley's Adm.*, 26 Ky. L. Rep. 134, 80 S. W. 825; *Owensboro Tool Co. v. Moore*, 154 Ky. 431, 157 S. W. 1121; *Walker v. Metropolitan Ins. Co.*, 56 Me. 371; *Neal v. Parker*, 98 Md. 254, 57 Atl. 213; *Campbell v. Burnett*, 120 Md. 214, 87 Atl. 894; *Carnig v. Carr*, 167 Mass. 544, 46 N. E. 117, 35 L. R. A. 512, 57 Am. St. Rep. 488; *Scribner v. Flagg Mfg. Co.*, 175 Mass. 536, 56 N. E. 603; *Collins v. Snow*, 218 Mass. 542, 106 N. E. 148; *Elwell v. State Mut. L. Assur. Co.*, 230 Mass. 248, 119 N. E. 794; *Smalley v. Mitchell*, 110 Mich. 650, 68 N. W. 978; *Wiebeler v. Milwaukee Ins. Co.*, 30 Minn. 464, 16 N. W. 363; *Stitt v. Rat Portage Co.*, 98 Minn. 52, 107 N. W. 824; *Green v. Whaley*, 271 Mo. 636, 197 S. W. 355; *Boggs v. Pacific Laundry Co.*, 86 Mo. App. 616; *Simmons v. Simmons*, 9 146 N. W. 951; *Gault v. N. H.* 183; *Burgesser v. N. J. L.* 286, 62 Atl. 9; *Balch (N. J. L.)*, 105 Atl. 1; *v. Voigt*, 134 N. Y. 69, 3 30 Am. St. Rep. 622; *Jones v. Ohio St.* 146; *Nonamant v. Ohio St.* 163, 76 N. E. A. (N. S.) 980, 112 Am. S. *Hodges v. Richmond M. R. I.* 482; *Groce v. West (Tex. Civ. App.)*, 165 S. W. *v. Stallings (Tex. Civ. App.)* 140; *Seddon v. Rosenbaum* 928, 9 S. E. 326, 3 L. R. A. *ley v. Zenn*, 74 W. Va. 43, 8 *McClanahan v. Otto Mann* 74 W. Va. 543, 82 S. E. 7; *Bowyer Smokeless Coal Co.* 99 S. E. 213. See also case section *passim*. The lead *Warner v. Texas, etc., R. Co.* 418, 17 S. Ct. 147, 41 L. Ed. the defendant orally promised a switch for the plaintiff as he needed it." The same maintained for thirteen years abolished. The railway company held liable. Somewhat to their facts are *Graham v. etc., R. Co.*, 111 Ark. 598, 729; *Frankfort, etc., R. Co.* 153 Ky. 534, 156 S. W. 103; *v. South Haven, etc., Co.*, 50, 100 N. W. 1009. A few hold that a contract which terminates a year is within the statute less of other possibilities. *Middleton*, 1 Desauss. 116; *McMichael*, 12 Rich. L. 176 (*Gibburg Cotton Oil Co. v. Jones*, 148, 80 S. E. 86). See also *v. Mosher*, 97 Mich. 554, 56 N. In *Warren Chemical & Mfg.*

year which will require the full payment of the policy.⁴² Nor is an oral promise performable on the marriage of the promisee unenforceable,⁴³ nor a promise of performance or forbearance during the life of a specified person,⁴⁴ nor a promise performable

Holbrook, 118 N. Y. 586, 593, 23 N. E. 908, 16 Am. St. Rep. 788, the court said: "While it is true, as insisted by the appellant, that it was not provided by the terms of the contract that it should be performed within one year from its making, neither was it provided that it should not be performed within such period. Nothing whatever was said as to time. Now the statute does not include an agreement which is not likely to be performed, nor yet one which is simply not expected to be performed within the space of a year. Neither does it include an agreement which, fairly and reasonably interpreted, admits of a valid execution within that time, although it may not be probable that it will be. (*Kent v. Kent*, 62 N. Y. 560, 20 Am. Rep. 502.)"

⁴² *Springfield Ins. Co. v. De Jarnett*, 111 Ala. 248, 19 So. 995 (fire); *Mattingly v. Springfield Ins. Co.*, 120 Ky. 768, 83 S. W. 577 (fire); *Sanford v. Orient Ins. Co.*, 174 Mass. 416, 54 N. E. 883 (fire); *Wiebeler v. Milwaukee Ins. Co.*, 30 Minn. 464, 16 N. W. 363 (fire); *Trustees v. Brooklyn Fire Ins. Co.*, 19 N. Y. 305, 28 N. Y. 153 (fire); *International Ferry Co. v. American Fidelity Co.*, 207 N. Y. 350, 101 N. E. 160 (marine liability). But a contract for placing insurance on vessels during two years is within the statute. *Johnson v. Harper Transp. Co.*, 244 Fed. 936, 157 C. C. A. 286. Cf. *Struzewski v. Farmers' F. Ins. Co.*, 179 N. Y. App. D. 318, 166 N. Y. S. 362.

⁴³ *Peter v. Compton, Skinner*, 353. See also *Hughes v. Frum*, 41 W. Va. 445, 23 S. E. 604.

⁴⁴ *Ridley v. Ridley*, 34 Beav. 478 (to leave property by will); *McGregor v. McGregor*, 21 Q. B. D. 424 (to

pay a separate wife a weekly allowance for maintenance. This case expressly overrules *Davey v. Shannon*, 4 Ex. D. 81, and apparently by implication, *Eley v. Positive Government, etc., Co.*, 1 Exch. D. 20, 88); *Hampton v. Caldwell*, 95 Ark. 387, 129 S. W. 816; *Osgood v. Skinner*, 111 Ill. App. 606 (not to compete); *Hill v. Jamieson*, 16 Ind. 125, 79 Am. Dec. 414 (not to compete); *Bell v. Hewitt's Ex.*, 24 Ind. 280 (to leave property by will); *Harper v. Harper*, 57 Ind. 547 (to support for life); *Welz v. Rhodius*, 87 Ind. 1, 44 Am. Rep. 747 (not to compete); *Cox v. Baltimore, etc., R. Co.*, 180 Ind. 495, 103 N. E. 337, 50 L. R. A. (N. S.) 453 (to serve for employee's life or as long as he proved competent and worthy); *Wolverton v. Bruce*, 6 Ind. Ter. 135, 89 S. W. 1018 (not to compete with promisee); *Atchison, etc., R. Co. v. English*, 38 Kans. 110, 16 Pac. 82 (to give railroad pass annually for life); *Pierson v. Kingman Milling Co.*, 91 Kans. 775, 139 Pac. 394, 92 Kans. 468, 140 Pac. 1033 (to serve for employee's life); *Howard's Adm. v. Burgen*, 4 Dana, 137 (to board for life); *Bull v. McCrea*, 8 B. Mon. 422 (to support for life); *Myles v. Myles*, 6 Bush, 237 (to leave property by will); *Stowers v. Hollis*, 83 Ky. 544 (to support for life); *Dickey v. Dickinson*, 105 Ky. 748, 49 S. W. 761 (not to compete with promisee); *Thomas v. Feese*, 21 Ky. L. Rep. 206, 51 S. W. 150 (to serve for employer's life in consideration of promise to will property); *McDaniel v. Hutcherson*, 136 Ky. 412, 124 S. W. 384 (to furnish a house for promisor's life and leave property by will); *Waggener v. Howsley*, 164 Ky. 113, 175 S. W. 4 (to pay \$10 a month for life);

promise of permanent personal performance is in legal effect a promise of performance for life, and therefore not within the statute;⁴⁷ and the same principle has been applied to promises in terms of unlimited duration made by or to a corporation when performance of the promise is by the nature thereof limited to the life of the corporation or the continuance of its business.⁴⁸ On the other hand, a promise, the performance of which is to continue for a fixed period, exceeding a year from the making of the contract, or is not to end until the expiration of such a period, must be in writing.⁴⁹ Thus a contract to

work); *Yellow Poplar Lumber Co. v. Rule*, 106 Ky. 455, 50 S. W. 685 (so long as defendant was engaged in a certain business); *H. J. McGrath Co. v. Marchant*, 117 Md. 472, 83 Atl. 912 (to serve for a term exceeding a year provided the employer continued so long in business); *Sax v. Detroit, etc., R. Co.*, 125 Mich. 252, 84 N. W. 314 (as long as his services are satisfactory); *Drew v. Billings-Drew Co.*, 132 Mich. 65, 92 N. W. 774 (until a lessor could obtain another tenant); *DeLand v. Hall*, 134 Mich. 381, 96 N. W. 449 (promise made Nov. 14th to charter a tug until the end of the ensuing navigation season, which did not in fact end until Dec. 5th of the following year); *Harrington v. Kansas City, etc., R. Co.*, 60 Mo. App. 223 (as long as he shall properly do his work); *Carter White Lead Co. v. Kinlin*, 47 Neb. 409, 66 N. W. 536 (as long as works are kept running); *Greene v. Harris*, 9 R. I. 401 (as long as parties are mutually satisfied); *Huggins v. Carey* (Tex. Civ. App.), 149 S. W. 390 (as soon as plaintiff could have a suitable house erected and wind up his business). See also *McGregor v. McGregor*, 21 Q. B. D. 424; *Osmont v. McElrath*, 68 Cal. 466, 9 Pac. 731, 58 Am. Rep. 17; *Burden v. Lucas*, 19 Ky. 1581, 44 S. W. 86; *Carnig v. Carr*, 167 Mass. 544, 46 N. E. 117, 35 L. R. A. 512, 57 Am. St. Rep. 488; *Drew v. Wiswall*, 183 Mass. 554, 67 N. E. 666;

Jackson v. Higgins, 70 N. H. 637, 49 Atl. 574.

⁴⁷ *Lyon v. King*, 11 Met. (Mass.) 411, 45 Am. Dec. 219; *Carnig v. Carr*, 167 Mass. 544, 46 N. E. 117, 35 L. R. A. 512, 57 Am. St. Rep. 488; *Zanturjian v. Boornarsian*, 25 R. I. 151, 55 Atl. 199; *Blanchard v. Weeks*, 34 Vt. 589. And where a contract of unlimited duration is construed as a contract from year to year, beginning at once, this contract also is not within the statute. *Smith & Egge Mfg. Co. v. Webster*, 87 Conn. 74, 86 Atl. 763.

⁴⁸ In *Talmadge v. Railroad Company*, 13 Barb. 493, an agreement by the plaintiff to fence along the line of the defendant's road was held not within the statute, and the case is supported by *Browne* (Stat. Frauds, § 273a), on the ground, not taken by the court, "that the duration of the plaintiff's promise was obviously limited by the duration of the circumstances of the parties leading to the making of it." So in *Richmond, etc., R. Co. v. Richmond, etc., R. Co.*, 96 Va. 670, 32 S. E. 787, the court upheld an oral agreement between two railroads to share the expense of maintaining a watchman at the crossing of their tracks, though the agreement was in terms unlimited as to time.

⁴⁹ *Mott J. Ward Co. v. Golet*, 230 Fed. 979, 145 C. C. A. 173 (contract involving performance of lease extending more than a year); *Morris v. Peck-*

serve for a period extending more than a year beyond making the agreement is uniformly held within the

ham, 51 Conn. 128 (contract of partnership to continue more than a year); Garber v. Goldstein, 92 Conn. 226, 102 Atl. 605 (contract of lease for more than a year); Radomski v. E. R. Stege Brewery, 258 Ill. 325, 101 N. E. 573 (promise to pay 50 cts. for every barrel of beer sold by a saloon during a lease of three years); Lowman v. Sheets, 124 Ind. 416, 24 N. E. 351, 7 L. R. A. 784 (contract to share expenses of keeping mares for four years); Kelley v. Thompson, 175 Mass. 427, 56 N. E. 713 (promise to apply a discount on a note payable in two years, when the note was settled); Coöperative Tel. Co. v. Katus, 140 Mich. 367, 103 N. W. 814, 112 Am. St. Rep. 414 (contract to rent a telephone for three years); Miles v. Shreve, 179 Mich. 671, 146 N. W. 374 (a parol agreement by a lessee for a term of five years to pay an increased rental); Keller v. Mayer Fertilizer Co., 153 Mo. App. 120, 132 S. W. 314 (a contract to buy and sell for a period exceeding a year all of certain goods which the seller might accumulate); Reynolds v. First Nat. Bank, 62 Neb. 747, 87 N. W. 912 (a contract to save harmless the surety on a bond, the obligation of which extended beyond a year); Clement v. Rowe, 33 S. Dak. 499, 146 N. W. 700 (promise performable if after two years a corporation had not paid dividends); Crenshaw v. Bishop (Tex. Civ. App.), 143 S. W. 284 (agreement to care for and breed stock for three years on shares); Spokane Canal Co. v. Coffman, 61 Wash. 357, 112 Pac. 383 (agreement to cultivate fruit trees for five years). It is immaterial that the period is not stated in words, if plainly indicated. Thus a contract to deliver all the logs on a piece, containing about 90,000, at the rate of 200 a day is within the stat-

ute. Edwards v. Farve 864, 71 So. 12.

¹⁰ Britain v. Rossiter, 11 Smith v. Gold Coast Exp. 1 K. B. 538; Oak Leaf Cooper, 103 Ark. 79, 146 Edgar Bros. Co. v. Schmeis 33 Cal. App. 667, 166 Pac. District v. Johnson, 26 Co. 143 Pac. 264; Grant v. Ne Mfg. Co., 85 Conn. 421, Kelly v. Terrell, 26 Ga. 1 McCormick Harvesting 196 Ill. 295, 63 N. E. 71 Theobald, 86 Ky. 141, 5 Tuttle v. Swett, 31 Me. 55 Chadbourne, 65 Me. 302 Cabot Mfg. Co., 71 Me. 1 Rep. 343; Wilhelm v. H Md. 140; Hill v. Hooper, 1 Freeman v. Foss, 145 M. N. E. 141, 1 Am. St. Rep. v. Palmer Mfg. Co., 181 M. N. W. 390; Lally v. Crooks Co., 85 Minn. 257, 88 N. W. v. Versteeg Shoe Co., 97 M. 70 S. W. 1081; Marks v. Mo. App. 557; Kansas City Conlee, 43 Neb. 121, 61 Emery v. Smith, 46 N. E. Elroy v. Ludlum, 32 N. Marks v. Cowdin, 226 N. N. E. 139; Townsend v. Hun, 617, 1 N. Y. S. 565 Caruso, 158 N. Y. S. 751 v. Jennings, 60 S. C. 373, 3 Milan v. Rio Grande, etc., 1 Civ. App.), 37 S. W. 165; Southgate, 11 Vt. 428; Le Hill, 87 Va. 497, 12 S. E. Savings &c. Co. v. Krumm 20, 152 Pac. 681; Chase v. F Wis. 75, 105 N. W. 230, (N. S.) 738, 110 Am. St. See also Harris v. Porter, Doyle v. Dixon, 97 Mass. 1 Dec. 80.

And an oral promise of permanent performance, not personal in character and, therefore, not terminable by the death of the promisor, or his cessation of business is equally obnoxious.⁵¹ An oral contract which is capable of performance within a year is not invalidated by the fact that a later agreement between the parties made in furtherance of the first cannot be performed within that time.⁵²

§ 496. Promises to support for a term of years.

Some courts have too hastily supposed that such decisions as those cited in the preceding section afforded support for the conclusion that a promise to support a minor until he reaches a stated age more than one year distant from the date of the agreement is not within the statute.⁵³ But courts making these decisions have failed to observe the distinction between performing a contract and being discharged from liability under it. It is true that if the minor dies within a year the promisor will not be thereafter liable, but he will not have performed his agreement; he will be excused from performing it. It is possible under any contract whatever, that some supervening circumstance may excuse the promisor from liability within a year; and in any personal contract, the possibility of death is the same as in promises to support.⁵⁴ Promises of

⁵¹ *Metropolitan Trust Co. v. Topeka Water Co.*, 132 Fed. 702; *Pitkin v. Long Island R. Co.*, 2 Barb. Ch. 221, 47 Am. Dec. 320. *Cf. Adair v. Stillings* (Tex. Civ. App.), 165 S. W. 140.

⁵² *Collins v. Snow*, 218 Mass. 542, 106 N. E. 148.

⁵³ *Wooldridge v. Stern*, 42 Fed. 311; *White v. Murtland*, 71 Ill. 250, 22 Am. Rep. 100; *Stowers v. Hollis*, 83 Ky. 548, *Myers v. Saltry*, 163 Ky. 481, 73 S. E. 1138, Ann. Cas. 1916 E. 1134; *Peters v. Westborough*, 19 Pick. 364, 31 Am. Dec. 142; *McKinney v. McCloskey*, 8 Daly, 368, 76 N. Y. 594; *Taylor v. Deseve*, 81 Tex. 246, 16 S. W. 1008. See also *Wiggins v. Keizer*, 6 Ind. 252; *Hollis v. Stowers*, 83 Ky. 544; *Ellicott v. Turner*, 4 Md. 476; *Wynn v. Follow-*

ill, 98 Mo. App. 463, 72 S. W. 140; *Martin v. Batchelder*, 69 N. H. 360, 41 Atl. 83; *M'Lees v. Hale*, 10 Wend. 426; *Shahan v. Swan*, 48 Oh. St. 25, 26 N. E. 222, 29 Am. St. Rep. 517.

⁵⁴ See *Edwards v. Farve*, 110 Miss. 864, 71 So. 12. This reasoning is used in *Weatherford, etc., Ry. Co. v. Wood*, 88 Tex. 191, 30 S. W. 859, 28 L. R. A. 526, to support the extraordinary conclusion that a contract to give a free annual pass for ten years is not within the statute; and similarly in *Martin v. Batchelder*, 69 N. H. 360, 41 Atl. 83, an oral contract to board a horse for a year, beginning at a future day, was upheld. *Cf. cases supra*, § 495, n. 49, 50, and *infra*, § 502.

have become certain that the contract would be performed since the promisor being dead, could no longer break a negative promise; but no one can refrain from competition for two years within a year. Such an agreement therefore should be, and has been held within the statute.⁵⁹

⁵⁹ So held in *McGirr v. Campbell*, 71 N. Y. App. D. 83, 75 N. Y. S. 571; *Gottschalk v. Witter*, 25 Ohio St. 76. See also *Higgins v. Gager*, 65 Ark. 604, 47 S. W. 848; *Self v. Cordell*, 45 Mo. 345. Cf. *O'Neal v. Hines*, 145 Ind. 32, 43 N. E. 946. In *Mallett v. Lewis*, 61 Miss. 105, 107, 108, the court said:

"The defendant bound himself not to re-enter the drug business in the town of Edwards for five years, and during this period to buy all his own drugs from the plaintiff, and to influence his friends to do the same, if goods could be obtained from the plaintiff on as good terms as elsewhere. The breach of contract relied on is that plaintiff was always ready and willing to sell all goods, and actually did sell them when called for, on as good terms as could be obtained elsewhere; but in violation of his contract the defendant and appellee was purchasing from other parties. . . . Plaintiff insists that the case is not within the statute for two reasons; 1st, he says that it was dependent upon the ability and willingness of defendant to furnish him the drugs upon as good terms as could be obtained elsewhere, and therefore it was upon 'a contingency,' to wit: defendant's refusal to comply with its terms in this regard which might occur within less than a year; 2d, that it was dependent upon 'the contingency' of death, which might occur within a year, and as the contract was purely personal and could not descend as an obligation resting upon the promisor's administrator, it was not within the statute. It is undoubtedly true that a contract which is dependent upon a contingency that may occur

within less than a year is not in violation of the statute, though it may, if the contingency does not occur, practically run on for a longer period than twelve months; but there is no such contingency here.

"The first contingency set up by the plaintiff, as liable to occur within the year, to wit: that the plaintiff might fail and refuse to sell the goods on as good terms as could be obtained elsewhere, is no contingency at all in the proper sense of that word. On the contrary, it is an attempt to avoid the force of the statute by saying that the adversary might within the year have refused to comply with his portion of it, and therefore his possible refusal makes the contract good. In other words, it is equivalent to saying that the contract is condemned by law; but inasmuch as it is possible that the adversary party may break it or be unable to comply with its terms within less than twelve months, it therefore escapes the condemnation of the statute. If the mere possibility that one of the parties to a contract may within the year refuse or be unable to comply with its terms avoids the statute prohibiting verbal contracts which do not contemplate full performance within the year, it is apparent that the statute is at once at an end. . . . Where the time is indefinite, and supervening death may work completion within the year, the court will not infer an intention to violate the statute, but where two, five, or ten years is expressly stipulated for there is no room for inference, and the statute comes like a tyrant and makes all unenforceable."

§ 498. Promises subject to an express defeasance providing for alternative performance.

The distinction between an excuse for not performing completion of performance, previously adverted to (as is taken in contracts requiring for their performance exceeding a year but which are subject to a right of defeasance by operation of law but by the express terms of the contract within the period of a year; as a contract for several years, or a contract containing a provision permitting termination by either party on a week's or a month's notice. Such contracts are held within the statute.⁶⁰ Where a promise is in

⁶⁰ In *Biest v. Versteeg Shoe Co.*, 97 Mo. App. 137, 70 S. W. 1081, such a contract was held within the statute, and the court said (70 S. W. at page 1086): "A few decisions which exclude an agreement having a fixed time of performance, but liable to be terminated by a contingency, such as the death of a party, from the operation of the statute, as an agreement to support a minor until his majority, or to abstain from doing an act indefinitely, would, of course, exclude this agreement if they were followed. But most cases are the other way, and hold a contract to render service for more than a year to be within the intention and force of the statute, notwithstanding one or both of the parties may have the option of ending it by notice in a year, because full performance cannot be rendered in a year consistently with the understanding of the parties. *Dobson v. Collis*, 1 H. & N. 81; *Ex parte Acraman* (*In re Pentreguinea Fuel Co.*), 4 De Gex F. & J. 541, 7 Law T. (N. S.) 84; *Booth v. Prittie*, 6 Ont. App. 680; *Packet Co. v. Sickles*, 72 U. S. 580, 18 L. Ed. 550; *Warner v. Railway Co.*, 164 U. S. 418, 17 S. Ct. 147, 41 L. Ed. 495; *Meyer v. Roberts*, 46 Ark. 80, 55 Am. Rep. 567; *Wilson v. Ray*, 13 Ind. 1; *Harris v. Porter*, 2 Har. 27; *Green v. Steel Co.*, 75 Md. 109, 23 Atl. 139; *Deaton v. Tennessee*

Coal & R. Co., 12 Heisk. (Tenn.) 239, 720; *Roberts v. Rockbo Metc.* (Mass.) 46; *Robertson v. Exch.* 632; *Sweet v. Le G.* 452; *Farrington v. Doane*, 1 C. L. 675; *Murphy v. 11 Ir. Jur.* (N. S.) 111; *Southbridge*, 2 C. B. 808; *Eley Co.*, 1 Ex. Div. 20, 88; *Beyer*, 4 Bing. 309; *Ridley*, 1 Wkly. Rep. 763; *Fenton v. 3 Burrow*, 1279; *Browne*, 1279.

"A number of those cases which found the very point involved, and found none to the contrary point, except *Smith v. Conington*, 234, and *Blake v. Voight*, 69, 31 N. E. 256, 30 Am. S. 69, the first of which is noticed as clearly erroneous in *Peter v. Compton*, 1 Smith (9th ed.), loc. cit. 586, 596. The second adopts the first as a precedent. The decision of the House of Lords in *Hanau v. Ehrlich*, [1912] A. C. 1, affirming s. c. [1911], 2 K. B. 1, conclusively establishes in England that such a contract is within the statute. See to the same effect besides the authorities above cited—*Keller v. Fertilizer Co.*, 153 Mo. App. 314; *Reid v. Harding*, 137 N. Brunswick, 137. On

native, the contract is not within the statute if either alternative can be performed within a year, though the other cannot be;⁶¹ unless at least performance of one alternative is not contemplated except in consequence of a breach of the main promise which forms the other alternative and which the parties contemplate shall be carried out. Thus the following contract though in terms presenting an alternative to the promisor of performance possible within a year was held within the statute: "I hereby agree to employ you at a compensation of fifty dollars per week for three years from the date hereof or for so much of such three years as your results show the ability that you now claim to be able to give me."⁶² The court said in regard to this contract: "It is clear that the parties intended that this agreement should run for three years and that it could be terminated before the end of that time only upon breach by one party or the other."⁶³

§ 499. The form rather than the substance of an agreement may bring it within the statute.

The distinction doubtless is a fine one between the performance of a promise on the one hand, and an excuse for non-performance on the other; especially when under the heading of excuse for non-performance must be included an excuse provided by the contract itself by way of defeasance or condition subsequent. The distinction involves the form of the contract quite as much as its substance, as may be shown by the following illustrative cases:—

1. A promise to serve two years;
2. A promise to serve as long as the employee lives, not exceeding two years;

hand, the case of *Johnston v. Bowersock*, 62 Kan. 148, 61 Pac. 740, must be added to those cited by the Missouri court as opposed to the text. There a contract for ninety-nine years, terminable on three months' notice if certain business proved unprofitable, was held not within the statute. See also *Girton v. Daniels*, 35 Nev. 438, 129 Pac. 555.

⁶¹ *McConahey v. Griffey*, 82 Ia. 564, 48 N. W. 983; *Standard Oil Co. v. Denton*, 24 Ky. L. Rep. 906, 70 S. W. 282; *Roberts v. Rockbottom Co.*, 7 Metc. (Mass.) 46.

⁶² *Wagniere v. Dunnell*, 29 R. I. 580, 73 Atl. 309.

⁶³ See further in regard to contracts only in form alternative, *infra*, §§ 781 *et seq.*

3. A promise to serve two years if the promisor lives so long;
4. A promise to serve two years, but if the promisor dies the contract shall be terminated.

It is obvious that all these promises have substantially the same meaning and legal effect; yet certainly the first promise, and presumably the fourth, are within the statute, while certainly the second and presumably the third are not.⁶⁴

§ 500. Agreements of which the parties do not contemplate performance within a year.

The distinction is also fine but important between—

1. An agreement which may be performed, as the parties intend that it shall be performed, within a year, though they fully expect that performance will take a longer period, and

"The distinction between a defeasance and a condition precedent is alluded to in—*Warner v. Texas & Pacific Ry. Co.*, 164 U. S. 413, 41 L. Ed. 495. The court in discussing the case of *Packet Co. v. Sickles*, 5 Wall. 581, 594; s. c. (Lawyers' Cop. Pub. Co. ed.), bk. 18, pp. 552, 554. The terms "during the continuance of" and "last so long" would seem to be precisely equivalent; and the full performance of the contract to be limited alike by the life of the patent, and by the life of the boat. It is difficult to understand how the duration of the patent and the duration of the boat differed from one another in their relation to the performance or the determination of the contract; or how a contract to use an aid to navigation upon a boat, so long as she shall last, can be distinguished in principle from a contract to support a man, so long as he shall live, which has been often decided, and is generally admitted, not to be within the statute of frauds." So in *McGrath Co. v. Marchant*, 117 Md. 472, 83 Atl. 912, a contract of service for more than a year "provided" the employer should remain in business for that period, was held not within the statute. See also *Smith v. Conlin*, 19 Hun, 234.

"It appears to have been assumed, almost without discussion, that the contract, according to its true construction, was not to be performed in less than twelve years, but was defeasible by an event which might or might not happen within one year. It may well be doubted whether that view can be reconciled with the terms of the contract itself, or with the general current of the authorities. The con-

tract, as stated in the fore part of the opinion, was to use and pay for the cut-off upon the boat "during the continuance of the said patent, if the said boat should last so long." 5 Wall. 581, 594; s. c. (Lawyers' Cop. Pub. Co. ed.), bk. 18, pp. 552, 554. The terms "during the continuance of" and "last so long" would seem to be precisely equivalent; and the full performance of the contract to be limited alike by the life of the patent, and by the life of the boat. It is difficult to understand how the duration of the patent and the duration of the boat differed from one another in their relation to the performance or the determination of the contract; or how a contract to use an aid to navigation upon a boat, so long as she shall last, can be distinguished in principle from a contract to support a man, so long as he shall live, which has been often decided, and is generally admitted, not to be within the statute of frauds." So in *McGrath Co. v. Marchant*, 117 Md. 472, 83 Atl. 912, a contract of service for more than a year "provided" the employer should remain in business for that period, was held not within the statute. See also *Smith v. Conlin*, 19 Hun, 234.

2. An agreement which cannot be performed within a year, as the parties intend and expect that it shall be performed, though performance in a different way within that time is conceivably possible and if so made would satisfy the literal words of the contract.

Agreements of the first sort are not within the statute;⁶⁵ agreements of the second sort are held at least by many courts to be within the statute. The opinion of the parties as to the time which a given performance will take is immaterial, but their mutual intentions as to the method of performance is important, and if that method cannot possibly be carried out within a year, the fact that another method which would satisfy the legal obligation is logically conceivable will not save the agreement. The leading case to this effect is *Boydell v. Drummond*;⁶⁶ the plaintiffs had agreed to publish a series of prints in eighteen numbers at a price of three guineas a number. The prospectus announced that "one number at least should be published annually, and the proprietors were confident they should be enabled to produce two numbers within the course of every year." The defendant, a subscriber, was sued for breach of his agreement to take numbers tendered to him. The court held the agreement within the statute. It is stated by Lord Ellenborough that even though "contrary to all physical probability" the contract could have been performed by the plaintiff within a year, "the whole work could not have been obtruded upon the subscribers at once, so as to demand payment of the whole subscription from them within a year." But in some of the cases hereafter referred to it seems that performance of the agreements in question if completed within a year could not have been objected to; and the agreements were nevertheless held within the statute because performance in the way intended and expected, though not specially contracted for, could not be made within a year.⁶⁷ Thus a con-

⁶⁵ See cases cited *supra*, § 495.

⁶⁶ 11 East, 142.

⁶⁷ In *Herrin v. Butters*, 20 Me. 119, the contract was thus stated, "Said Butters doth agree to clear a piece of ground, containing eleven acres, on lot No. 8, in the 10th range of lots in

Exeter, to be done in three years from date, in a clean and workmanlike manner, and [one acre] well seeded down this present spring, and one acre the spring following, and nine acres in the spring of 1835. And the said Shaw, on his part, doth agree to let the said

tract to do construction or engineering work which can only be fulfilled within a year by abnormal and unusual methods not within the contemplation of the parties has been held within the statute.⁶⁸ So an oral promise to pay \$400 in monthly in-

Butters have all the proceeds of said land three years, in consideration of a faithful performance of the above agreement, excepting the first two acres seeded down, which the said Shaw is to have the grass after seeded down." The court held the contract within the statute, saying: "It is urged, that the defendant might have cleared up the land, and have seeded it down in one year, and thereby have performed his contract. This may have been within the range of possibility; but whether so or not must depend upon a number of facts, of which the Court are uninformed. This however is not a legitimate inquiry under this contract. We are not to inquire what, by possibility, the defendant might have done, by way of fulfilling his contract. We must look to the contract itself, and see what he was bound to do; and what, according to the terms of the contract, it was the understanding that he should do. Was it the understanding and intention of the parties, that the contract might be performed within one year?" In *Goodrich v. Johnson*, 66 Ind. 258, 262, the court said: "The law on the subject now under consideration is thus stated in section 273 of Browne's treatise on the Statute of Frauds: 'That the statute does not mean to include an agreement which is simply not likely to be performed, nor yet one which is not expected to be performed within the space of a year from the making; but that it means to include any agreement which, fairly and reasonably interpreted, does not admit of a valid execution within that time.'" See also *Eikelman v. Perdew*, 140 Cal. 687, 74 Pac. 291; *Warren v. Ayres*, 126 Md. 551, 95 Atl. 53.

⁶⁸ In *White v. Fitts*, 102 Me. 240, 66 Atl. 533, 15 L. R. A. (N. S.) 313, the plaintiff was to cut down and saw into the desired lengths all of the standing timber on the 350 acres of defendant's timber land, as fast as the defendant needed it for use in his mill. There were no specifications and no further stipulations in regard to the time within which the work was to be completed and the contract performed. The agreement was held within the statute.

In *Farwell v. Tillson*, 76 Me. 227, the defendant had a government contract to furnish stone for the custom house at St. Louis, and made a verbal contract with plaintiff for the transportation of the stone from Maine to Baltimore. The government required defendant to furnish the stone "at such times as may be required" by the government. No time was specified. The court held that the circumstances showed that the parties did not intend or understand that the contract was to be performed within one year, and hence the contract was within the statute of frauds. See also *East Tennessee Tel. Co. v. Paris Electric Co.*, 156 Ky. 762, 162 S. W. 530, Ann. Cas. 1915 C. 543; *Akins v. Hicks*, 109 Mo. App. 95, 83 S. W. 75; *Jones v. McMichael*, 12 Rich. L. 176. Cf. *Randall v. Turner*, 17 Ohio St. 262. There the plaintiff agreed to receive certain stock, on condition that he should retain the same until a reasonable time should expire for the completion of a railroad; and, if the road should be so completed, he agreed to receive the stock in full satisfaction of four hundred dollars owing to him; and, in case of the failure to complete the road in a reason-

stalments of not less than \$4 nor more than \$8, "unless the plaintiff should find it convenient to pay more" has been held bad.⁶⁹ So an agreement to indorse renewal notes to a bank until the promisee "was put in position to pay the same by realizing on his other collaterals," the circumstances showing that practically this could not be done within a year;⁷⁰ an agreement to support a child, then five years old, until she is able to support herself;⁷¹ a contract made on August 20th for a year's employment to begin as soon as the employee could; when in fact he began to work on August 27th,⁷² an agreement by a mortgagee who has entered to foreclose that if he sells the property (which under prevailing statutes he could not

able time, he was to return the stock to the defendant whereupon the four hundred dollars was to become due, and to be then paid by him to the plaintiff. The court said: "The most that can be claimed, is that it was not likely to be performed within a year; but it was clearly susceptible of performance within that time. The road might have been abandoned within a year, and thus a reasonable time to wait for its completion would have expired. There was, surely, nothing in the contract that fixed the time of performance beyond a year." So in *McClanahan v. Otto-Marmet, etc., Co.*, 74 W. Va. 543, 82 S. E. 752, a contract to cut the timber on certain tracts of land, and deliver it as ties and posts, was held not within the statute, though the employee expected when he undertook the work that it would require six years; the court saying of the contract: "It can only be said that it was not likely to be performed, nor expected by plaintiff to be performed within a year. This was held in *Kimmins v. Oldham*, 27 W. Va. 258, not to bring an agreement within the statute." A similar case is *Reckley v. Zenn*, 74 W. Va. 43, 81 S. E. 565. [*Cf. Rua v. Bowyer Smokeless Coal Co. (W. Va.)*, 99 S. E. 213.] If the construction or work in question may

reasonably be completed within a year, unquestionably the statute is inapplicable. *Series v. Sharlow*, 5 Dak. 100, 37 N. W. 748; *First Presbyterian Church v. Swanson*, 100 Ill. App. 39; *Ford Lumber Co. v. Cobb*, 138 Ky. 174, 127 S. W. 763; *Drew v. Wiswall*, 183 Mass. 554, 67 N. E. 666; *Barton v. Gray*, 48 Mich. 164, 12 N. W. 30, 57 Mich. 662, 24 N. W. 638; *Thomas v. South Haven, etc., R. Co.*, 138 Mich. 50, 100 N. W. 1009; *Girton v. Daniels*, 35 Nev. 438, 129 Pac. 555; *Gault v. Brown*, 48 N. H. 183, 2 Am. Rep. 210; *Plimpton v. Curtiss*, 15 Wend. 336; *Van Woert v. Albany, etc., R. Co.*, 67 N. Y. 538; *Travis v. Myers*, 67 N. Y. 542; *Jones v. Pouch*, 41 Ohio St. 146; *Long Mfg. Co. v. Gray*, 13 Tex. Civ. App. 172, 35 S. W. 32; *Rogers v. Brightman*, 10 Wis. 55.

⁶⁹ *Saunders v. Kastenbine*, 6 B. Mon. 17. See also *Kellogg v. Clark*, 23 Hun, 393.

⁷⁰ *Cantwell v. Johnson*, 236 Mo. 575, 139 S. W. 365.

⁷¹ *Farrington v. Donohoe, Jr.* Rep. 1 C. L. 675.

⁷² *Sutcliff v. Atlantic Mills*, 13 R. I. 490, 43 Am. Rep. 39. This case is defensible only on the assumption that the parties understood that A could not begin his year's service at once.

do for three years), he will pay the mortgagor any received in excess of the amount of the mortgage all been held within the statute.⁷⁴ Clearer cases a contract could not be performed according to the course of nature within a year, as where crops are produced,⁷⁵ or the future young of animals are agreed at a time which must fall beyond the end of a year.

Whether a promise to perform a given act "within a period greater than a year should be within the statute, depend, if the cases in this section are sound, on whether the performance in question is capable of performance within a year, if the anticipated methods are followed. A man might dig a tunnel within fifty years would then be within the statute if the contemplated method of performance require necessarily more than a year. And this would be so even though by an enormous force of workmen, and by new inventions, performance might conceivably be accomplished within a year.⁷⁷

On the other hand, if the contemplated mode of performance might possibly be carried out in less than a year, the contract would not be within the statute;⁷⁸ and by a

⁷³ *Frary v. Sterling*, 99 Mass. 461. But see *McGinnis v. Cook*, 57 Vt. 36, 52 Am. Rep. 115.

⁷⁴ See also for the point that the contemplation of the parties, not merely the possibilities legally open under the contract, is to be considered, *Wagniere v. Dunnell*, 29 R. I. 580, 73 Atl. 309.

⁷⁵ *Swift v. Swift*, 45 Cal. 266; *Eikelman v. Perdew*, 140 Cal. 687, 74 Pac. 291.

⁷⁶ *Summerall v. Thoms*, 3 Fla. 298; *Butler v. Shehan*, 61 Ill. App. 561; *Groves v. Cook*, 88 Ind. 169, 45 Am. Rep. 462; *Williams v. Calloway*, 12 Ky. L. Rep. 716; *Lockwood v. Barnes*, 3 Hill, 128, 38 Am. Dec. 620; *Van Dyke v. Clark*, 19 N. Y. S. 650.

⁷⁷ A promise by a seller of an interest in a patent to repay the buyer the price paid by him if he should not

within three years realize the patent equalling the amount held within the statute. *Whipple*, 8 Metc. 59, 41 See also *Moore v. Vosb* App. Div. 223, 72 N. Y.

⁷⁸ Thus a promise to perform a period exceeding a year within the statute, although may not have expected to take place in less than a year. *Strong*, 51 Ind. 339; *Law* 56 Me. 187, 96 Am. Dec. Tapman, 90 Md. 294, 4 L. R. A. 385. So an contract made in October, 1886, for the sale of grain the market on any day prior to March 1st, the seller might choose, *Powder River Co. v. L* 339, 56 N. W. 1019. It is a contract that a mortgagor

oral promises to retain property until the profits should repay certain sums,⁷⁹ or until a net profit of \$50,000 had been realized, have been upheld without inquiry as to the possibility of achieving these results under the actually contemplated method of performance.⁸⁰

§ 501. Promises to marry and promises falling within other clauses of the statute.

It has been held in some cases that a promise to marry at a time more than a year from the making of the agreement is not within the statute,⁸¹ but the contrary rule is better supported.⁸² If any distinction is made between contracts to marry and other agreements, it can be based only on an exception made to the statute in violation of its terms from judicial ideas of public policy. The fact that such promises have been held unaffected by the clause of the statute relating to promises in consideration of marriage is immaterial.⁸³ Contracts which are not obnoxious to one clause of the statute are not therefore free from objection based on another clause, if that is applicable; and, on the other hand, contracts relating to land or goods, guaranties, as well as contracts relating to other matters, if

⁷⁹ At any time within three years was held valid. *Bickel v. Wessinger*, 58 Or. 98, 113 Pac. 34. See also *Parker v. Siple*, 76 Ind. 345; *Linseott v. McIntire*, 15 Me. 201; *Kent v. Kent*, 18 Pick. 569; *Ward v. Hasbrouck*, 169 N. Y. 407, 62 N. E. 434. The opinion in *Mills v. O'Daniel*, 23 Ky. L. Rep. 73, 62 S. W. 1123, cannot be supported. The contract there provided that a certain sum should be paid and accepted in full satisfaction if paid "within two years." The court held the contract within the statute because suit could not be brought upon it until the two years had expired. But the statute invalidates contracts which cannot be performed within a year, not those in which the permissible period is greater than a year. See also *Thomas v. Croom*, 102 Ark. 108, 143 S. W. 88.

⁸⁰ *Daily v. Cain*, 11 Ky. L. Rep. 936, 13 S. W. 424.

⁸¹ *Hodges v. Richmond Mfg. Co.*, 9 R. I. 482. The parties in this case had apparently estimated the necessary period as two years or longer. See also *Southwell v. Beasley*, 5 Ore. 143, 458, where a contract to pay for sheep within three years, or as soon as the vendee "can make the price out of them" was held not within the statute.

⁸² *Blackburn v. Mann*, 85 Ill. 222; *Lewis v. Tapman*, 90 Md. 294, 45 Atl. 459, 47 L. R. A. 385; *Brick v. Gannar*, 36 Hun. 52.

⁸³ *Ullman v. Meyer*, 10 Fed. 241; *Paris v. Strong*, 51 Ind. 339; *Nichols v. Weaver*, 7 Kans. 373; *Barge v. Haslam*, 63 Neb. 296, 88 N. W. 516.

⁸⁴ See *supra*, § 485; *Derby v. Phelps*, 2 N. H. 515.

§ 502. Calculation of the term of a year.

How the period of a year is to be calculated has given rise to some litigation. If a contract, for instance a contract of service, is for the term of a year beginning on the day of the contract, there is no doubt that the statute is inapplicable.⁸⁷ It has also been held that an agreement for a year, performance for which is to begin on the day following the agreement, is not within the statute, since performance will end on the day exactly one year from the date of making the agreement; and the old maxim that the law disregards fractions of a day is invoked to prove immaterial any difference in the hour of the day when the contract was made, and the close of business hours.⁸⁸ Other courts, however, discard fiction and calculating the period exactly hold the agreement within the Statute.⁸⁹ But if an offer for a year's employment to begin at a future day is not accepted until the day when the employment begins, as the contract does not arise until the latter day the agreement is binding though oral.⁹⁰ If in any case performance is to begin

⁸⁷ *Britain v. Rossiter*, 11 Q. B. D. 123; *Russell v. Slade*, 12 Conn. 455; *Sprague v. Foster*, 48 Ill. App. 140; *Aiken v. Nogle*, 47 Kans. 96, 27 Pac. 825; *Galvin v. Detroit Windshield Co.*, 176 Mich. 589, 142 N. W. 742; *O'Donnell v. Daily News Co.*, 119 Minn. 378, 138 N. W. 677; *A. B. Smith Co. v. Jones*, 75 Miss. 325, 22 So. 802; *Embrey v. Hargadine-McKittrick Co.*, 115 Mo. App. 130, 91 S. W. 170; *Sheingold v. Baer*, 145 N. Y. App. D. 493, 129 N. Y. S. 924. See also *Sanborn v. Fireman's Ins. Co.*, 16 Gray, 448, 77 Am. Dec. 419.

⁸⁸ *Smith v. Gold Coast Explorers, Ltd.*, [1902] 1 K. B. 285, 538 (following *Cawthorne v. Cordrey*, 13 C. B. (N. S.) 406, and by implication overruling *Dollar v. Parkington*, 84 L. T. 470); *Dickson v. Frisbee*, 52 Ala. 165, 23 Am. Rep. 565; *Beller v. Klotz*, 31 Dom. L. R. 647.

⁸⁹ *Raymond v. Phipps*, 215 Mass. 559, 102 N. E. 905; *Brosius v. Evans*, 90 Minn. 521, 97 N. W. 373; *Keller v.*

Mayer Fertilizer Co., 153 Mo. App. 120, 132 S. W. 314; *McElroy v. Ludlum*, 32 N. J. Eq. 828; *Billington v. Cahill*, 51 Hun, 132, 4 N. Y. S. 660. See also *Bracegirdle v. Heald*, 1 B. & Ald. 722, 726; *Grant v. New Departure Mfg. Co.*, 85 Conn. 421, 83 Atl. 212; *Reynolds v. Wymore Bank*, 62 Neb. 747, 752, 87 N. W. 912. So exactly was time calculated in *Shibley v. Patton's Admr.*, 21 Ind. 169, that a contract whereby A sold a horse to B, and warranted that it should be sound for one year thereafter, and agreed that, if, after the expiration of one year, the horse should prove unsound he would take it back and pay the plaintiff one hundred dollars, was held within the Statute of Frauds, since the return of the horse must follow by however small a fraction of time, the expiration of a year.

⁹⁰ *Mobile, etc., R. Co., v. Hayden*, 116 Tenn. 672, 94 S. W. 940. See also *McArthur v. Times Printing Co.*, 48 Minn. 319, 51 N. W. 216, 31 Am. St.

opening of the new year. If there were no contract then implied there would, therefore, be no agreement whether enforceable or unenforceable between the parties for the coming year. It may be asked, what is the difference in principle if there were a prior oral bargain for the coming year made some time before the beginning of performance? Would not the tender of the first beginnings of performance by one party, and the acceptance of them by the other party necessarily imply a fresh assent to or acceptance of the terms of the oral bargain at a time when the contract could be performed within a year. Such an implication of fact seems fairly warranted.⁹⁵ It has indeed been said of such a case in the English Court of Appeal:⁹⁶ "The contract is not void under the 4th section; the contract exists, but no one is liable upon it. It seems to me impossible that a new contract can be implied from the doing of acts which were clearly done in performance of the first contract only, and to infer from them a fresh contract would be to draw an inference contrary to the fact. It is a proposition which cannot be disputed that no new contract can be implied from acts done under an express contract, which is still subsisting; all that can be said is that no one can be

⁹⁵ In contracts made by promoters before the organization of corporations, the accepting or rendering of performance by the corporation when formed creates a contract on its part if the character of the contract is such as to need no formal action. See *supra*, § 306. And accordingly in *McArthur v. Times Printing Co.*, 48 Minn. 319, 51 N. W. 216, 31 Am. St. Rep. 653, it was held that where a contract was made by a promoter to employ the plaintiff for a year beginning in the future, and the corporation on being formed began to carry out the contract, a new contract with the corporation was thereby formed which was not within the Statute of Frauds, since performance could be completed within a year from the time when the beginning of performance indicated assent by the corporation, and a continuance of the plaintiff's assent.

If beginning performance in such a case indicates assent to the terms of a bargain previously made by a promoter, it is hard to see why acceptance of a beginning of performance does not in any case indicate a new assent to the bargain previously made. So in *Lavery v. Turley*, 6 H. & N. 239, the court held an executed oral agreement of accord and satisfaction was a good defence, though the accord while executory was within the statute. The decision seems to involve giving effect to the implied renewed assent to the terms of the executory accord, indicated by accepting performance of it. Consider also cases holding an invalid bilateral agreement may ripen into a valid unilateral agreement on performance by one party. See *supra*, § 131, *ad fin.*

⁹⁶ By Brett, L. J., in *Britain v. Rossiter*, 11 Q. B. D. 123, 127.

charged upon the original contract because it is not binding."

The proposition thus stated, however, in regard to contracts relates properly to quasi-contractual obligations not to contracts implied in fact. It is undoubtedly a quasi-contractual obligation will not be, and should be imposed on parties when they have made a bargain for themselves which still remains subsisting and enforceable. If such an obligation may not be imposed if the bargain made is unenforceable, need not here be argued,⁸⁷ but if the parties manifest an intention in fact, there is no reason why a contract should not then be formed. If this were accepted, it would follow that the statute is satisfied by the giving of performance by one and acceptance of it by the other. No implication of a new contract would be warranted merely by performance on one side without such acceptance of or assent to the performance as would indicate assent to an agreement for the remainder of performance within one year of the time when the period for full performance would expire. This result certainly has not generally been reached by the cases; on the contrary it has been held that an agreement for a year's services to begin in the future is taken out of the statute by beginning performance.⁸⁸ It has indeed been held that a subsequent oral restatement of a previous oral bargain at a time when performance has been completed within a year, is sufficient to satisfy the

⁸⁷ As to this see *infra*, § 534.

⁸⁸ *Comes v. Lamson*, 16 Conn. 246; *Kleeman v. Collins*, 9 Bush, 460, 464; *Oddy v. James*, 48 N. Y. 685; *Turnow v. Hochstadter*, 7 Hun, 80; *Hillhouse v. Jennings*, 60 S. C. 373, 392, 38 S. E. 596, 599.

Similarly it was held in—*Draheim v. Evison*, 112 Wis. 27, 87 N. W. 795; *Chase v. Hinkley*, 126 Wis. 75, 105 N. W. 230, 2 L. R. A. (N. S.) 738, that an employee who had ceased performance under such a contract after having begun performance, could recover on a *quantum meruit* and the employer could not set up against him

the special contract. In the cases in this note, however, the court suggest the line of authority in the text; and it should be obvious that a party who would seek to enforce an implied agreement as such, under the text must base his claim on a contract implied in fact, rather than on an original oral agreement. See *S. v. Highland Park College*, 141 N. W. 571.

⁸⁹ *Catlett v. Burke*, 96 S. E. 610; *Huebner v. Huebner*, 157 N. W. 765. See also *San Antonio Light Pub. Co. v. M. Civ. App.*, 101 S. W. 867.

But it is generally held requisite that a new oral contract should be made in express terms; a restatement of the old contract being regarded as merely an admission that a contract was formerly made and not as the making of a new contract.¹ It is to be observed, however, that a restatement of the terms of the agreement coupled with the beginning of performance involves more than an admission of a former agreement, there is a present assent to carry it out, and in this case there is no need to refer to an oral agreement made prior to the year allowed by the statute in order to determine the nature of the new promise implied from the acceptance and receipt of part performance, for the restatement clearly indicates what implication of fact arises from the beginning of performance. For similar reasons, if a contract originally within the statute is orally modified at a time when performance can be completed within a year, the agreement as modified would seem to be enforceable, a new substituted contract being formed which is not within the statute.

§ 504. Contracts performable or performed within a year on one side but not on the other.

It has been settled in England that though part performance of an oral agreement not performable within a year does not take the contract out of the statute, yet full performance within a year on one side, at least if such full performance was intended to be made within the year, takes the whole contract out of the statute.² The extent of the exception is, however,

¹ In *Odell v. Webendorfer*, 50 N. Y. App. Div. 579, 581, 64 N. Y. S. 451, the court said: "No contract was made that day, but only the terms of the prior contract were restated by either him or the defendant, for the sake of certainty as to the mutual obligations. What was actually said on the first of April does not appear in the case at all. This is not sufficient to take the case out of the operation of the statute. A new contract then made is requisite; that is, the former contract should then be expressly renewed or the employer cannot be held bound. *Oddy*

v. James, 48 N. Y. 685; *Berrien v. Southack*, 26 N. Y. St. Rep. 932, 7 N. Y. S. 324; *Billington v. Cahill*, 51 Hun, 132, 4 N. Y. S. 660." See also *Oak Leaf Mill Co. v. Cooper*, 103 Ark. 79, 146 S. W. 130; *Blanton v. Knox*, 3 Mo. * 342; *Haslam v. Barge*, 69 Neb. 644, 96 N. W. 245; *Booker v. Haffner*, 95 N. Y. App. D. 84, 88 N. Y. S. 499; *Gottlieb v. Gins*, 169 N. Y. S. 599; *Guitar v. McGee* (Tex. Civ. App.), 139 S. W. 622.

² This doctrine started from a *dictum* in *Boydell v. Drummond*, 11 East, * 142. It was finally settled and es-

not at all clear. It has sometimes been said that of the statute include only agreements not to be performed by either side within a year.³ If this is true, then, if the contract is wholly executory on both sides and a lie for breach of the promise, which was performed within the year.⁴ This subjects the maker of that promise to no hardship for if he performs whether voluntarily or legal compulsion, he would be allowed to enforce the promise when its performance was due; and if he is held liable in damages for failing to perform; the value of future counter performance will be taken into account. It may be doubted, however, whether the statute should generally be held applicable to such contracts. But when performance on one side or the other may have not been the only definition suggested for the limits of the statute considered in this section. Eminent judges hold that the statute is inapplicable if the promise on one side has been fully executed.⁵ If this is the correct view, it

established by *Donellan v. Read*, 3 B. & Adol. 899; *Cherry v. Heming*, 4 Exch. 631, and has been followed or recognized in *Smith v. Neale*, 2 C. B. (N. S.) 67; *Miles v. New Zealand Alford Est. Co.*, 32 Ch. Div. 266, 296; *Reeve v. Jennings*, [1910] 2 K. B. 522.

³ *Cherry v. Heming*, 4 Exch. 631, 635, per Parke, B.

So Leake, *Contracts* (4th ed.), page 170, says that—"contracts which may be performed within the year on one side only, though they cannot be performed within the year on the other side, are not within the statute."

⁴ This conclusion was actually reached in *Sheehy v. Adarene*, 41 Vt. 541, 98 Am. Dec. 623. In that case the defendant promised to provide the plaintiff with a cow, beginning at an early specified day and continuing for a year thereafter. The plaintiff agreed to buy the cow at the end of the year or pay for her use. The defendant failed to provide the cow and the plaintiff was allowed to recover damages. The court said that the defendant's

performance was to be rendered within the year, and that the failure to do so left nothing to be recovered by either party except the damages which were due. The reasoning in the case and its conclusion of correctness. The case of *Samuel v. Neale*, 147 Ia. 335, 126 N. W. 101, is, however, to substantially the effect. There the plaintiff contracted to sell certain lumber to compete with the defendant within a year; the defendant agreed to pay the cost of the lumber a condition. The defendant failed to pay of the lumber but not the cost of \$500, and the plaintiff failed to recover it. The court held for the plaintiff in *Smalley v. Greene*, 52 Ia. 278, 35 Am. Rep. 267, as a matter of principle, but in that case the contract was on one side not only made within a year but actually performed and the court states this as a matter of decision.

⁵ *Knowlman v. Bluet*

rial when performance on one side is executed, whether within or beyond the period of a year. Indeed, it has been stated by good English authority that either if the contract was performable on one side within a year or, though not so performable, was in fact fully executed on one side, the contract is not within the statute.⁶ Subsequently, however, the English court has held a contract within the statute where performance on one side could not be completed within the year, and performance on the other side (though it might possibly have been performed within the year), was not expected to be so performed and was not so performed, in spite of the fact that the latter promise was fully executed after the expiration of a year.⁷ † In the United States the distinct numerical weight of authority supports the proposition that if performance on one side can be fully executed within a year, and is so executed, the contract is not within the statute, and in many cases the mere fact that it is executed on one side withdraws it from the statute.⁸ It is not usually clearly stated upon what ground the

Exch. 1, per Blackburn, J., referring to *Souch v. Strawbridge*, 2 C. B. 808.

⁶ In 7 Halsbury's Laws of England, 366, it is said: "The statute has no application to contracts for an executed consideration (citing *Knowlman v. Bluet*, L. R. 9 Exch. 1; *Souch v. Strawbridge*, 2 C. B. 808. As to executed consideration, see page 384, 7 Laws of England); or where the contract is to be entirely executed by one party within the year (citing *Donellan v. Read*, 3 B. & Ad. 899, where the plaintiff, a landlord, had laid out £50 on improvements in consideration of the tenants agreeing to pay him £5 more rent; *Smith v. Neale*, 26 L. J. C. P. 143. See 1 Smith L. C. (11th ed.) 319), nor is a contract under the terms of which it is possible that one of the parties may wholly perform his part of the contract within the year, although the performance by the other party extends over several years (citing *Cherry v. Heming*, [1849] 4 Exch. 631, assignment of patent, the price to be paid by instalments extending over several years)."

⁷ *Reeve v. Jennings*, [1910] 2 K. B. 522. The facts of the case were that the plaintiff had employed the defendant orally without limit of time other than that a week's notice might terminate the arrangement. The defendant promised further that he would not set up a competing business for three years after leaving the defendant's service. The defendant remained with the plaintiff for about two years and set up a competing business within three years thereafter. The court assumed as a fact that when the original arrangement was made it was thought probable that the employment might last more than a year.

⁸ *Fernald v. Town of Gilman*, 123 Fed. 797; *Wehner v. Bauer*, 160 Fed. 240; *Rake's Admr. v. Pope*, 7 Ala. 161; *Diamond v. Jacquith*, 14 Ariz. 119, 125 Pac. 712, L. R. A. 1915 D. 880; *Enos v. Anderson*, 40 Colo. 395, 93 Pac. 475; *Johnson v. Watson*, 1 Ga. 348; *Fraser v. Gates*, 118 Ill. 99, 112, 1 N. E. 817; *MacDonald v. Crosby*, 192 Ill. 283, 61 N. E. 505; *Hodgens v. Shultz*, 92 Ill.

decisions so holding rest. In some of them at least broadly that full performance on one side, when it takes the case out of the statute; but generally it is regarded as essential that such performance be made in a year. There are, however, numerous decisions well supported by a more reasonable construction of the statute which hold that unless the contract from its inception is performable within a year on both sides, it is within the statute, and if after full performance on one side, performance on the other side still cannot take place within a year, the statute is applicable; and any redress which can be obtained for non-performance, full or partial performance must be based on principle of quasi-contract.⁹

App. 84; *Wolke v. Fleming*, 103 Ind. 105, 2 N. E. 325, 53 Am. Rep. 495; *Piper v. Foshier*, 121 Ind. 407, 23 N. E. 269; *Smalley v. Greene*, 52 Ia. 241, 3 N. W. 78; *Atchison, etc., Ry. Co. v. English*, 38 Kan. 110, 16 Pac. 82; *Heery v. Reed*, 80 Kans. 380, 102 Pac. 846; *Dant v. Head*, 90 Ky. 255, 13 S. W. 1073, 29 Am. St. Rep. 369; *Jones v. Comer*, 25 Ky. L. Rep. 773, 1104, 76 S. W. 392, 77 S. W. 184; *Whitley v. Whitley's Adm.*, 26 Ky. L. Rep. 134, 80 S. W. 825; *Holbrook v. Armstrong*, 10 Me. 31; *Ellicott v. Turner*, 4 Md. 476; *Warren v. Ayres*, 126 Md. 551, 95 Atl. 52, 54; *Lally v. Crookston Lumber Co.*, 85 Minn. 257, 88 N. W. 846; *Bless v. Jenkins*, 129 Mo. 647, 31 S. W. 938; *Marks v. Davis*, 72 Mo. App. 557; *Kendall v. Garneau*, 55 Neb. 403, 75 N. W. 852; *Blanding v. Sargent*, 33 N. H. 239, 66 Am. Dec. 720; *Perkins v. Clay*, 54 N. H. 518 (but see *Emery v. Smith*, 46 N. H. 151); *Berry v. Doremus*, 30 N. J. L. 399 (but see *Okin v. Selidor*, 78 N. J. L. 54, 78 Atl. 770, where the court admits that a promise to guarantee the condition of a sidewalk after a year would be within the statute, though the consideration had been fully paid); *Matter of Chamberlain*, 146 N. Y. App. D. 583, 131 N. Y. S. 245; *Durfee v. O'Brien*, 16 R. I. 213, 14 Atl. 857;

Compton v. Martin, 51 R. I. 1; *Bates v. Moore*, 2 Bailey, 37, 45 S. E. 868; *McClella*, 26 Wis. 595; *Grace v. Ly*, 166, 49 N. W. 751; *Phillip*, 149 Wis. 524, 136 N. W. 1.

⁹ *Warner v. Texas & P. Ry. Co.*, 4 C. C. A. 673, 164 U. S. 449, 49 S. W. 495, but the upper court defendant's promise to perform within a year found it unnecessary to determine the effect of the plaintiff's promise; *Jackson Iron Co. v. Co.*, 65 Fed. 298, 12 C. C. A. 10, 43 Cal. 500; *Marcy*, 9 Allen, 8; *Frery v. Frery*, 41 Mass. 461; *Kelley v. The Commonwealth*, 56 N. E. 713; *Parker*, 29 Mich. 369; *Dietrich v. Dietrich*, 128 Mich. 145, 87 (cf. *Paul v. Graham*, 193 M. 1, 193 N. W. 616, 617, and cases cited); *Levy v. Buckley*, 9 Nev. 373; *Getman*, 2 Denio, 87; *York Central R. Co.*, 51 N. Y. 616; *Hubbard v. Hubbard*, 135 N. Y. App. D. 174, 135 N. Y. S. 245; *Reinheimer v. Carter*, 31 C. C. 587; *Pierce v. Payne*, 28 Vt. 626, 28 At.

CHAPTER XVII

CONTRACTS FOR THE SALE OF GOODS

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§ 505. Statutes of Frauds in England and America concerning sales of goods.

The seventeenth section of the English Statute of Frauds¹ is as follows:

"And be it further enacted by the authority aforesaid, That from and after the said four and twentieth day of June [A. D. 1677] no contract for the sale of any goods, wares, and merchandises, for the price of ten pounds sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized." There

¹ 29 Car. II, c. 3, § 17.

is a corresponding enactment in all of the United States, Alabama, Delaware, Kansas, Kentucky, Louisiana, Mexico, North Carolina, Texas, Virginia, and Wisconsin. The language of the American statutes is not uniform, but not quite the same in meaning as that of the English statute. Reference will be made hereafter to these changes.

509. Statute of Frauds in Sales Act.

The effect of the English statute has been preserved in the English Sale of Goods Act, section 4, though the statute has been changed and elaborated. In the American Uniform Sales Act,² except in one or two particulars which will be referred to, the wording of the later English statute has been followed, the section reading:

Sec. 4. STATUTE OF FRAUDS.

(1.) A contract to sell or a sale of any goods or interest in goods the value of which exceeds five hundred dollars³ or upon which an action of the value of five hundred dollars³ or up to which the contract or sale is not to be enforceable by action unless the buyer has received part of the goods or choses in action so contracted for or sold, and actually receive the same,⁴ or give in earnest to bind the contract, or in part payment of the price some note or memorandum in writing of the contract, and the same be signed by the party to be charged or his agent on his behalf.

(2.) The provisions of this section apply to every contract or sale, notwithstanding that the goods may be to be delivered at some future time, or may not be, and whether or not of such contract or sale be actually made, procured or to be made, procured.

² This statute was enacted in 1907 by Arizona, New Jersey and Connecticut; in 1908 by Massachusetts, Rhode Island and Ohio; in 1910 by Maryland, in 1911 by New York and Wisconsin; in 1913 by Michigan and Alaska; in 1915 by Illinois, Nevada and Pennsylvania; in 1917 by Minnesota, North Dakota, Utah and Wyoming, and in 1919, by Idaho, Iowa, Oregon and Tennessee.

³ This was amended in 1920 to read "the value of the goods or interest in goods" the act as passed in Ohio, Connecticut and Michigan in Minnesota, New York and Wisconsin.

⁴ The requirement of receipt was considered in *Castle v. Cross*, 104 Atl. 187.

⁵ See *Falletti v. Carrara*, 103 Atl. 753.

vided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery; but if the goods are to be manufactured by the seller especially for the buyer and are not suitable for sale to others in the ordinary course of the seller's business, the provisions of this section shall not apply.⁶

(3.) There is an acceptance of goods within the meaning of this section when the buyer, either before or after delivery of the goods, expresses by words or conduct his assent to becoming the owner of those specific goods.

§ 507. "A contract to sell or a sale."

The question was early made under the English Statute whether it applied to executory contracts to sell goods as well as to sales, and there were decisions to the effect that executory contracts were not included,⁷ but the contrary view was afterward taken and the correctness of it confirmed by a statute known as Lord Tenterden's Act.⁸ This statute is in terms merely declaratory, and such it has always been considered, so that though not enacted in the United States there has never been any doubt that in America as in England executory contracts are within the terms of Statutes of Frauds.⁹ It is probable, however, that the early English decisions in regard to this matter have been partly responsible for the confusion of the law in the United States in regard to contracts for work and labor as distinguished from contracts to sell. The words of the Uniform Sales Act make it clear that executory contracts are covered. A conditional sale or contract to sell on condition is

⁶ On the construction of this clause, see *Willard v. Higdon*, 123 Md. 447, 91 Atl. 577; *Ann. Cas.* 1916 C. 339; *Davis v. Blanchard*, 138 N. Y. S. 202; *Goldowitz v. Kupfer*, 80 N. Y. Misc. 487, 141 N. Y. S. 531; *Schneider v. Lesinsky*, 162 N. Y. S. 769; *Reading Silk Mills v. Barso*, 169 N. Y. S. 672; *Zimmerman v. Gillman*, 172 N. Y. S. 263. Appropriation of the goods by the seller in conformity with an order by the buyer does not satisfy this provision. *Peck v. Abbott & Fernald Co.*,

223 Mass. 423, 111 N. E. 890. See also *infra*, § 548. But putting them as requested in a place which belongs to the buyer or is under his control is evidence of acceptance and receipt. *Castle v. Swift*, 132 Md. 631, 104 Atl. 187.

⁷ *Towers v. Osborne*, 1 Strange, 506; *Clayton v. Andrews*, 4 Burr, 1201.

⁸ 9 George IV, c. 14, § 7.

⁹ See cases cited *infra*, § 516; also *Barr v. Satcher*, 72 S. C. 35, 51 S. E. 530.

§ 509. American rules.

Although the rule finally reached in England is absolutely logical and is the only rule that has ever been suggested for which so much can be said, it has not been followed in the United States. The only decisions approving it to its full extent seem to be Missouri cases.¹⁶ The rule most commonly adopted is what is known as the Massachusetts rule, which was first laid down by Chief Justice Shaw, in *Mixer v. Howarth*.¹⁷ This was an action to recover the price of a buggy made to the defendant's order and the court held the plaintiff entitled to recover. Chief Justice Shaw stated the principles governing the case as follows: "When the contract is a contract of sale, either of an article then existing, or of articles which the vendor usually has for sale in the course of his business, the statute applies to the contract, as well where it is to be executed at a future time, as where it is to be executed immediately. . . . But where it is an agreement with a workman to put materials together and construct an article for the employer, whether at an agreed price or not, though in common parlance it may be called a purchase and sale of the article, to be completed *in futuro*, it is not a sale until an actual or constructive delivery and acceptance; and the remedy for not accepting is on the agreement." This rule has been followed both in Massachusetts¹⁸ and elsewhere, either exactly or substantially.¹⁹ In New York

ronto Ry. Co., 22 Ont. App. 462; Wolfenden v. Wilson, 33 U. C. Q. B. 442.

¹⁶ *Pratt v. Miller*, 109 Mo. 78, 18 S. W. 965, 32 Am. St. Rep. 656; *Burrell v. Highleyman*, 33 Mo. App. 183; *Pike Co. v. Richardson Co.*, 42 Mo. App. 272; *Helmert v. Nagel*, 112 Mo. App. 202; *Schmidt v. Rozier*, 121 Mo. App. 306, 98 S. W. 791; *Lesan Advertising Co. v. Castleman*, 165 Mo. App. 575, 148 S. W. 433; *Krippendorf-Dittman Co. v. Hunt-Riddick Merc. Co.*, (Mo. App. 1916), 190 S. W. 44. The facts of most of these cases do not present an extreme application of the English rule. But in *Lesan Advertising Co. v. Castleman*, the subject matter of the bargain was a set of drawings made by the plaintiff.

¹⁷ 21 Pick. 205, 32 Am. Dec. 256.

¹⁸ *Goddard v. Binney*, 115 Mass. 450, 15 Am. Rep. 112. But if the seller is to procure the goods from a third person who manufactures them, the contract is within the statute. *Smalley v. Hamblin*, 170 Mass. 380, 49 N. E. 626.

¹⁹ *Rantoul Co. v. Claremont Paper Co.*, 196 Fed. 305, 116 C. C. A. 125; *Flynn v. Dougherty*, 91 Cal. 669, 27 Pac. 1080, 14 L. R. A. 230; *Bond v. Bourk*, 54 Colo. 51, 129 Pac. 223, 43 L. R. A. (N. S.) 97, Ann. Cas. 1914 C. 599; *Atwater v. Hough*, 29 Conn. 508, 79 Am. Dec. 229; *Cason v. Cheely*, 6 Ga. 554; *Yoe v. Newcomb*, 33 Ind. App. 615, 71 N. E. 256; *Edwards v. Grand Trunk R. Co.*, 48 Me. 379; *Crockett*

prior to its enactment of the Sales Act, still another in force. The distinction was drawn between goods manufactured, which were treated as not within the statute already in existence which were held as within it even though something remained to be done before the goods were in deliverable condition.²⁰ This rule also has had a wide application in the United States.²¹ In the Uniform Sales Act it

v. Scribner, 64 Me. 447; *Turner v. Mason*, 65 Mich. 662, 32 N. W. 846; *Bauscher v. Gies' Est.*, 160 Mich. 502, 125 N. W. 420; *Ericsson Mfg. Co. v. Caille Bros. Co.*, 195 Mich. 545, 162 N. W. 81; *Russell v. Wisconsin Ry. Co.*, 39 Minn. 145, 39 N. W. 302; *Brown & Hayward Co. v. Wunder*, 64 Minn. 450, 67 N. W. 357; *Greenhut Cloak Co. v. Oresak*, 130 Minn. 304, 153 N. W. 613; *Schloss v. Josephs*, 98 Minn. 442, 108 N. W. 474; *Pitkin v. Noyes*, 48 N. H. 294, 97 Am. Dec. 615, 2 Am. Rep. 218; *Prescott v. Locke*, 51 N. H. 94, 12 Am. Rep. 55; *Pawelski v. Hargreaves*, 47 N. J. L. 334, 54 Am. Rep. 162; *Mechanical Boiler Co. v. Kellner*, 62 N. J. L. 544, 43 Atl. 599; *Roubicek v. Haddad*, 67 N. J. L. 522, 51 Atl. 938; *Orman v. Hager*, 3 N. Mex. 331, 9 Pac. 363; *Courtney v. Bridal Veil Box Factory*, 55 Or. 210, 105 Pac. 896; *Puget Sound Depot v. Rigby*, 13 Wash. 264, 43 Pac. 39; *Meinke v. Falk*, 55 Wis. 427, 13 N. W. 545, 42 Am. Rep. 722; *Hanson v. Roter*, 64 Wis. 622, 25 N. W. 530; *Gross v. Heckert*, 120 Wis. 314; *Williams-Hayward Co. v. Brooks*, 9 Wyo. 424, 64 Pac. 342. See also *Sawyer v. Ware*, 36 Ala. 675; *Scales v. Wiley*, 68 Vt. 39, 33 Atl. 771; *Wisconsin Fibre Co. v. Jeffris Lumber Co.*, 132 Mich. 111, 111 N. W. 237. In *Willak v. Sisters of Mercy*, 185 Mich. 185, 185 N. W. 85, the court refused to allow parol evidence to show that goods ordered were to be specially manufactured for the buyer.

²⁰ *Parsons v. Loucks*, 48 N. Y. 17, 8 Am. Rep. 517; *Cooke v. Millard*, 65 N. Y. 352, 22 Am. Rep. 619; *Hinds v.*

Kellogg, 13 N. Y. S. 133, 133 N. Y. 536, 30 N. E. Maxwell, 51 N. Y. 652; *Holbrook*, 118 N. Y. 586, 16 Am. St. Rep. 788; *Joey Abb. N. C. 373*; *Talmac N. Y. Misc. Rep. 731*, 4 Gerli *v. Metzger*, 99 N. Y. Meyer Bros. Drug Co. 137 N. Y. App. Div. 54, 845. See also *Roubicek N. J. L. 522*, 51 Atl. 83; *v. Trokie*, 139 N. Y. App. N. Y. S. 121, it was held goods are to be manufactured one other than the seller was within the statute; *v. Canaswacta Knitting Co.* App. D. 351, 139 N. Y. S. preceding case was disapproved; contract for goods to be manufactured by any one held a contract for labor. In *Goldowitz v. Kull* Misc. 487, 141 N. Y. S. 8; *v. Lezinaky*, 162 N. Y. S. were decided after the Uniform Act was applicable, the goods were held not within the statute; goods in question were not for sale to others."

²¹ *Bennett v. Nye*, 4 G. 410 (compare *Mighell v. Iowa*, 480, 53 N. W. 402, 755, 41 An. St. Rep. 5; *Evans*, 108 Iowa, 296, 7 Dierson *v. Petersmeyer* 233, 80 N. W. 389; *Clintfinning Co. v. Horras*, 176 N. W. 602); *Eichelberger* 5 H. & J. 213, 9 Am. Dec. *v. Walker*, 78 Md. 239, 1

best to follow the Massachusetts rule as representing, on the whole, the weight of American authority. Although the English rule is more exact from a scientific standpoint, as a practical rule it seems to have no advantage.²²

§ 510. Exchanges.

It is said by Chalmers in his annotation of the English Sale of Goods Act, that an exchange is not within the meaning of sale in the Statute of Frauds. He cites no authority for this, however, and in the United States it is well settled that a contract of exchange or barter is within the statute.²³ As the mischief is the same whether the bargain is one for a money price or an exchange or barter, it is desirable that the rule should be the same. Under the definition of sale in section 1, and that of price in section 9 (2) of the Uniform Sales Act, there can be no question that an agreement to transfer title to goods, or an actual transfer of title, in consideration of any personal property

Stuart v. University Lumber Co., (Or. 1913), 132 Pac. 1; *Winship v. Buzzard*, 9 Rich. 103; *Suber v. Pullin*, 1 S. C. 273; *Wallace v. Dowling*, 86 S. Car. 307, 68 S. E. 571, 138 Am. St. Rep. 1054; *Jones v. Pettigrew*, 25 S. Dak. 432, 127 N. W. 538; *Mattison v. Westcott*, 13 Vt. 258; *Ellison v. Brigham*, 38 Vt. 64; *Forsyth v. Mann*, 68 Vt. 116, 34 Atl. 481, 32 L. R. A. 788. See also *Heintz v. Burkhard*, 29 Or. 55, 43 Pac. 866, 54 Am. St. Rep. 777.

²² By express provision of a few statutes some definition is made. In California (Civ. Code, § 1740), agreements to manufacture goods from materials furnished by the manufacturer or another are excluded. See *Flynn v. Dougherty*, 91 Cal. 669, 27 Pac. 1080, 14 L. R. A. 230. So in Iowa (Code 1897, § 4626), contracts requiring the expenditure of labor, skill, or money for producing or procuring the goods are excepted. See *Dierson v. Petersmeyer*, 109 Iowa, 233, 80 N. W. 389; *Lewis v. Evans*, 108 Iowa, 296, 79 N. W. 81.

²³ *Raymond v. Colton*, 104 Fed. 219, 43 C. C. A. 501; *Franklin v. Matos Gold Min. Co.*, 158 Fed. 941, 86 C. C. A. 145; *Kuhns v. Gates*, 92 Ind. 66; *Wallace v. Long*, 105 Ind. 522, 526, 5 N. E. 666, 55 Am. Rep. 222; *Dowling v. McKenney*, 124 Mass. 478; *Gorman v. Brossard*, 120 Mich. 611, 79 N. W. 903; *Rutan v. Hinchman*, 30 N. J. L. 255; *Misner v. Strong*, 181 N. Y. 163, 168, 73 N. E. 965. In *Spinney v. Hill*, 81 Minn. 316, 84 N. W. 116, however, it was held, citing no authority, that an agreement to transfer stock in part payment for services was not a sale of the stock within the meaning of the Statute of Frauds. But see the case of *White v. [redacted]*, 53 How. Pr. 53, where a contract to give stock for valuable information was regarded as within the statute, though the bargain was enforced because the statute was held to have been satisfied. Also *Wallace v. Long*, 105 Ind. 522, 526, 5 N. E. 666, 55 Am. Rep. 222.

transferred or promised to be transferred, is within of section 4 of the Act.²⁴

§ 511. Mortgages.

It is not clear at common law whether a mortgage is to be regarded as within the statute. In jurisdiction it is held that a mortgage does not transfer title but creates a lien, it seems obvious that the statute must be inapplicable. Even in jurisdictions where a mortgage transfers a title defeasible upon the condition subsequent by the mortgagor, authority points in the same direction. In view of the definitions in section 75 of the Uniform Act it is clear that mortgages are not within the words "to sell" or "sale" in section 4 of that Act.

§ 512. Agreements of partnership or agency.

A contract by which parties agree to acquire and to acquire and sell to third persons, or simply to third persons, property for their joint benefit is not a contract to sell, or a sale, within terms of the statute.²⁵ An agreement between partners to dissolve the partnership and divide the assets is not within the statute, though one partner, who has advanced the money,

²⁴ See *infra*, § 559.

²⁵ *Gleason v. Drew*, 9 Greenl. 79; *Alexander v. Ghiselin*, 5 Gill, 138; *Bogigian v. Hassanoff*, 186 Mass. 380, 382, 71 N. E. 789. See also *Helfrech, etc., Co. v. Honaker*, 25 Ky. L. Rep. 717, 76 S. W. 342. In *Cerny v. Paxton & Gallagher Co.*, 78 Neb. 134, 110 N. W. 882, 10 L. R. A. (N. S.) 640, a debtor gave a chattel mortgage to his creditor on the faith of a promise by the latter that, if the property when sold at auction did not bring above a certain price, he would bid it in and allow the debtor to sell it at private sale and keep any balance above the debt. This agreement was held not within the statute.

²⁶ *Hunt v. Elliott*, 80 Ind. 245, 41

Am. Rep. 794; *Colt v. Clapp*, 476; *Bullard v. Smith*, 139 N. E. 86; *Bogigian v. Hassanoff*, 186 Mass. 380, 71 N. E. 789; *Reis*, 34 Mo. 357; *McNealley*, 123 Mo. App. 58, 99; *Coleman v. Eyre*, 45 N. Y. 213, 23; *Treat v. Hiles*, 68 W. N. W. 517, 60 Am. Rep. 84; *Roth Bros. Co.*, 162 Wis. 148, Ann. Cas. 1918 C. see *Mace v. Heath*, 30 N. W. 918. *A fortiori*, an agency under which the agent purchases goods for the principal is within the statute. *Wiger*, 1 Wis. 584, 111 N. W. 657, 1 (N. S.) 650. See also *supra*,

which the assets had been purchased, is by the agreement to have a lien on the property until the other partner pays his share of the debt.²⁷ With such cases should be contrasted a case where the agreement is that one party shall buy goods and, subsequently, resell a share of them to the other. Such a contract is within the statute.²⁸ Where choses in action are expressly included in the terms of the statute the sale of a partner's interest in a business would seem also to require a writing.²⁹ But otherwise such a sale is not within the statute.³⁰ A contract creating an agency to sell goods is not a contract for the sale of goods and is not within the statute.³¹

§ 513. Agreements of compromise.

A contract by which one person agrees merely to surrender a claim upon goods is not within the statute, for the title in the other person vests in him, not by virtue of a transfer from the adverse claimant, but by virtue of his own original title.³² So where parties having competing executions agree that the property shall be sold under one of them and the proceeds divided, they are not agreeing to transfer title to the property or to their claims but merely to divide the money received from the sale.³³

§ 514. "Of any goods."

The words of the original English statute were "goods, wares, and merchandises," and they have been copied in many American statutes, but the term "goods," as defined in the Uniform

²⁷ *Mason v. Spiller*, 186 Mass. 346, 71 N. E. 779.

²⁸ *Brown v. Slausen*, 23 Wis. 244. Contrast with this case, *Stack v. Roth Bros. Co.*, 162 Wis. 281, 156 N. W. 148, Ann. Cas. 1918 C. 741, where an agreement to buy at auction, and sell for the joint benefit of the parties such of the goods as proved salable and divide the remainder at an inventory valuation was held not within the statute.

²⁹ See *infra*, § 528.

³⁰ *Vincent v. Vieths*, 60 Mo. App. 9. Where one partner sells to a co-partner and withdraws from the con-

duct of the business, and the latter takes the sole management of the business, there is such acceptance and actual receipt as to satisfy the statute. *Gaisell v. Johnston*, 68 Wash. 470, 123 Pac. 783.

³¹ *Arkansas Lumber &c. Co. v. Benson*, 92 Ark. 392, 123 S. W. 367.

³² *Clark v. Duffey*, 24 Ind. 271; *Holden v. Gilfeather*, 78 Vt. 405, 63 Atl. 144.

³³ *Mygatt v. Tarbell*, 78 Wis. 351, 47 N. W. 618. See also *Goldbeck v. Kensington Bank*, 147 Pa. 267, 23 Atl. 565.

Sales Act, is as wide in its meaning as the several words of the older statute. The most troublesome question is how to tempt to define the meaning of goods relates to the distinction between real and personal property. Although the Statute of Frauds in England and the United States require a writing for the sale of land to be in writing, it is frequently necessary to distinguish whether a transaction is within the section of the statute relating to lands or in that relating to goods, and there is no limitation of value in the section relating to goods. That section also offers only one method of making a transaction enforceable, namely, a writing, whereas the section relating to goods offers several alternatives.

§ 515. Crops and *fructus industriales*.

It would seem, on principle, that as long as crops are growing or even standing matured in the earth, they are the realty; and that an agreement for an immediate transfer of title to them while thus growing or standing is an agreement for the sale of an interest of land. Doubtless the earth is used as a storehouse for articles of any kind, but to so reason, as has been done to the case of trees in a previous section, is pushing it beyond the point where it is justified by the facts. In truth, the nurseryman has attached his trees to the earth by the fact that he means to detach them later does not destroy the bond existing in the meantime. On the other hand, it is clear, on principle, that a contract to sell a particular crop when it has been gathered is a contract for the sale of goods, even though at the time the contract was made the crop was still growing (unless under a local American rule it was a contract for work and labor),³⁵ for the contract is not to sell the crop but to sell the harvested crop. There can be no doubt that the law supports this proposition,³⁶ but it does not

³⁵ *Miller v. Baker*, 1 Met. 27. The fact, however, that such trees had to be dug and packed by the seller does not make the contract one of work and labor and thus withdraw it altogether from the Statute of Frauds. *Jones v. Pettigrew*, 24 S. Dak. 432, 127 N. W. 538.

³⁶ As it was held, *e.g.*, in *Eichelberger*

v. M'Cauley, 5 H. & J. 213, 514 [now overruled by *Widdall v. Don*, 123 Md. 447, 91 Atl. Cas. 1916 C. 339; *Stemmer v. (Md.)*, 105 Atl. 780]; *T. Lane*, 17 N. Y. Misc. 731, 413.

³⁷ *Evans v. Roberts*, 5 B. & C. 101; *Watts v. Friend*, 10 B. & C. 101.

the criticism as to trees in a nursery. The tendency of the decisions has been to treat crops as personal property in some cases where strict reasoning might lead to a contrary conclusion. The vegetable products of the earth have been classified as *fructus naturales* and *fructus industriales*. In the former class are included everything which grows spontaneously, or without annual cultivation, such as trees or grass. In the second class are included crops which are the subject of yearly planting and cultivation. By a rule arbitrary, but not inconvenient, *fructus industriales* are treated in every case as goods, whether matured or not at the time when by the terms of the bargain they were to be sold.³⁷ The definition of goods in the Uniform Sales Act clearly involves the adoption of this rule. Some difficult questions have arisen in regard to the line dividing *fructus naturales* and *fructus industriales*. Thus, in the case of fruit, though the crop is picked annually, it is not the result of annual planting and not always of regular cultivation, but because of the annual character of the crop, together with the labor required to produce it, it has been held that a crop of peaches or other orchard fruit is to be classed as *fructus industriales*.³⁸ The same has been held in regard to hops,³⁹ and a crop of timothy seed.⁴⁰ A crop of grass growing from peren-

man v. Conn, 8 Ind. 58; Wainscott v. Kellogg, 84 Mo. App. 621; Pitkin v. Noyes, 48 N. H. 294, 97 Am. Dec. 615, 2 Am. Rep. 218.

³⁷ Marshall v. Green, 1 C. P. D. 35; Stuttgart Rice Mill Co. v. Renischl 123 Ark. 351, 184 S. W. 836; Marshal, v. Ferguson, 23 Cal. 65; Davis v. MoFarlane, 37 Cal. 634, 99 Am. Dec. 340; Wetopsky v. New Haven Gas Light Co., 88 Conn. 1, 90 Atl. 30; Bull v. Griswold, 19 Ill. 631; Sherry v. Picken, 10 Ind. 375; Moreland v. Myall, 14 Bush, 474; Bryant v. Crosby, 40 Me. 9; Purner v. Piercy, 40 Md. 212, 17 Am. Rep. 591; Willard v. Higdon, 123 Md. 447, 91 Atl. 577, Ann. Cas. 1916 C. 339; Whitmarsh v. Walker, 1 Met. 313; Smock v. Smock, 37 Mo. App. 56; Holt v. Holt, 57 Mo. App. 272; Swaf-

ford v. Spratt, 93 Mo. App. 631, 67 S. W. 701; Wimp v. Early, 104 Mo. App. 85; Newcomb v. Ramer, 2 Johns. 421, note; Webster v. Zielly, 52 Barb. 482; Walton v. Jordan, 65 N. C. 170; Carson v. Browder, 2 Lea, 701; Crosby v. De Bord (Tex. Civ. App.), 155 S. W. 647; Kerr v. Hill, 27 W. Va. 576. Cf. Powell v. Rich, 41 Ill. 466; Powers v. Clarkson, 17 Kan. 218.

³⁸ Purner v. Piercy, 40 Md. 212, 17 Am. Rep. 591; Vulioevich v. Skinner, 77 Cal. 239, 19 Pac. 424; Smock v. Smock, 37 Mo. App. 56. But see Rodwell v. Phillips, 9 M. & W. 501.

³⁹ Rodwell v. Phillips, 9 M. & W. 501, 503; Frank v. Harrington, 36 Barb. 415.

⁴⁰ Wimp v. Early, 104 Mo. App. 85, 78 S. W. 343.

§ 517. Water and ice.

Water when separated from a stream or lake becomes personalty. In the case of *Jersey City v. Harrison*,⁴⁶ where one town had contracted to supply water to another at a specified price per million gallons, the court held the contract to be "a contract for the sale of goods, wares, and merchandise, as fully as if the water was to be delivered in bottles."⁴⁷ Ice which has been cut is personal property, and a contract to sell and deliver after cutting would be a contract to sell goods. It has even been broadly held that a sale of ice, whether the subject of the sale is ice in the water or not, is a sale of goods, owing to the ephemeral character of ice and because it can only be used and sold as personalty.⁴⁸

§ 518. Minerals, manure.

Minerals also, though part of the realty, may be severed and, when severed, become goods. A contract to sell severed iron ore would be a contract to sell goods even though the ore which the parties expected, or even contracted, should be the subject of the sale, was not yet mined; but any attempt to give the buyer a right in the ore before it was mined would be an attempt to transfer an interest in land.⁴⁹ As to manure, the Massachusetts court said:⁵⁰ "It is till then [the time when

Eager, 16 N. J. L. 81; *Green v. Armstrong*, 1 Denio, 550; *Bishop v. Bishop*, 11 N. Y. 123, 62 Am. Dec. 68; *Misell v. Burnett*, 4 Jones (N. C.), 249, 69 Am. Dec. 744; *Drake v. Howell*, 133 N. C. 162, 45 S. E. 539; *Clark v. Guest*, 54 Ohio St. 298, 43 N. E. 862; *Bowers v. Bowers*, 95 Pa. 477; *Miller v. Zufall*, 113 Pa. 317, 6 Atl. 350; *Knox v. Haralson*, 2 Tenn. Ch. 232; *Buck v. Pickwell*, 27 Vt. 157; *Charles Somers Co. v. Pix*, 75 Wash. 233, 134 Pac. 932; *France v. Deep River Logging Co.*, 79 Wash. 336, 140 Pac. 361; *Fluharty v. Mills*, 49 W. Va. 446, 38 S. E. 521; *Daniels v. Bailey*, 43 Wis. 566; *Lillie v. Dunbar*, 62 Wis. 198, 22 N. W. 467; *Seymour v. Cushway*, 100 Wis. 580, 67 N. W. 769, 69 Am. St. Rep. 957.

⁴⁶ 71 N. J. L. 69, 72 N. J. L. 185, 58 Atl. 100.

⁴⁷ 71 N. J. L. 69, 70.

⁴⁸ *Higgins v. Kusterer*, 41 Mich. 318, 2 N. W. 13, 32 Am. Rep. 160. Compare *State v. Pottmeyer*, 33 Ind. 402.

⁴⁹ See *McConathy v. Lanham*, 25 Ky. L. Rep. 971, 76 S. W. 535. In *Morgan v. Russell*, [1909] 1 K. B. 357, the plaintiff sued on a contract to sell him slag, which had been tipped on the defendant's land a long time previously. The plaintiff was given the right to enter on the land and take as much as he wanted at a fixed price per ton. This was held not a contract for the sale of goods and the buyer was held not entitled to the measure of damages provided in the Sale of Goods Act.

⁵⁰ *Strong v. Doyle*, 110 Mass. 92, 93.

What are fixtures may depend to some extent upon the agreement of the parties.⁵⁴ For the same reason that a sale of fixtures by a tenant to his landlord is not a sale of goods, so a contract by which one person agrees to make improvements on land of another who agrees to pay subsequently for the improvements is not within the statute, whether the agreement to pay is made before or after the improvements have been made.⁵⁵

§ 520. Buildings.

Agreements are not infrequently made for the sale of buildings or of the materials in standing buildings. If the contract is to sell and deliver a house, even though the house is at the time of the bargain affixed to the realty, it is a contract for the sale of goods, for the parties contract to buy and sell a house separated from the realty and moved from its foundations.⁵⁶ On the other hand, if the parties attempt to make a present transfer of a building or materials fixed in a building, it is evident that they are attempting to make a sale of realty, even though it is also agreed that the subject-matter of the sale shall be severed within a short time;⁵⁷ and a parol reservation

observe the importance of distinguishing between a sale of fixtures to the landlord and one to a third person. See also *Strong v. Doyle*, 110 Mass. 92, 93; *Morgan v. Russell*, [1909] 1 K. B. 357.

⁵⁴ *Durkee v. Powell*, 75 N. Y. App. Div. 176, 77 N. Y. S. 368. See also *Strong v. Doyle*, 110 Mass. 92.

⁵⁵ *Frear v. Hardenbergh*, 5 Johns. 272, 4 Am. Dec. 356; *Benedict v. Beebee*, 11 Johns. 145; *Lower v. Winters*, 7 Cow. 263. See also *Underfeed Stoker Co. v. Detroit Co.*, 135 Mich. 431, 97 N. W. 959.

⁵⁶ *Scoggin v. Slater*, 22 Ala. 687; *Harris v. Powers*, 57 Ala. 139; *Clements v. Morton* (Ala.), 76 So. 306; *Long v. White*, 42 Ohio St. 59. See also *Rogers v. Cox*, 96 Ind. 157, 49 Am. Rep. 152; *Whetmore v. Rhett*, 12 Rich. L. 565; *Brown v. Roland*, 11 Tex. Civ.

App. 648, 33 S. W. 273. Compare *Fenlason v. Rackliff*, 50 Me. 362; *Powell v. McAshan*, 28 Mo. 70. The statement of law in this section was quoted with approval in *Wetopsky v. New Haven Gas Light Co.*, 88 Conn. 1, 90 Atl. 30, where the sale of a house to be removed was held not to be a contract for the sale of realty.

⁵⁷ *Lavery v. Pursell*, 39 Ch. D. 508. In this case the defendant sold building materials in a standing building. By the terms of the sale the materials were to be taken down and removed within two months. *Chitty, J.*, held the contract to be one for the sale of an interest in land and refused to follow the doctrine applied to trees in *Marshall v. Green*, 1 C. P. D. 35, that the prospect of immediate severance took the case out of the fourth section. To the same effect as *Lavery*

of a building is equally opposed to the section of relating to land.⁵⁸

§ 521. Choses in action.

Under the English statute it is settled that choses are not included within the terms "goods, wares, and dishes." This is true even though the chose in action is evidenced by a tangible document, as a certificate. In the United States, under statutes similar to the English, shares of stock are held to be included.⁶⁰ Like bonds and mortgage are goods, wares and merchandise under the statutes in the United States;⁶¹ and bills and notes.⁶²

v. Pursell is *Meyers v. Schemp*, 67 Ill. 469. See, however, *Keyser v. School District*, 35 N. H. 477.

⁵⁸ *McLeod v. Clark*, 110 Miss. 861, 71 So. 11.

⁶⁰ See as to shares of stock, *Humble v. Mitchell*, 11 A. & E. 205; *Bradley v. Holdsworth*, 3 M. & W. 422; *Knight v. Barber*, 16 M. & W. 66; *Heseltine v. Siggers*, 1 Ex. 856; *Tempest v. Kilner*, 3 C. B. 249; *Bowlby v. Bell*, 3 C. B. 284; *Duncuft v. Albrecht*, 12 Sim. 189. As to choses in action generally, *Colonial Bank v. Whinney*, 30 Ch. D. 261, 283; *Benjamin on Sales* (5th Eng. ed.), 174. Compare *Evans v. Davies*, [1893] 2 Ch. 216.

⁶⁰ *Snow Storm Min. Co. v. Johnson*, 186 Fed. 745, 108 C. C. A. 615; *Stiff v. Stiewel*, 91 Ark. 445, 125 S. W. 1008, 18 Ann. Cas. 597; *Russell v. Betts*, 107 Ark. 629, 156 S. W. 457; *Mayer v. Child*, 47 Cal. 142, 144; *North v. Forest*, 15 Conn. 400; *De Nunzio v. De Nunzio*, 90 Conn. 342, 97 Atl. 323; *Banta v. Chicago*, 172 Ill. 204, 218, 50 N. E. 233, 40 L. R. A. 611; *Pray v. Mitchell*, 60 Me. 430; *Colvin v. Williams*, 3 H. & J. 38, 5 Am. Dec. 417; *Tisdale v. Harris*, 20 Pick. 9; *Boardman v. Cutter*, 128 Mass. 388; *Fine v. Hornsby*, 2 Mo. App. 61; *Bernhardt v. Walls*, 29 Mo. App. 206; *Davis Laundry &c. Co. v. Whitmore*, 92 Ohio St.

44, 110 N. E. 518, Ann. 988; *Hewson v. Peterman*, Wash. 600, 136 Pac. 111 (N. S.) 398, Ann. Cas. *Korrer v. Madden*, 152 N. W. 325. *Webb v. E. R. R.*, 77 Md. 92, 26 At. St. Rep. 396, follows the contrary in—*Colvin v. W.* See also *Rogers v. Burr*, 31 S. E. 438, 70 Am. St. *Meehan v. Sharp*, 151 N. E. 507; *Schaefer v. Mass.* 467, 89 N. E. (1) *Brookins*, 23 Mich. 48, 9 In *Trenholm v. Kloepper*, 129 N. W. 436, and *Hartrett*, 143 Wis. 639, 128 N. tracts to repurchase stock seller as a term of the taken out of the statute acceptance and receipt of the original purchase. See *ad fin.*

⁶¹ *Greenwood v. Law*, 168, 26 Atl. 134, 19 L. R. A.

⁶² *Hudson v. Weir*, 29 Al. v. *Holmes*, 41 Me. 523; *chell*, 60 Me. 430, 435; *Belliams*, 3 Met. 365; *Somer* 118 Mass. 279, 19 Ar. But see *contra*, *Vawter* Ind. 593; *Howe v. Jones*,

has no existence until it is issued, and, therefore, an oral agreement to contribute capital and take stock in a corporation about to be formed has been upheld;⁶³ as has an oral agreement for the sale of an interest in an invention, before letters-patent have been obtained;⁶⁴ and so a patent itself or an interest in a patent has been held orally assignable.⁶⁵ In a Massachusetts case which so held,⁶⁶ the court said: "The words of the statute have never yet been extended by any court beyond securities which are subjects of common sale and barter and which have a visible and tangible form." These words are quoted with approval in other cases.⁶⁷ They are, however, not strictly accurate, for even a sale of a simple contract debt has been held by some courts to be within the statute.⁶⁸ The sale of a partner's interest in a firm is not within the statute.⁶⁹ In some States choses in action have been included by the express words of the statute,⁷⁰ or the wide term "personal property" is used.⁷¹

N. W. 451, 10 N. W. 299; *Bell v. Pitman*, 143 Ky. 521, 136 S. W. 1026, 35 L. R. A. (N. S.) 820; *Whittemore v. Gibbs*, 24 N. H. 484.

⁶³ *Wemple v. St. Louis &c. R. Co.*, 120 Ill. 196, 11 N. E. 906; *Peninsula Leasing Co. v. Cody*, 161 Mich. 604, 126 N. W. 1053; *York Park Building Assoc. v. Barnes*, 39 Neb. 834, 58 N. W. 440; *Clapp v. Gilt Edge Mines Co.*, 33 S. Dak. 123, 144 N. W. 721. See also *Berwin v. Bolles*, 183 Mass. 340, 342, 67 N. E. 323; *Clement v. Rowe*, 33 S. Dak. 499, 146 N. W. 700.

⁶⁴ *Dalsell v. Dueber Watch Case Mfg. Co.*, 149 U. S. 315, 37 L. Ed. 749, 13 S. Ct. 886; *Somerby v. Buntin*, 118 Mass. 279, 19 Am. Rep. 459; *Harrigan v. Smith*, 57 N. J. Eq. 635, 42 Atl. 579; *Jones v. Reynolds*, 120 N. Y. 213, 24 N. E. 279. See also *Cook v. Sterling Electric Co.*, 118 Fed. 45. An assignment of a patent must be in writing. U. S. Comp. St. (1901), p. 3387.

⁶⁵ *Searle v. Hill*, 73 Ia. 367, 35 N. W. 490, 5 Am. St. Rep. 688; *Burr v. DeLeVergne*, 102 N. Y. 415, 7 N. E. 366; *Whitcomb v. Whitcomb*, 85 Vt. 76, 81

Atl. 97. The Federal Statute requiring a writing in order to validate an assignment [Comp. Stat. (1901), p. 3387], is only of importance where the rights of third persons are concerned. See cases *supra*, also *Burke v. Partridge*, 58 N. H. 349.

⁶⁶ *Somerby v. Buntin*, 118 Mass. 279, 19 Am. Rep. 459.

⁶⁷ *Meehan v. Sharp*, 151 Mass. 564, 24 N. E. 907; *Vincent v. Vieths*, 60 Mo. App. 9. See also *Banta v. Chicago*, 172 Ill. 264, 218, 50 N. E. 233, 40 L. R. A. 611; *Howe v. Jones*, 57 Iowa, 130, 8 N. W. 451.

⁶⁸ *Walker v. Supple*, 54 Ga. 178; *French v. Schoonmaker*, 69 N. J. L. 6, 54 Atl. 225.

⁶⁹ *Vincent v. Vieths*, 60 Mo. App. 9.

⁷⁰ See *Colton v. Raymond*, 114 Fed. 863, 52 C. C. A. 382; *Artcher v. Zeh*, 5 Hill, 200; *Peabody v. Speyers*, 56 N. Y. 230; *Tomplins v. Sheehan*, 158 N. Y. 617, 53 N. E. 502; *Greenberg v. Davidson*, 39 N. Y. Misc. Rep. 796, 81 N. Y. S. 345; *Nichols v. Clark*, 40 N. Y. Misc. Rep. 107; *Spear v. Bach*, 82 Wis. 192, 52 N. W. 97.

⁷¹ See *Mechem on Sales*, § 287.

That such bargains may be within the statute is clear from the authorities cited, but a subsidiary question is, as yet, not so clearly settled. Is the value of goods for the purpose of determining whether a contract to sell at a price to be fixed in the future is within the statute, to be regarded as the amount the parties, or a reasonable person in their position, would have expected, or is the value what it actually turns out to be, or is the true construction that which has been adopted in connection with contracts not to be performed within a year, namely, that if the value may not exceed the statutory amount, even though it probably will and, in fact, ultimately does, the contract is not within the statute. Probably the true view is that the matter depends on the ultimate value of the goods to be sold.⁷⁸ This rule, however, leads to the curious result that not only may it be uncertain at the time the contract is made whether it is within the statute, but if the contract is utterly broken by the seller at the outset, it may happen that it never can be determined with certainty what the amount or value of the goods would have been if the contract had been carried out, and, therefore, whether the contract is within the statute.

§ 524. "Five hundred dollars or upwards."

The amount fixed by the English statute is £10 or upwards and this sum has generally been translated in the United States into \$50. In Arkansas, Maine, and Missouri, it is fixed at \$30;⁷⁹ in New Hampshire, \$33; in Vermont, \$40; in California, Idaho, Montana, and Utah, \$200; and in Florida there is no limit. It should be noticed that at the time when the amount was originally fixed in the English statute, £10 meant a great deal more money than it does to-day. It was deemed wise in fixing the amount in the Uniform Sales Act to set the limit at \$500. This figure has been changed, however, in several of the States which have passed the Act.⁸⁰ It has been seriously questioned

Bowman v. Conn, 8 Ind. 58; *Jersey City v. Harrison*, 72 N. J. L. 185.

⁷⁸ *Watts v. Friend*, 10 B. & C. 446.

⁷⁹ This was also the amount in New Jersey until the passage of the Uniform

Sales Act fixed the amount at \$500. *Eigen v. Rosolin*, 85 N. J. L. 515, 89 Atl. 923.

⁸⁰ It is reduced to \$50 in Michigan, Minnesota, New York, Wisconsin and Wyoming.

although each article was separately bid for and knocked down, acceptance of one article took all out of the statute.⁸⁴ Where goods are to be delivered in instalments, even though each instalment is of less value than that specified in the statute, the contract is within the statute if it is in fact a single contract, and if the total value of all the instalments exceeds the prescribed amount.⁸⁵ Where, however, goods belonging to several persons are sold, even though one bargain only is intended, there must be several sales in order to transfer title to the goods to a purchaser and the property of each seller must be considered separately.⁸⁶

§ 524a. Agreements to execute a written memorandum of an oral contract.

Sometimes parties not only enter into an oral contract within the Statute of Frauds but further agree to reduce their oral agreement to writing. If this last agreement can be specifically enforced it will result in making the principal agreement enforceable; or if damages can be recovered for breach of the contract to make a writing these damages will be indetical with the damages recoverable on the principal agreement if that were enforceable.⁸⁷ Whether a court should thus allow in effect the enforcement of the principal agreement though that is oral depends upon its attitude towards the Statute of Frauds. Technically the agreement to reduce the main contract to writing is not within the Statute; and courts desirous of limiting the statute to the narrowest possible field will be disposed to enforce the contract;⁸⁸ but as a practical matter the enforce-

⁸⁴ *Jenness v. Wendell*, 51 N. H. 63, 12 Am. Rep. 48; *Coffman v. Hampton*, 2 W. & S. 377, 37 Am. Dec. 511; *Tompkins v. Haas*, 2 Barr, 74. In the New Hampshire case the purchases were not even all made on the same day. But see the contrary and sounder decisions, *Emerson v. Heelis*, 2 Taunt. 38; *Couston v. Chapman*, L. R. 2 H. L. Sc. 250, 252. See also *Hess v. Dicks*, 181 Ia. 342, 164 N. W. 639.

⁸⁵ *Marsh v. Hyde*, 3 Gray, 331; *Standard Wall Paper Co. v. Towns*, 72 N. H. 324, 56 Atl. 744.

⁸⁶ *Tompkins v. Sheehan*, 158 N. Y. 617, 53 N. E. 502.

⁸⁷ *Clark v. Bradford Gas, etc., Co.*, (Del. 1916), 98 Atl. 368; *Pratt v. Hudson River Railroad Co.*, 21 N. Y. 305; *McLachlin v. Whitehall*, 114 N. Y. App. Div. 315, 99 N. Y. S. 721.

⁸⁸ *Hollis v. Whiteing*, 1 Vern. 151 (lease); *Shakespeare v. Alba*, 76 Ala. 351 (lease); *Brickey v. Continental Gin Co.*, 113 Ark. 15, 166 S. W. 744 (insurance policy for more than a year); *Eaton v. Whitaker*, 18 Conn. 222, 44 Am. Dec. 586 (lease); *Julin v.*

CHAPTER XVIII

EFFECT OF FAILING TO COMPLY WITH STATUTORY FORMALITIES

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§ 525. Varying language of the fourth and seventeenth sections of the English statute.

The fourth section of the English Statute of Frauds provides that "no action shall be brought," to charge the promisor upon any of the contracts therein enumerated unless a memorandum is made and signed. Section seventeen of the original statute provides that no contract for the sale of goods "shall be allowed to be good" unless the statute is complied with. These words of the latter section have been changed by the English Sale of Goods Act to "shall not be enforceable by action." The new words are supposed to reproduce accurately the legal effect of the earlier language¹ and they have been copied in the American Uniform Sales Act. No distinction is made by the English courts in the effect of the fourth and seventeenth sections based on the difference of language herein alluded to.²

¹ See, however, *Morris v. Baron*, [1918] A. C. 1.

² It was indeed said by Parke, B., in *Carrington v. Roots*, 2 M. & W. 248,

but the same assumption cannot safely be made in regard to the words "shall be void," or "are void," which are contained in the statutes of a number of the States, namely: Alabama,⁵ Colorado,⁶ Michigan,⁷ Nebraska,⁸ Nevada,⁹ New Jersey,¹⁰ New York,¹¹ Oregon,¹² Utah,¹³ Wisconsin,¹⁴ Wyoming,¹⁵ and the word "invalid" is sometimes treated as equivalent to void.¹⁶

§ 527. Effect of noncompliance with the statute.

Under the English statute it has been held that only the enforceability, not the validity, of a bargain depends upon the satisfaction of the statute. It is even said that the only effect of the statute is to require certain evidence in order to prove the bargain. This view has been given currency by the learned author of the leading treatise on the Statute of Frauds,¹⁷ and has been expressed in the statute of Iowa referred to in the preceding section.¹⁸ It has also received sanction from expressions of distinguished judges.¹⁹ But it has more accurately

⁵ Code (1907), § 4289.

⁶ Mills' St. (1912), § 3065.

⁷ Comp. L. (1916), § 11981. The enactment of the Uniform Sales Act in 1913 substitutes "not enforceable by action" in the clause relating to sales of goods.

⁸ Rev. St. (1913), § 2630.

⁹ Rev. L. (1912), § 1075. The enactment of the Uniform Sales Act in 1915 substitutes "not enforceable by action" in the clause relating to sales.

¹⁰ Comp. St. (1915), p. 2615, § 6. The Uniform Sales Act was passed in 1907.

¹¹ Birdseye's Cum. & Gilb. Cons. L. (1918), Personal Property Law, Sec. 31. The Uniform Sales Act was passed in 1911.

¹² Lord's Oreg. Laws (1910), § 808. See Taggart v. Hunter, 78 Oreg. 139, 150 Pac. 738, 152 Pac. 871, Ann. Cas. 1918 A. 128.

¹³ Comp. L. (1907), § 2467. The Uniform Sales Act was passed in 1917.

¹⁴ Stat. (1915), § 2307. The Uni-

form Sales Act was passed in 1911, and the Statute of Frauds in that Act is printed in the Wisconsin Statutes as 1684-t, § 4; but the old statute declaring sales "void" if the statute is not satisfied is still printed as § 2308.

¹⁵ Comp. St. (1910), §§ 3751, 3752. The Uniform Sales Act was passed in 1917.

¹⁶ Jones v. Pettigrew, 25 S. Dak. 432, 127 N. W. 538. See *infra*, § 531, n. 55, 56.

¹⁷ Browne on the Statute of Frauds.

¹⁸ In Reuber v. Negles, 147 Iowa, 374, 126 N. W. 966, 968, the court said: "Our Statute of Frauds is a statute of evidence. It does not forbid an oral contract nor render an alleged oral contract void or invalid. It only forbids oral evidence of a contract which is within its provisions. It permits the plaintiff to call his adversary as a witness and to establish the alleged contract by his oral evidence if he can."

¹⁹ Lord Blackburn in Maddison v. Alderson, 9 App. Cas. 467, at p. 488:

evidence were involved this would be unnecessary. To be sure the requirement of a special plea is by no means universal; for in England at common law, and still in many jurisdictions of the United States, the defendant may take advantage of the statute under the general issue.²⁴ In some of these cases the fact that the local Statute of Frauds declared that contracts within its terms were "void" is the decisive point. The words of the English statute also seem to express, if naturally construed, more than a rule of evidence. For these reasons it seems better to call the rule of the statute one of remedial procedure, somewhat analogous to the rule of the Statute of Limitations, rather than a mere rule of evidence.²⁵

§ 528. The statute does not affect fully executed agreements.

The Statute of Frauds invalidates only agreements executory at least on one side, whether rendering them unenforceable as in most jurisdictions or wholly void as in a few others. It does not render transactions illegal or opposed to public policy,

Smyth, 21 Utah, 109, 59 Pac. 756; *Jennings v. Auger*, 215 Fed. 658 (D. C. Wash.); *Tregea v. Mills*, 11 Wyo. 438, 72 Pac. 578.

²⁴ *Buttermere v. Hayes*, 5 M. & W. 456; *Eastwood v. Kenyon*, 11 A. & E. 438; *Dunphy v. Ryan*, 116 U. S. 491, 6 S. Ct. 486, 29 L. Ed. 703; *McDonald v. Yungbluth*, 46 Fed. 836; *Buhl v. Stevens*, 84 Fed. 922; *Thompson v. Frakes*, 112 Iowa, 585, 84 N. W. 703; *Wiswell v. Tefft*, 5 Kan. 263; *Morgan v. Wickliffe*, 22 Ky. L. Rep. 1648, 61 S. W. 13; *Hamilton v. Thirston*, 93 Md. 213, 48 Atl. 709; *Morgart v. Smouse*, 103 Md. 463, 63 Atl. 1070, 115 Am. St. Rep. 367; *Third Nat. Bank v. Steel*, 129 Mich. 434, 88 N. W. 1050, 64 L. R. A. 119; *Bean v. Lamprey*, 82 Minn. 320, 84 N. W. 1016; *Neuvirth v. Engler*, 83 Mo. App. 420; *Leesley v. A. Rebori Fruit Co.*, 162 Mo. App. 195, 144 S. W. 138; *Riiff v. Riibe*, 68 Neb. 543, 94 N. W. 517; *Jones v. Pettigrew*, 25 S. Dak. 432, 127 N. W. 538; *Hotchkiss v. Ladd*, 36 Vt. 593, 86

Am. Dec. 679; *McClanahan v. Otto-Marnet &c. Co.*, 74 W. Va. 543, 82 S. E. 752; *Williams-Hayward Co. v. Brooks*, 9 Wyo. 424, 64 Pac. 342. See also *Boone v. Coe*, 153 Ky. 233, 154 S. W. 900.

²⁵ This view is elaborated in an able article in 9 Am. L. Rev. 434. The article is not signed but was, in fact, written by William C. Loring, late justice of the Supreme Judicial Court of Massachusetts. The theory is substantially stated also by Willes, J., in *Gibson v. Holland*, L. R. 1. C. P. 1, in language quoted and approved by Peters, J., in *Bird v. Munroe*, 66 Me. 337, 347, 22 Am. Rep. 571: "The courts have considered the intention of the Legislature to be of a mixed character; to prevent persons from having actions brought against them so long as no written evidence was existing when the action was instituted." See also *Kerr v. Finch*, 25 Ida. 32, 135 Pac. 1165.

and therefore if an agreement within its scope is made by both sides, neither party can reclaim what he has given, it is true even where the performance on one side consists of an agreement to receive the performance of the other in satisfaction of a preëxisting claim.²⁷ Moreover, if the contract within the statute is performed on one side by conveying real property, the transfer is for value and cannot be set aside by creditors as a voluntary conveyance.²⁸

Nor can one who has received performance in full

²⁷ *Simon v. Motivos*, 1 W. Black. 599 ("If a contract is executed, it is never set aside"); *Shaw v. Woodcock*, 7 B. & C. 73, s. c. 9 D. & R. 889 (an agent who had voluntarily paid his principal the debt of another, was held not entitled to recover it); *Hansen v. Uniform Seamless Wire Co.*, 243 Fed. 177, 156 C. C. A. 43 (payment of sums on a ten-year contract of employment as full satisfaction); *Bates v. Babcock*, 95 Cal. 479, 30 Pac. 605, 16 L. R. A. 745 (after a conveyance of land had been made in pursuance of an oral agreement, though it could not have been compelled, the statute was held not to diminish the grantee's rights); *Craig v. Vanpelt*, 3 J. J. Marsh. 489 (one who orally promised to pay the debt of another and who has done so, cannot avail himself of the statute); *Eaton v. Eaton*, 35 N. J. L. 390 (an oral trust having been executed, the trustee cannot recover money paid in execution of it); *Newman v. Nellis*, 97 N. Y. 285, 291 (one who has dedicated a way in pursuance of an oral contract, cannot recall the dedication); *Larsen v. Johnson*, 78 Wis. 300, 47 N. W. 615, 23 Am. St. Rep. 404 (after a conveyance of land had been made in pursuance of an oral agreement, though it could not be compelled, the statute was held not to diminish the grantee's rights). See also *McCue v. Smith*, 9 Minn. 252, 86 Am. Dec. 100; *Dodge v. Crandall*, 30 N. Y. 294,

304; *Brown v. Farmers'* 117 N. Y. 266, 273, 22 N. J. L. 304.

²⁸ *Kling v. Tunstall*, 117 N. Y. 266, 273, 22 N. J. L. 304. (An oral agreement made that certain mortgages should be bid in and application of certain claims of property was bid in it, the agreed effect took place.)

In *James v. Morey*, 44 Cal. 479, an oral promise was made by the defendant to pay the plaintiff's mortgage on the promise the defendant would give the plaintiff Part of the money was paid to the defendant. The plaintiff's books for the rent of the defendant being indebted to the plaintiff for rent. It was held that the plaintiff could not recover the money. The court treated the books as equivalent payment and execution of the agreement. It seems, however, as to this portion of the case, that there was merely a discharge of the defendant from the promise to pay the rent in question. The promise was within the statute, and was not satisfied, the court should have erred in holding the defendant freed from liability.

²⁹ *Andrews v. Jones*, 117 N. Y. 266, 273, 22 N. J. L. 304. *Gordon v. Tweedy*, 71 Ala. 316. In the exceptional doctrine concerning nuptial agreements see, however, § 486.

with an oral agreement within the statute disclaim the terms of the agreement, and recover on a *quantum meruit* the value of what he has given.²⁹ So an agent authorized to contract who has fully performed an unenforceable contract made on behalf of another may recover from his principal what he has paid,³⁰ and this is true even though the agent after making the oral agreement was forbidden by his principal to carry it out.³¹ So the title which a grantee has received in performance of an unenforceable executory agreement is indefeasible.³² The ambiguity of the phrase "executed contract" has led to expressions in some cases to the effect that a contract executed on one side only is not within the terms of the statute.³³ No such general principle can be admitted. How far it is true depends on the clause of the statute in question, and on the character of the promise, performance of which still remains due. This matter has therefore been considered separately under the various clauses of the statute.

Another view of doubtful correctness has been adopted by some courts. The transfer of the possession and enjoyment of real estate is treated as if it were performance of an agreement to transfer title, so that thereby the contract becomes executed.³⁴

²⁹ *Stone v. Dennison*, 13 Pick. 1, 23 Am. Dec. 654. Cf. the decisions *infra*, § 534, where a plaintiff who had not actually received performance was held entitled to refuse tender thereof though made in accordance with the terms of a contract within the statute, and sue for the fair value of what he had himself given.

³⁰ *Pawle v. Gunn*, 4 Bing. (N. C.) 445, 448; *Bibb v. Allen*, 149 U. S. 481, 37 L. Ed. 819, 13 S. Ct. 950.

³¹ *Beal v. Brown*, 13 Allen, 114.

³² *Mushat v. Brevard*, 4 Dev. 73, 77.

³³ See, e. g., *Castlen v. Marshburn*, 8 Ga. App. 400, 69 S. E. 317.

³⁴ Thus in *Pearce v. Pearce*, 184 Ill. 289, 56 N. E. 311, an oral agreement was made as to a widow's dower rights. The widow took possession of the dower land assigned to her during her life

and her son agreed to pay rent for it to her. He was held liable for this; the agreement in regard to the dower right being regarded as validated by her possession. In *Anderson School Township v. Lodge*, 130 Ind. 108, 20 N. E. 411, 30 Am. St. Rep. 206, a building was put up by tenants in common under an agreement that one should own the land and ground floor while the other should own the second storey. The court held a partition suit could not be maintained, saying "the agreement was fully performed and possession taken."

In *Pireaux v. Simon*, 79 Wis. 392, 48 N. W. 674, after a party wall had been built and used by the defendant, it was held that he must pay half the cost as he had orally agreed. See also cases of agreements for partition and

§ 529. Illustrations of the effect of unenforceability against the original parties, or their

The validity of an unenforceable contract, or important in several kinds of cases. As between themselves the effect of a transaction sufficient at to pass the title to goods but where the statute has interfered, was thus expressed in a recent English case, the contract being good, all the legal consequences follow; so that, if the contract is for sale of specific property in the goods pass to the buyer. It may be said, What happens if the buyer, after making the purchase, fails to fulfill any of the statutory conditions which alone would make the contract enforceable against him? The property has passed to him, and it may be that he has received the goods, yet he cannot be sued for the price. The remedy is that the seller may call on the buyer to pay for the goods, and, if he fails to comply, the seller may treat the contract as rescinded. The effect of such rescission would be to restore the property to the seller and to entitle him to sue for possession." It is clear, however, that the seller may not have this right but must also have a right to repudiate if it is not enforceable against him; and if he cannot sue, he must also be able to resell the goods and give the purchaser a good title.³⁵ Similarly if the buyer resells

for the settlement of boundaries, *supra*, § 490, and of partly performed contracts for the sale of land, *supra*, § 494.

³⁴ *Taylor v. Great Eastern Ry. Co.*, [1901] 1 K. B. 774, 779.

³⁵ *Shelton v. Thompson*, 96 Mo. App. 327, 70 S. W. 256; *Fifth Nat. Bank v. Blair State Bank*, 80 Neb. 400, 114 N. W. 409, 127 Am. St. Rep. 752. In the case first cited, the court said: "If the acts of the parties constituted a sale at law, the transaction was not void but only voidable at the election of the party to be charged. *Aultman v. Booth*, 95 Mo. 383, 8 S. W. 742; *Maybee v. Moore*, 90 Mo. 340, 2 S. W. 471. And it may also be said that as the Statute of Frauds affects

only the remedy of title to be charged, its benefit is claimed by one who is not bound by the contract and is not charged thereby. *St. Louis v. Clark*, 121 Mo. 169, 906. But we hold that the facts are not within the statute for the reason that *Bain*, avoided the contract by refusing to have the hogs in dispute, it would be illogical to hold that he had repudiated an oral contract. The one in question, he cannot sue after he has sold the goods and the title. That is to say, that the Statute keeps the goods because

not having been satisfied, the subpurchaser cannot enforce his title against the original seller.³⁶ So where two oral contracts for the sale of real estate are made between different persons, the purchaser under the second agreement, if he actually receives a conveyance though with notice of the previous oral contract, can retain his title.³⁷ The seller had the legal right to repudiate his first oral contract and regain his title. This right he could transfer under the second contract; nor would a subsequently executed memorandum validating the first contract, give the purchaser under that contract a right against the grantee though it would give a right of action for damages against the seller. Indeed even though the original owner should execute a deed of conveyance to the purchaser who had the prior oral contract, the right of the latter will be inferior to that of one who has an earlier conveyance, though it was taken with notice of the prior oral contract.³⁸ But if the first oral agreement is validated by a memorandum made prior to the conveyance of the land to another purchaser, though after a written contract to convey has been made with him, the oral contract is validated from the time when it was first made and takes precedence over the second contract though that was in writing; and if the purchaser under the later contract thereafter takes a deed with notice of the prior contract, equity will compel him to convey to the first purchaser.³⁹ And, generally where the statute is satisfied at

could not be found, for the reason that they could be taken from him by the original vendee, which would destroy their character as articles of merchandise. But it is plain, that when the vendor voids a sale under said statute and retains the goods, his title is as if no such sale had ever been made, and he can resell and give as good a title as his own to the purchaser, who can, at a suit by the first vendee for the same goods, plead the action of the vendor, as a bar to such suit."

³⁶ But if the statute is satisfied even though after the subpurchase, the subpurchaser's title becomes enforceable. *Norton v. Simonds*, 124 Mass. 19.

³⁷ *Van Cloostere v. Logan*, 149 Ill. 588, 36 N. E. 946; *Asher v. Brock*, 95 Ky. 270, 24 S. W. 1070.

³⁸ *Pickerell v. Morss*, 97 Ill. 220.

³⁹ *Dawson v. Ellis*, 1 Jac. & W. 524; *Chicago Dock Co. v. Kinsie*, 49 Ill. 289; *Lucas v. Mitchell*, 3 A. K. Marsh. 244; *Gallaher v. Hunter*, 5 Mo. 507; *Magee v. Blankenship*, 95 N. C. 563; *Patterson v. Marts*, 8 Watts, 374; *Maguire v. Heraty*, 163 Pa. 381, 30 Atl. 151. See also *Mitchell v. King*, 77 Ill. 462; *Peck v. Williams*, 113 Ind. 256, 15 N. E. 270; *Lefferson v. Dallas*, 20 Ohio St. 68; *Main v. Bosworth*, 77 Wis. 660, 46 N. W. 1043.

some time after the oral bargain, either by a man or otherwise,⁴¹ the transaction dates, as between from the oral contract. That an unenforceable contract is also shown by the fact that where money is lent to his creditor without direction as to its use it may be applied by the creditor to the earliest indebtedness though that is unenforceable because of the

§ 530. Third persons cannot take advantage of the

It follows from what has been stated that a contract within the statute is valid except that it cannot be set aside against either party or his successor in interest if the statute has been satisfied as to him. A third party cannot be able to assert the invalidity of such transaction if he is an assignee or successor to a party to the contract. In general the authorities support this view. Therefore a contract is valid under the statute of a lease cannot be shown to be invalid who is not a party to it.⁴⁵ And in an action for performance of a contract between a third person and a plaintiff, the defense cannot set up that the contract

⁴⁰ See *infra*, § 590.

⁴¹ *Riley v. Bancroft's Est.*, 51 Neb. 864, 868, 71 N. W. 745 (acceptance and actual receipt of goods). See also *Goffard v. Stearns*, 51 Ala. 434, 444.

⁴² See *infra*, § 1796, *ad fin.*

⁴³ *Green v. Johnson*, 151 Ill. App. 63; *Schaefer v. Whitham*, 146 Ia. 64, 124 N. W. 763; *Bauer v. Weber Implement Co.*, 148 Mo. App. 652, 129 S. W. 59; *Stitt v. Ward*, 142 N. Y. App. Div. 626, 127 N. Y. S. 351; *Draper v. Wilson*, 143 Wis. 510, 128 N. W. 66. In the case last cited the court held that one who claimed hay under an alleged written bill of sale could not set up the Statute of Frauds as a defence to an action of replevin by one who claimed the hay under a subsequent oral agreement with the seller. In *Jacob v. Smith*, 5 J. J. Marsh. 380, a principal had agreed to sell certain land, if his agent had not "already disposed of it." The agent had previously

made an oral bargain for land. The principal was in carrying out the agent's duty.

⁴⁴ See cases cited *supra*.
⁴⁵ *Ex parte Banks*, 18 L. J. 74.

⁴⁶ *Jackson v. Stanfield*, 36 N. E. 345, 37 N. E. 1588; *Rice v. Manley*, 66 Am. Rep. 30. In the former case the court said: "If this be the concern of the appellee, the contracts and their privies cannot take advantage of the fact that the contract is invalid under the Statute of Frauds. Many forms of fraud are covered by this and other courts have held that a third person cannot make the Statute of Frauds a defence to overthrow a transaction between other persons; that the contract is purely a personal one and cannot be made by strangers." *Railroad Co.*, 107 Ind.

Again, if insurance is made by a buyer upon property which he has bought by oral purchase, and the statute has been in no way satisfied,⁴⁷ the insurance company cannot set up that the insurer had no insurable interest in the property.⁴⁷ It should also be true that the buyer, in the case of such a sale, should be able to recover against any one who has injured the property. On this point however, most of the decisions seem to be adverse. The buyer has not been allowed to sue a carrier for goods injured in transit when title had passed at common law, but the statute had not been satisfied.⁴⁸ It has been held in Florida that a buyer could not maintain an action against a third person for detaining property which the buyer had bought, the statute not having been satisfied.⁴⁹ Other decisions, however, are opposed to this in principle.⁵⁰

167; *Bodkin v. Merit*, 102 Ind. 293, 1 N. E. 625; *Cool v. Peters Box, etc., Co.*, 87 Ind. 531; *Dixon v. Duke*, 85 Ind. 434; *Wright v. Jones*, 105 Ind. 17, 4 N. E. 281; *Savage v. Lee*, 101 Ind. 515, 8 Am. & Eng. Enc. Law, 659, and cases cited. It concerns the remedy alone, and the modern law is well settled that, in the absence of a statutory provision to the contrary, the effect of the statute is not to render the agreement void, but simply to prevent its direct enforcement by the parties, and to refuse damages for its breach. 8 Am. & Eng. Enc. Law, 658, 659, and cases cited."

⁴⁷ *Amsinck v. American Ins. Co.*, 129 Mass. 185; *Wainer v. Milford Mutual F. I. Co.*, 153 Mass. 335, 26 N. E. 877, 11 L. R. A. 598. Cf. *Stockdale v. Dunlop*, 6 M. & W. 224, per Parke, B.; *Felthouse v. Bindley*, 11 C. B. (N. S.) 869, per Willes, J.; *Pitney v. Glen Falls Ins. Co.*, 65 N. Y. 6.

⁴⁸ *Morgan v. Sykes*, stated in 3 Q. B. 486; *O'Neill v. New York, etc., R. R. Co.*, 60 N. Y. 138. It should be noticed, however, that the New York statute says that such a transaction shall be "void."

⁴⁹ *Summerall v. Thoms*, 3 Fla. 298.

⁵⁰ *Garcia v. United States*, 37 Ct. Cl. 243. In *Townsend v. Hargraves*, 118 Mass. 325, 333, Colt, J., said: "In carrying out its purpose, the statute only affects the modes of proof as to all contracts within it. If a memorandum or proof of any of the alternative requirements peculiar to the seventeenth section be furnished; if acceptance and actual receipt of part be shown; then the oral contract, as proved by the other evidence, is established with all the consequences which the common law attaches to it. If it be a completed contract according to common-law rules, then, as between the parties at least, the property vests in the purchaser, and a right to the price in the seller, as soon as it is made, subject only to the seller's lien and right of stoppage *in transitu*. Many points decided in the modern cases support by the strongest implication the construction here given. Thus, if one party has signed the memorandum, the contract can be enforced against him, though not against the other—showing that the promise of the other is not wholly void, because it affords a good and valid consideration to support the promise which by reason of the memorandum may be

Further, though in Minnesota and New York it that a buyer under such a sale cannot maintain against an officer who attaches the goods as the purchaser,⁵¹ in opposition to these cases are decisions in New Jersey, allowing the action against the officer

enforced. *Reuss v. Picksley*, L. R. 1 Ex. 243. The memorandum is sufficient if it be only a letter written by the party to his own agent; or an entry or record in his own books; or even if it contain an express repudiation of the contract. And this because it is evidence of, but does not go to make the contract. *Gibson v. Holland*, L. R. 1 C. P. 1; *Buxton v. Rust*, L. R. 7 Ex. 1, 279; *Allen v. Bennet*, 3 Taunt. 169; *Tufts v. Plymouth Mining Co.*, 14 Allen, 407; *Argus Co. v. Albany*, 55 N. Y. 495. A creditor, receiving payment from his debtor, without any direction as to its application, may apply it to a debt upon which no action can be maintained under the statute. *Haynes v. Nice*, 100 Mass. 327, 1 Am. Rep. 109. The contract is treated as a subsisting valid contract when it comes in question between other parties for purposes other than a recovery upon it. Hence the statute cannot be used to charge a trustee, who may set up against his debt to the principal defendant a verbal promise within the statute to pay the defendant's debt to another for a greater amount. *Cahill v. Bigelow*, 18 Pick. 369. And a guarantor may recover of his principal a debt paid upon an unwritten guaranty. *Beal v. Brown*, 13 Allen, 114. On the ground that the statute affects the remedy and not the validity of the contract, it has been held that an oral contract, good by the law of the place where made, will not be enforced in the courts of a country where the statute prevails. *Leroux v. Brown*, 12 C. B. 801. The defendant may always waive its protection, and the court will not interpose the defense. *Middlesex Co. v. Osgood*, 4 Gray, 447. And,

except that the statute no action shall be brought, there be no good reason to hold that an oral contract, if proved, at any time would not be sufficient. 9 M. & W. 36; *Tisdal v. Pick*, 9. In a recent case, *Bench*, a memorandum made by the defendant had been delivered to the plaintiff, but had been totally lost at the hands of the plaintiff. The case was held sufficient to take the case out of the statute. It is taken of the fact that the contract was not in existence when the memorandum was furnished. *Co. v. Hieronimus*, 140."

⁵¹ *Waite v. McKelvey*, 73 N. W. 727; *Ely v. C.*, 570. See also *Winner v. Ely*, 13 Mich. 363, 28 N. W. 570. It should be noticed that in Minnesota and the New York court does not use the word "void," but regards this as affecting the remedy of the statute, the law does. See notes to this section.

⁵² *Cowan v. Adams*, 2 Am. Dec. 242; *Sherron v. Green* (N. J. L.), 217. *Pierson v. Pierson*, 42 Ala. 370. That one who had been indebted to the plaintiff at the time of his death, he had subsequently paid his debt by performing a contract with a third party, even though this contract was made and within the statute

a Federal statute allowing compensation to loyal owners of property captured or destroyed during the Civil War, the Supreme Court of the United States had to consider the question whether the buyer of cotton, under a sale in which the statute had not been satisfied, could be regarded as owner, and the court held that he could not.⁵³ The court cites no authorities in support of this statement, however; and a later decision by the same court, involving almost precisely the same question, expressed a contrary view without citing the earlier case.⁵⁴

§ 531. Effect of the word "void" or a similar word in statutes.

How far the use of the word "void" in the statute^{54a} should be held to require a difference in construction is a question upon which authority is not wholly consistent. It may be questioned whether statutes containing this word were intended to vary the meaning of the English statute which forms the original basis of all of them, and it may fairly be argued that the word "void" should be given the meaning of "voidable," at the election of the other party. The decisions of some courts, at least, warrant such a construction.⁵⁵

⁵³ *Mahan v. United States*, 16 Wall. 143, 21 L. Ed. 307. Miller, J., delivering the opinion of the court, said (p. 147): "To hold that an agreement which that statute declares shall not be allowed to be good and valid was sufficient to transfer the title of the property to the claimant would be to overrule the uniform construction of this or a similar clause in all Statutes of Frauds by all the courts which have construed them."

⁵⁴ *Briggs v. United States*, 143 U. S. 346, 12 S. Ct. 391, 36 L. Ed. 180. The court there said: "There was no creditor or purchaser who could question the transfer of title to the vendee. The government stood in no such relation and could raise no such objection. It has no pre-existing demand or equity against the property. All the rights of the government resulted from capture."

^{54a} See *supra*, § 526.

⁵⁵ In *Crane v. Powell*, 139 N. Y. 379, 384, 34 N. E. 911, the court said, speaking of the statute: "It simply requires that certain agreements must be proved by writing. It introduced a new rule of evidence in certain cases without condemning as illegal any contract that was legal before." The court here does not seem to distinguish the construction to be given the New York statute from that given the English statute. In *Riley v. Bancroft's Est.*, 51 Neb. 864, 868, 71 N. W. 745, the court said: "While the statute declares that sales not conforming to its requirements shall be void, it is a truism that they are not void, but voidable. Such is the construction that all courts have placed upon the statute. Indeed the requirements of the statute are in a certain sense merely requirements of certain modes of proof and not requirements of inherent elements in the contract." In *Doney v.*

Other courts, however, construe the word more out considering its history.⁵⁸

Laughlin, 50 Ind. App. 38, 42, 46, 47, the court said: "It has been held that the words 'void' and 'invalid,' when used in regard to contracts not immoral nor against public policy, usually mean voidable at the option of one of the parties, or some one legally interested therein, and that such construction leads to fewer errors than that which ascribes to those words the meaning of absolute nullity for any and all purposes. *State v. Richmond*, 26 N. H. 232; *Mutual Benefit Life Ins. Co. v. Winne*, 20 Mont. 20, 49 Pac. 446; *Pearson v. Chapin*, 44 Pa. 9; *Ewell v. Daggs*, 108 U. S. 143, 2 S. Ct. 408, 27 L. Ed. 682; *Kearney v. Vaughan*, 50 Mo. 284." See also *Wills v. Ross*, 77 Ind. 1. Such was the construction put upon the word "void" in the Sales in Bulk Act in *Dickinson v. Harbison*, 78 N. J. L. 97, 72 Atl. 941.

⁵⁸ In *Laun v. Pacific Mut. L. Ins. Co.*, 131 Wis. 555, 560, 111 N. W. 660, however, the court said: "Where the contract is declared void by statute, and the statute is within the power of the legislature to enact, there is not much room for discussion, although even then the whole purview of the statute may indicate that the word 'void' is used in the sense of 'voidable.'" In *Pierce v. Clarke*, 71 Minn. 114, 73 N. W. 522, in construing the Minnesota statute which contains the word void, the court went farther and declared a contract within the statute "absolutely void," and overruled a statement in *Hagelin v. Wacks*, 61 Minn. 214, 216, 63 N. W. 624, that such a contract was merely not enforceable by action. See also *Prestwood v. Carlton*, 162 Ala. 327, 50 So. 254; *Scott v. Bush*, 26 Mich. 418, 12 Am. Rep. 311; *Barton v. Gray*, 57 Mich. 622, 24 N. W. 638; *Waite v. McKelvy*, 71 Minn. 167, 73 N. W. 727;

Marie v. Garrison, 13 Wis. 257, 259; *Brandeis v. Wis.* 142. In *Ex parte* 275, 64 So. 74, the court said in the most emphatic way within the statute "void," not voidable, and yet said that unless taken by plea or defense waived, and held that the court could not take advantage to satisfy the statute. The Alabama court seems to hold that "void" is "absolutely void" what other courts hold voidable, it is unfortunate confusion by a difference of opinion. In California, the court declares oral agreements "invalid." Such agreements are enforceable unless they are set aside.

In *Townsend v. Hargrave*, 325, the Supreme Court sets, in construing the local statute relating to the action in which the words "shall be good and valid" are used, that there is a difference in these sections; but the policy of the enactment is the necessity of giving consistency to the parts, this difference to change the force of the two sections. . . . It is intended is that which action on the contract. In construing out its purpose, it affects the modes of contracts within it." *Munroe*, 66 Mo. 337, 2 the court disclaimed between the words in the statute: no contract valid," and "no action maintained" on certain contracts. *Pettigrew*, 25 S.

§ 532. Divisible contracts.

A contract though within the statute as to some portion of the performance promised by the defendant, may not be as to the remainder.¹ Such a contract is nevertheless unenforceable in any part, since the contract is an entirety, and the fact that part cannot be enforced involves the unenforceability of the whole.⁵⁷ Even though the contract is divisible in its nature⁵⁸ and a divisible portion of performance on both sides may not be within the statute, the same result must be reached. As a divisible contract is not several contracts but a single agreement, neither party can be required to perform part unless the whole is enforceable. Therefore, so long as the contract is wholly executory, it seems obnoxious to the statute unless it can be saved under the principles of part performance or of contracts executed on one side referred to in the preceding sections as adopted by some courts.⁵⁹ Nor would it seem material that a division of the agreed consideration on the plaintiff's side had been actually performed in expectation of receiving the promised corresponding division of performance from the defendant. As the contract is by hypothesis but a single contract, it does not follow that the defendant would

N. W. 538, "invalid" in the local statute was held equivalent to void.

⁵⁷ *Chater v. Beckett*, 7 T. R. 201; *Thomas v. Williams*, 10 B. & C. 664; *Mechelen v. Wallace*, 7 A. & E. 49; *Vaughan v. Hancock*, 3 C. B. 766; *Harman v. Reeve*, 18 C. B. 587; *Pond v. Sheean*, 132 Ill. 312, 23 N. E. 1018, 8 L. R. A. 414; *Rainbolt v. East*, 56 Ind. 538, 26 Am. Rep. 40; *Caylor v. Roe*, 99 Ind. 1; *Becker v. Mason*, 30 Kan. 697, 2 Pac. 850; *Jackson v. Evans*, 44 Mich. 510, 7 N. W. 79; *Savage v. Canning*, 1 Ir. R. C. L. 434.

⁵⁸ As to the meaning of divisible contracts, see *infra*, § 861.

⁵⁹ In *Cooke v. Tombs*, 2 Anst. 420, the defendant contracted to sell certain real estate and the personal property thereon for a lump sum. It was held that the contract was unenforceable even as to the personal property.

The court seemed to think this would be so even if the price were not a lump sum, since it could not be assumed that the parties would have bought or sold the personal property without the real estate. The same result was reached in fact in *Lea v. Barber*, 2 Anst. 425, n. where the price was divisible. See also *Mechelen v. Wallace*, 7 Ad. & E. 49; *Stringfellow v. Ivie*, 73 Ala. 209; *Grant v. Grant*, 63 Conn. 530, 29 Atl. 15, 38 Am. St. Rep. 379; *Thayer v. Rock*, 13 Wend. 53. Contracts are sometimes called divisible when what is really meant is that they are several independent contracts. Where such is the case even though the independent contracts were made at the same time one may be enforced without reference to the unenforceability of the other. *Mayfield v. Wadsley*, 3 B. & C. 357.

have agreed to give a single division of the contract price provided therein, had the contract not also provided for the remaining divisions of the contract also were to be performed.⁶⁰ But where the entire consideration agreed to be given on one side has been given, the party so performing is not liable under the contract for a divisible portion of the performance on the other side which is not within the statute.⁶¹

⁶⁰ See *Galvin v. Prentice*, 45 N. Y. 162, 6 Am. Rep. 58. In such a case the plaintiff may recover on the theory of quasi-contract, and the extent of his recovery may in a particular case be that specified in the express contract. See *infra*, § 1459, but it should be remembered that the obligation on which recovery is had is quasi-contractual.

In *Hurley v. Donovan*, 182 Mass. 64, 68, 64 N. E. 685, the court said: "Where the plaintiff has done work in consideration of the defendant's promising to do two things, the promise to do one being valid, the promise to do the other being within the statute of frauds, it has been held that the plaintiff can, if he chooses, forego all rights by reason of having been promised the two things, and enforce the performance of the one for which the promise is valid, as in *Rand v. Mather*, 11 Cush. 1, 59 Am. Dec. 131. There are other cases where there is a contract containing 'several stipulations, having reference to distinct objects, and imposing distinct duties, some of which can and some cannot be enforced,' in which it has been held that one of the separate contracts not within the statute can be enforced although some are within the statute and cannot be enforced, as in *Friedn v. Pettingill*, 116 Mass. 515. But in the case at bar the promise is part of one inseparable contract, namely, the contract to reconvey the land on being paid the money lent, and until then to keep down the interest on the prior incumbrance. It is like an agreement to buy a cargo of

coal and pay for its transportation from Philadelphia to Boston, the entire consideration in *Irving v. Cush*, 508, and like the contract to sell flats and fill them to a certain grade, and to sell land at a certain assessment, in *question v. Monks*, 5 Gray, 492, a case in *Dooley*, 119 Mass. 294. So long as the part of the contract is within the statute of frauds, no part of the contract can be enforced, as was held in *Stone*, 6 Cush. 508; on the other hand, it has been held that where a contract has been voluntarily executed in whole, which is within the prohibition of the statute, the promise to do more, not within the statute, may be enforced, as in *Monks*, 5 Gray, 492; *Case v. Potter*, 99 Mass. 354.

⁶¹ In *Wood v. Benson*, 3 Mass. 515, the defendant entered into a contract with the plaintiff, a guaranty: "I, the undersigned, hereby engage to pay to the plaintiff, the Manchester Gas Works, the gas consumed in the Minor Ward, by the lamps outside the time it is occupied by my brother-in-law, Mr. Nevil, also engage to pay for all the gas consumed by this 10th day of August, 1841." The court held the agreement enforceable for the consideration appearing from the facts, and refused to set it aside on the ground that it was a contract in violation of the statute.

been held that a contract to guarantee the condition of a sidewalk or a roof for a period of five years, the agreement on the other side being fully executed, might be enforced for the period within a year after it was made.⁶² It has hitherto been assumed that the part of the contract which is still unexecuted is within the statute. But it may be supposed that every part of the contract which is obnoxious to the statute has been performed. Under these circumstances even though a contract is not properly termed divisible, the promise for the remaining performance may be enforced.⁶³ If, however, the

held that recovery might be had for the gas subsequently supplied. See also *Flournoy v. Van Campen*, 71 Cal. 14, 12 Pac. 257; *Rand v. Mather*, 11 Cush. 1, 59 Am. Dec. 131; *Hurley v. Donovan*, 182 Mass. 64, 68, 64 N. E. 685; *Godefroy v. Hupp*, 93 Wash. 371, 160 Pac. 1056. *Cf. Pond v. Sheean*, 132 Ill. 312, 23 N. E. 1018, 8 L. R. A. 414, where an oral contract to leave the plaintiff real and personal property in consideration of services, was held unenforceable even for the personal property after the services had been performed.

⁶² *Okin v. Selidor*, 78 N. J. L. 54, 56, 78 Atl. 770, 138 Am. St. Rep. 588. The court said: "The agreement was not that after the first year the sidewalk should be in good condition for four more years, but that it should be in such condition during the first year as well. As to a breach occurring during the first year, this agreement was therefore not one that was not to be performed within one year. The fact that an action for breaches occurring after the first year would be barred by the statute does not enter into the present case in which the cause of action arose within the year." In the similar case of *Philip Carey Mfg. Co. v. Southern Construction Co.*, 2 Ala. App. 292, 56 So. 746, though the court notes that the breach relied on occurred within a year, it also seems of opinion that the contract in no event was

within the statute because the contingency on which liability might arise, might happen within the year, and cites the cases concerning contracts of insurance referred to *supra*, § 495. It should be observed, however, that the contract of insurance may be fulfilled within a year by the occurrence of loss to the full amount of the policy within that time; but a contract to guarantee a roof for five years is not fulfilled when a breach of the guaranty occurs within a year, and even if the total destruction of the premises might terminate the obligation within a year, it would be excused not performed. See *supra*, § 496.

⁶³ *Morgan v. Griffith*, L. R. 6 Exch. 70; *Angell v. Duke*, L. R. 10 Q. B. 174; *Pearsall v. Henry*, 153 Cal. 314, 95 Pac. 154; *Stephenson v. Arnold*, 89 Ind. 426; *Rosenberg v. Drooker*, 229 Mass. 205, 118 N. E. 302; *Negley v. Jeffers*, 28 Ohio St. 90; *Dock v. Hart*, 7 W. & S. 172. In *Zwicker v. Gardner*, 213 Mass. 95, 99 N. E. 949, 42 L. R. A. (N. S.) 1160, a mortgagee promised orally that if the mortgagor would refrain from bidding at the foreclosure sale, he himself would bid in the property, sell it, and account for the surplus over and above the debt and expenses. The mortgagor refrained as requested. The property was sold and suit was brought for the surplus. The court said: "Nothing remains to be done except for the defendant to ac-

local statute declares that the original contract, if this word is literally construed⁶⁴ it seems impossible that the portion of it remaining unperformed can be enforced unless the acceptance of part performance can be indicated by mutual assent to the creation of a new

§ 533. The doctrine of part performance applies to contracts for the sale of land.

In contracts for the sale of goods which are subject to a statute, its express terms provide that certain acts of part performance operate as a satisfaction of its requirements, that there has been no occasion for any equitable modification of the terms of the section of the statute relating to part performance.⁶⁵ It has not been suggested that part performance discharges a promise to answer for the debt of another; it has been often urged that after marriage has intervened, an oral promise previously made in consideration thereof cannot be enforced, the contrary has been uniformly held,

count for and pay over the excess. That part of the contract is separable from the rest of the contract, and the rest of the contract having been performed, there is no reason why this part of it should not be enforced. And to that effect see the cases which we cite. *Page v. Monks*, 5 Gray, 492; *Trowbridge v. Wetherbee*, 11 Allen, 361; *Graffam v. Pierce*, 143 Mass. 386, 9 N. E. 819." Cf. *Dyer v. Graves*, 37 Vt. 369.

⁶⁴ See *supra*, § 531.

⁶⁵ *Pierce v. Clarke*, 71 Minn. 114, 73 N. W. 522.

⁶⁶ See *supra*, § 503.

⁶⁷ *Sarkisian v. Teele*, 201 Mass. 596, 607, 608, 88 N. E. 333.

⁶⁸ *Montacute v. Maxwell*, 1 P. Wm. 618; *Caton v. Caton*, L. R. 2 H. L. 127; *In re Holland*, [1901] 2 Ch. 145; *M'Aske v. M'Cay*, 2 Ir. R. Eq. 447; *Lloyd v. Fulton*, 91 U. S. 479, 23 L. Ed. 363; *Andrews v. Jones*, 10 Ala. 400, 420; *Peek v. Peek*, 77 Cal. 106, 19 Pac. 227, 1 L. R. A. 185, 11 Am. St. Rep. 244; *Keedy v. White*, 168 Ill. 76, 48 N. E.

314; *Fleener v. Flenne*, 13 N. W. 92, 11 L. R. A. Ann. Cas. 556; *Greer v. Kans.* 740, 10 Pac. 156, 256; *Petty v. Petty*, 4 I. R. 501; *Albert v. Deshon*, 19 N. E. 1, 1 L. R. A. Whelpley, 62 Mich. 15, 4 Am. St. Rep. 810; *C. Miss.* 335, 54 So. 953, 1 S. 147, Ann. Cas. 191; *kings v. Watkins*, 82 N. Atl. 253; *Hunt v. Hunt*, 64 N. E. 159, 59 L. R. A. *ney v. Fittsworth*, 142 N. Y. 292, 126 N. Y. S. 905; *I. 27 Ohio St.* 121; *Adam v. Oreg.* 247, 20 Pac. 633; *Bail. Eq.* 228; *Hackney v. Humph.* 452; *Hannon v. Va.* 429, 12 S. E. 157; *R. 142 Wis.* 304, 125 N. W. A. (N. S.) 1140; *Crov. L. R.* 10 Vict. Eq. 186.

promisor fraudulently intended from the outset to induce the marriage without performing his promise. In such a case specific performance has generally been allowed.⁶⁸ Nor does it help the plaintiff's case that relying upon an agreement in consideration of marriage he changed his position, as by giving up his employment.⁶⁹ An agreement not performable within a year also is not validated by part performance,⁷⁰ though performance of one entire side of such a contract or of a divisible portion thereof is often held to make the statute inapplicable.⁷¹

Though the doctrine of part performance is not applicable to other provisions of the statute than that relating to real estate, whether because quasi-contractual remedies afford sufficient relief for such hardships as are likely to arise under other clauses, or because courts of equity have built up the doctrine in regard to part performance, and it is chiefly the clause of the statute relating to land which comes before such courts, it seems that the doctrine will none the less be applied to an oral contract for the sale of land because the contract was not performable within a year.⁷²

⁶⁸ *Cookes v. Mascall*, 2 Vern. 200; *Dundas v. Dutens*, 1 Ves. Jr. 196, 199; *Wood v. Midgley*, 5 D. M. & G. 41; *Caton v. Caton*, 1 Ch. App. 137; *Peek v. Peek*, 77 Cal. 106, 19 Pac. 227, 1 L. R. A. 185, 11 Am. St. Rep. 244; *Green v. Green*, 34 Kans. 740, 10 Pac. 156, 55 Am. Rep. 256; *Petty v. Petty*, 4 B. Mon. 215, 39 Am. Dec. 501. But see *contra*, *Hackney v. Hackney*, 8 Humph. 452.

⁶⁹ *Dienst v. Dienst*, 175 Mich. 724, 141 N. W. 591.

⁷⁰ *Britain v. Rossiter*, 11 Q. B. D. 123; *Conoley v. Harrell*, 182 Ala. 243, 62 So. 511; *Oak Leaf Mill Co. v. Cooper*, 103 Ark. 79, 146 S. W. 130; *Long v. Long*, 162 Cal. 427, 122 Pac. 1077; *Butler v. Shehan*, 61 Ill. App. 561; *Smith v. Chase & Co. Piano Mfg. Co.*, 175 Mich. 371, 141 N. W. 563, 185

Mich. 313, 151 N. W. 1025; *Union Savings & Co. v. Krumm*, 88 Wash. 20, 152 Pac. 681. Cf. *Diamond v. Jacquith*, 14 Ariz. 119, 125 Pac. 712, L. R. A. 1916 D. 880; *Bagwell v. Milam*, 9 Ga. App. 315, 71 S. E. 684.

⁷¹ See *supra*, § 504.

⁷² *Fall v. Hazelrigg*, 45 Ind. 576, 15 Am. Rep. 278. See also *Lavoie v. Dube*, 229 Mass. 87, 118 N. E. 179. The former case was made the basis of the broad statement in *Baynes v. Chastain*, 68 Ind. 376, 380, that the prohibition of the statute against contracts not performable within a year "is not applicable to agreements in relation to real estate." A similar statement is made in *Taggard v. Roosevelt*, 2 E. D. Smith (N. Y.), 100, but such broad statements are exceptional and do not represent the law.

§ 534. Quasi-contractual recovery for part performance of a contract within the statute.

Whether an agreement obnoxious to the Statute is void or merely unenforceable, one who has partly performed the agreement and who is not in default in continuing to perform should be compensated for any benefit which he has furnished his co-contractor. It has been suggested by the writer⁷³ that such relief ought not to be granted if the party knew that the agreement was unenforceable, since he has thereby voluntarily assumed the risk of receiving nothing in return for his performance. This suggestion, the writer admits, is not supported by the decisions, for it fails to recognize the important distinction between (1) agreeing to buy a chance of performance and (2) buying the performance itself, knowing that there is a possibility that the proposed exchange will not be carried out. One who pays a price for an insurance policy or for the purchase of a doubtful claim, is proposing to buy a chance of receiving something from the insurance company, or if in fact he receives nothing, he has none the less got what he paid for. Even one who under a mistake pays a claim which he supposes to be valid but which is invalid, at least as a result he desires—freedom from liability; though he may have achieved that result without payment. But one who has given his performance in return for a promise of a specific exchange does not receive that exchange, though he has given consideration on the one side and unjust enrichment on the other; and his knowledge beforehand that he may receive nothing for that exchange does not alter the case. It would be the same in law as in morals if one who had paid a thousand dollars for an absolute promise of a piece of land believing the promisor's word was as good as his bond, though knowing the agreement was legally invalid, should be without remedy if the vendor or his representatives failed to perform. Without regard to the plaintiff's knowledge, or lack of knowledge, of the invalidity of the oral contract, he is entitled to recover the fair value of what he has given when the defendant fails or refuses to perform on his part. It is immaterial

⁷³ Woodward, Quasi-Contracts, § 94.

the plaintiff has parted with money,⁷⁴ property,⁷⁵ or services.⁷⁶ The value of the use of premises may also be recovered from one who has occupied them under an oral contract to purchase,⁷⁷ or an oral lease within the statute.⁷⁸ It has been held

⁷⁴ *Gosbell v. Archer*, 2 Ad. & E. 500; *Head v. Sanders*, 189 Ala. 443, 66 So. 621; *Littell v. Jones*, 56 Ark. 139, 19 S. W. 497; *Bergtold v. Worthy*, 182 Ill. App. 379; *Frey v. Stangl*, 148 Ia. 522, 125 N. W. 868; *Brashear v. Rabenstein*, 71 Kans. 455, 80 Pac. 950. *Robertson v. Talley*, 84 Kans. 817, 115 Pac. 640; *Weber v. Weber*, 25 Ky. L. Rep. 908, 76 S. W. 507; *Jellison v. Jordan*, 68 Me. 373; *Cross v. Iler*, 103 Md. 592, 64 Atl. 33; *Cook v. Doggett*, 2 Allen, 439; *De Moss v. Robinson*, 46 Mich. 62, 8 N. W. 712, 41 Am. Rep. 144; *Presnell v. Lundin*, 44 Min. 551, 47 N. W. 161; *Larson v. O'Hara*, 98 Minn. 71, 107 N. W. 821, 116 Am. St. 342, 8 Ann. Cas. 849; *Interstate Hotel Co. v. Woodward, etc., Co.*, 103 Mo. App. 198, 77 S. W. 114; *Whitaker v. Burrows*, 71 Hun, 478, 24 N. Y. S. 1011; *Wilkie v. Womble*, 90 N. C. 254; *Ford v. Stroud*, 150 N. C. 364, 64 S. E. 1; *Durham v. Wick*, 210 Pa. St. 128, 59 Atl. 824, 105 Am. St. Rep. 789, 2 Ann. Cas. 929; *Miller v. Healey*, 39 R. I. 339, 97 Atl. 796; *Vaughn v. Vaughn*, 100 Tenn. 282, 45 S. W. 677; *Bedell v. Tracy*, 65 Vt. 494, 26 Atl. 1031; *Thomas v. Sowards*, 25 Wis. 631; *Miller v. Metz*, 103 Wis. 220, 79 N. W. 213.

⁷⁵ *Booker v. Wolf*, 195 Ill. 365, 63 N. E. 265; *Montague v. Garnett*, 3 Bush (Ky.), 297; *Bethel v. Booth*, 115 Ky. 145, 72 S. W. 803; *Richards v. Allen*, 17 Me. 296; *Bassett v. Bassett*, 55 Me. 127; *Chapman v. Rich*, 63 Me. 588; *Dix v. Marcy*, 116 Mass. 416; *Peabody v. Fellows*, 177 Mass. 290, 58 N. E. 1019; *Cromwell v. Norton*, 193 Mass. 291, 79 N. E. 433, 118 Am. St. Rep. 499; *Todd v. Bettingen*, 109 Minn. 493, 124 N. W. 443; *Day v. New York, etc., R. Co.*, 51 N. Y. 583.

⁷⁶ *Knowlman v. Bluett*, L. R. 9 Exch. 307; *Franklin v. Matos, etc.*, Min. Co., 158 Fed. 941, 86 C. C. A. 145, 16 L. R. A. (N. S.) 381; *Matt J. Ward Co. v. Goelert*, 230 Fed. 979, 145 C. C. A. 173; *Quirk v. Bank of Commerce*, 244 Fed. 682, 157 C. C. A. 130; *Patten v. Hicks*, 43 Cal. 509; *Fraser v. Howe*, 106 Ill. 563; *Wonsettler v. Lee*, 40 Kan. 367, 19 Pac. 862; *McDaniel v. Hutcherson*, 136 Ky. 412, 124 S. W. 384; *Chapman v. Rich*, 63 Me. 588; *Williams v. Bemis*, 108 Mass. 91, 11 Am. Rep. 318; *Whipple v. Parker*, 29 Mich. 369; *Smith v. Chase & Co. Piano Mfg. Co.*, 175 Mich. 371, 141 N. W. 563, 185 Mich. 313, 151 N. W. 1025; *Spinney v. Hill*, 81 Minn. 316, 84 N. W. 116; *Lally v. Crookston Lumber Co.*, 85 Minn. 257, 88 N. W. 846; *Emery v. Smith*, 46 N. H. 151; *Gay v. Mooney*, 67 N. J. L. 27, 687, 50 Atl. 596, 52 Atl. 1131; *Lockwood v. Barnes*, 3 Hill, 128, 38 Am. Dec. 620; *Thacher v. New York & Co. R. Co.*, 153 N. Y. App. D. 186, 138 N. Y. S. 463; *Graham v. Graham*, 134 N. Y. App. Div. 777, 119 N. Y. S. 1013; *Carter v. Brown*, 3 S. Car. 298; *Fabian v. Wasatch Orchard Co.*, 41 Utah, 404, 125 Pac. 860, L. R. A. 1916 D. 892; *Union Sav. & Trust Co. v. Krumm*, 88 Wash. 20, 152 Pac. 681; *Taylor v. Thieman*, 132 Wis. 38, 111 N. W. 229; *Savage v. Canning*, 1 Ir. Rep. C. L. 434; *Giles v. McEwan*, 11 Manitoba L. R. 150.

⁷⁷ *Davidson v. Ernest*, 7 Ala. 817; *Patterson v. Stoddard*, 47 Me. 355, 74 Am. Dec. 490; *Dwight v. Cutler*, 3 Mich. 566, 64 Am. Dec. 105.

⁷⁸ *Smith v. Pritchett*, 98 Ala. 649, 13 So. 569; *King v. Woodruff*, 23 Conn. 56, 60 Am. Dec. 625; *Donohue v. Chicago Bank Note Co.*, 37 Ill. App. 552; *Talamo v. Spitsmiller*, 120 N. Y.

in Massachusetts that if the defendant has refused but has not pleaded the Statute of Frauds as a bar for his refusal, recovery cannot be had for the contract furnished.⁷⁹ This is surely a most undesirable result. It compels a plaintiff first, to sue upon the contract, and then if the Statute of Frauds is pleaded to discontinue the action and begin another. It should be enough that the contract has been generally treated without discussion as enforceable if the defendant has refused to perform, without requiring more than that of the statute, and that he has this defense if he chooses to assert it.⁸⁰ If the defendant can show that his refusal is based on some other valid ground than that of the Statute of Frauds, the plaintiff's right will depend on whether the defense is given to one who is himself in default.⁸¹

If the plaintiff has not only rendered performance but has received part of the consideration for it, he should be able to recover the net benefit which the defendant has

37, 23 N. E. 980, 8 L. R. A. 221, 17 Am. St. Rep. 607. The extent of the tenant's obligations are somewhat illogically limited by the terms of the lease. Woodward, Quasi-Contracts, § 97.

⁷⁹ *DeMontague v. Bacharach*, 187 Mass. 128, 131, 72 N. E. 938, the court saying: "Nor could the action be maintained to recover what he had paid. For if the contract was oral, and within the statute of frauds, and it had been broken by the defendants, yet the statute had not been pleaded, and until this defence had been interposed the contract could be enforced, and an action would not lie to recover the consideration."

⁸⁰ In *De Moss v. Robinson*, 46 Mich. 62, 8 N. W. 712, 41 Am. Rep. 144, the plaintiff's intestate had paid the defendant \$900 in consideration of his promise to leave real estate by will. The court held the money recoverable because the will which the defendant made "was not in accordance with the agreement, and even if it had been there was nothing to prevent his re-

voking the same or selling the same during his life." Cooley, J., dissented, saying that the will made contrary to the agreement and the agreement partly performed.

⁸¹ See *infra*, §§ 1473 et seq.
⁸² In *Day v. New York Co.*, 51 N. Y. 583, 590, said: "If one pays money for service, or delivers property in pursuance of an agreement condemned by the statute of frauds, he may recover the money paid in an action for money received, and he may recover for his services and for the value of his property upon an implied assumption of duty provided he can show that he was ready and willing to perform, and the other party accepted or refused to perform."

"But what shall he do if he has received part of the consideration? He should not be left without a remedy for the balance due to him, but upon the same principles of justice and equity that

§ 535. Restoration or recovery in specie of what has been given or received.

It should not be requisite for the plaintiff to restore what he has received. The requirement of restoration by a plaintiff who seeks to rescind a transaction for the defendant's fraud or breach of promise⁸³ is only defensible because the plaintiff is seeking an alternative remedy. His primary remedy is to sue for deceit or for breach of contract; and the law in giving an alternative redress may well limit it to cases where no possible injustice will be done to the defendant. But where the original contract is unenforceable the quasi-contractual remedy is the only one available, and accordingly, the court should undertake to value any benefit which the plaintiff has received and deduct this benefit from the plaintiff's recovery.⁸⁴ It has been held that the defendant cannot defeat the plaintiff's right of recovery by offering to restore in specie what the plaintiff gave him;⁸⁵ but the decision has been criticized,⁸⁶ and it seems rightly, on the ground that the fundamental duty of the defendant is restitution, and that the law gives money value generally, not because that is the plaintiff's primary right but merely as the equivalent of what he is entitled to. If the plaintiff has transferred specific personal property, on the faith of the defendant's oral promise within the statute, the plaintiff may bring trover on the defendant's refusal to perform.⁸⁷ Similarly

imply a promise to pay the balance." In *Chapman v. Rich*, 63 Me. 588, the plaintiff, who had furnished the defendant's child with board and clothing for her services during a portion of the agreed period, was allowed to recover. In *Bethel v. Booth*, 115 Ky. 145, 72 S. W. 803, the plaintiff had sold the defendant a business for a price less than its actual value, receiving as part consideration an oral promise to employ him for ten years. On the failure of the defendant to keep his promise, the plaintiff was allowed to recover the difference between the price actually paid for the business and its real value.

⁸³ See *infra*, §§ 1454 *et seq.*

⁸⁴ See further *infra*, § 1460.

⁸⁵ In *Hawley v. Moody*, 24 Vt. 603, 606, Redfield, J., said at page 606, "If the party repudiating the future performance has himself received advances which he declines to pay for in the mode stipulated, it is regarded as equitable that he should refund in the usual mode for money had and for goods sold, and it is not in his power without the consent of the other party, to revest the title of the specific thing received."

⁸⁶ Keener, *Quasi-Contracts*, 286.

⁸⁷ *Keath v. Patton*, 2 Stew. 38; *Luey v. Bundy*, 9 N. H. 298, 32 Am. Dec. 359; *Dietrich v. Hoefelmeir*, 128 Mich. 145, 87 N. W. 111.

what he has done.⁹² Some cases do indeed allow recovery of the contract price,⁹³ but the better view is otherwise.⁹⁴ Whether the reasonable value allowed the plaintiff should be based on the plaintiff's detriment from the performance which he has rendered or the defendant's benefit therefrom is more doubtful. The former rule has been permitted,⁹⁵ but the latter seems more accurate.⁹⁶ Accordingly if the defendant has received no benefit, because the plaintiff's performance has enured to the benefit of a third person,⁹⁷ or has enured to no one's benefit,⁹⁸ as where the defendant refused to receive the product of the plaintiff's labor,⁹⁹ no recovery can be allowed. The contract price is, however, an admission of value by the defendant and as such should be admitted in evidence, though not treated as conclusive.¹ Decisions which refuse altogether to admit the agreed price in evidence² cannot be supported;

⁹² *Fuller v. Reed*, 38 Cal. 99; *Patten v. Hicks*, 43 Cal. 509; *Hull v. Thomas*, 82 Conn. 647, 74 Atl. 925; *Butler v. Shehan*, 61 Ill. App. 561; *Stout's Adm. v. Royston*, 32 Ky. L. Rep. 1055, 107 S. W. 785; *Dowling v. McKenney*, 124 Mass. 478; *Snyder v. Neal*, 129 Mich. 692, 89 N. W. 588; *Cosad v. Elam*, 115 Mo. App. 136, 91 S. W. 434; *Riiff v. Riibe*, 68 Neb. 543, 94 N. W. 517; *Galvin v. Prentice*, 45 N. Y. 162, 6 Am. Rep. 58; *Jackson v. Stearns*, 58 Ore. 57, 113 Pac. 30, 37 L. R. A. (N. S.) 639, Ann. Cas. 1913 A. 284; *Hertzog v. Hertzog's Admr.*, 34 Pa. 418; *Werre v. Northwest Thresher Co.*, 27 S. Dak. 486, 131 N. W. 721; *Masson v. Swan*, 6 Heisk. 450; *Pierce v. Paine*, 28 Vt. 34. See further, *infra*, §§ 1478 *et seq.*

⁹³ *Murphy v. DeHaan*, 116 Ia. 61, 89 N. W. 100; *Sears v. Ohler*, 144 Ky. 473, 139 S. W. 759; *Fuller v. Rice*, 52 Mich. 435, 18 N. W. 204; *Spinney v. Hill*, 81 Minn. 316, 84 N. W. 116; *Lally v. Crookston Lumber Co.*, 85 Minn. 257, 88 N. W. 846. (In *Spinney v. Hill* the court admits that the law of Minnesota on this matter can hardly be defended.) *Carter v. Brown*, 3 S. Car. 298.

⁹⁴ *Patten v. Hicks*, 43 Cal. 509; *William, etc., Works v. Atkinson*, 68 Ill. 421, 18 Am. Rep. 560; *Schanzenbach v. Brough*, 58 Ill. App. 526; *Stout's Admr. v. Royston*, 32 Ky. L. Rep. 1055, 107 S. W. 784; *Emery v. Smith*, 46 N. H. 151; *Jackson v. Stearns*, 58 Ore. 57, 113 Pac. 30, 37 L. R. A. (N. S.) 639, Ann. Cas. 1913 A. 284; *Hertzog v. Hertzog's Adm.*, 34 Pa. 418.

⁹⁵ *Fabian v. Wasatch Orchard Co.*, 41 Utah, 404, 125 Pac. 860, L. R. A. 1916 D. 892.

⁹⁶ See *infra*, § 1480.

⁹⁷ *Bristol v. Sutton*, 115 Mich. 365, 73 N. W. 424; *Pierce v. Paine's Est.*, 28 Vt. 34; *Kimmins v. Oldham*, 27 W. Va. 258. See also *Dunphy v. Ryan*, 116 U. S. 491, 29 L. Ed. 703, 6 S. Ct. 486.

⁹⁸ *Butler v. Shehan*, 61 Ill. App. 561; *Banker v. Henderson*, 58 N. J. L. 26, 32 Atl. 700. See also *Coheco Acqueduct v. Boston, etc., R. Co.*, 59 N. H. 312.

⁹⁹ *Dowling v. McKenney*, 124 Mass. 478.

¹ See Woodward on Quasi-Contracts, page 166, L. R. A. 1916 D. 900.

² *E. g.*, *Emery v. Smith*, 46 N. H. 151.

§ 538. The statute as a defence to recovery by a plaintiff in default.

Though no action can be brought upon a contract within the statute, and though "it is also clear that neither party can be held liable upon it indirectly in any action, which necessitates the admission of the existence of the contract,"⁶ it does not follow that a contract within the statute may not be admitted as evidence to establish a defence. If suit is brought on an alleged contract, for instance, the conduct of the parties might indicate an assent implied in fact to such a contract, were it not that an express oral agreement between them indicated a different arrangement. Even though the local Statute of Frauds declares the oral agreement void, evidence of it should be admissible in order to negative the implication of fact which might otherwise arise from the circumstances. The oral agreement should also be provable in order to prevent the imposition of any quasi-contractual liability at variance with the express agreement, as fully as if that agreement had been in writing. Under some circumstances a plaintiff in default is allowed

In *Waters v. Cline*, 121 Ky. 611, 616, 618, 85 S. W. 209, 750, the court said:

"The rule in Kentucky is that part performance of a contract will not take it out of the statute. But the court has also uniformly held that the statute is a shield, not a sword, and that where the party has received the consideration of the contract the court will not allow him to rely upon the statute and keep the consideration. In applying this rule in cases where the party who has performed the contract cannot be restored to the situation in which he was before the contract was made, and it is impossible to estimate by any pecuniary standard the value of what the other party has received, this court has adopted the rule that in such cases the contract itself is the best evidence of the value of what has been received; and while it will not enforce specific performance by decreeing a conveyance of the land, it will

adjudge compensation for what has been received by the defendant under the contract, measured by the consideration which, by the contract, he agreed to as the value of what he received." "For authorities in other States, see the following: *Sutton v. Hayden*, 62 Mo. 101; *Sharkey v. McDermott*, 91 Mo. 647, 4 S. W. 107, 60 Am. St. Rep. 270; *Owens v. McNally*, 113 Cal. 444, 450, 45 Pac. 710, 33 L. R. A. 369; *Brinton v. Van Cott*, 8 Utah, 480, 33 Pac. 218; *Quinn v. Quinn*, 5 S. D. 328, 335, 58 N. W. 808, 49 Am. St. Rep. 875; *Rhodes v. Rhodes*, 3 Sandf. Ch. (N. Y.) 279; *Parsell v. Stryker*, 41 N. Y. 480; *Johnson v. Hubbell*, 3 Stockt. Ch. 332 (N. J.) 66 Am. Dec. 773; *Wright v. Wright*, 99 Mich. 170, 58 N. W. 54, 23 L. R. A. 196, and *Kofka v. Rosicky*, 41 Neb. 328, 59 N. W. 788, 25 L. R. A. 207, 43 Am. St. Rep. 685."

⁶ *Brett, L. J.*, in *Britain v. Rossiter*, 11 Q. B. D. 123, 128.

to recover on a *quantum meruit* or *quantum valebat* in some of the United States even though the express contract was written, or enforceable without a writing.⁷ In such jurisdictions if the express agreement is oral and unenforceable because of the Statute of Frauds, proof of it clearly could not prevent quasi-contractual liability under circumstances where such liability would be imposed if the express agreement had been enforceable. In England and in some of the United States, however, a plaintiff in default under an enforceable contract can never recover quasi-contractually, and everywhere there are limitations on the quasi-contractual right of such a plaintiff.⁸ Wherever in a given jurisdiction the express agreement is unenforceable, the limitations on the quasi-contractual rights of a plaintiff in default thereunder should be the same as if the express contract were enforceable.

Allowing proof of the contract for such purposes is not enforcing it, but is merely refusing to impose liability on a defendant under circumstances where it is unjust to do so. The basis of quasi-contractual recovery is that the defendant has received something for which in equity and good conscience he ought to pay a fair value; but if the parties have made their own arrangement as to what should be given by the plaintiff, and what should be paid for it, and the defendant though not obliged to perform his agreement is willing to do so, there is no occasion for the court to invoke the principles of quasi-contract to any greater extent than if the contract had been enforceable. A promise to give is not only unenforceable, but void; yet if a promise to give is afterwards executed by the delivery of the promised property, no implication of fact, nor imposition of a legal obligation, requires the donee to pay the value of the property. A promise within the Statute of Frauds should be dealt with in the same way; and would be so dealt with in many if not most jurisdictions. Brett, L. J., in the English Court of Appeal has said:⁹ "It seems to me impossible that a new contract can be implied from the doing of acts which were clearly done in performance of the first contract only [which was within the statute] and to infer from them a

⁷ See *infra*, §§ 1473 *et seq.*

⁸ *Ibid.*

⁹ *Britain v. Rossiter*, 11 Q. B. D. 123, 127.

fresh contract would be to draw an inference contrary to the facts." ¹⁰

As a matter of actual decision, it cannot be assumed that a plaintiff in default will be treated in the same way under one class of contract within the statute as under another. Where money has been paid as the whole or part of the price under an oral contract to buy land, recovery of the money paid is almost universally disallowed if the seller is ready and willing to convey as he orally agreed,¹¹ and one who has transferred

¹⁰ In *Abbott v. Inskip*, 29 Ohio St. 59, 61, the court said: "The express promise contained in the agreement, under which the plaintiff assumed to render the service, excludes the presumption of the implied promise relied on."

In Kentucky (where the statute does not make oral agreements wholly void), the defendant may use the oral agreement as a shield in several ways, the court saying: "If a party borrows money, to be returned in two years, whilst no suit could be brought to enforce such mere verbal promise, yet a suit to enforce the implied promise, created by law, to return the money on the valuable consideration, could be maintained. Nor would the contract be without effect in such case, for the defendant could use it to protect himself against suit until the expiration of the time, simply because the statute has not declared the contract void. He could also use it for the purpose of reducing the interest below the legal rate, if such had been agreed; but he could not use it to prevent a recovery of the valuable consideration which he had derived by virtue of its terms, because the statute was never designed for such purposes." *Montague v. Garnett*, 3 Bush, 297, 299. See also *Roberts v. Tennell*, 3 T. B. Monroe, 247, 252; *Weber v. Weber*, 25 Ky. L. Rep. 908, 67 S. W. 507.

¹¹ *Thomas v. Brown*, 1 Q. B. D. 714; *York v. Washburn*, 118 Fed. 316, *affd.*

129 Fed. 564, 64 C. C. A. 132; *Venable v. Brown*, 31 Ark. 564; *Laffey v. Kaufman*, 134 Cal. 391, 66 Pac. 471, 86 Am. St. 283; *Crabtree v. Welles*, 19 Ill. 55; *Day v. Wilson*, 83 Ind. 463, 43 Am. Rep. 76; *Duncan v. Baird*, 8 Dana (Ky.), 101; *Gammon v. Butler*, 48 Maine, 344; *Plummer v. Bucknam*, 55 Me. 105; *Coughlin v. Knowles*, 7 Metc. (Mass.) 57, 39 Am. Dec. 759; *Congdon v. Perry*, 13 Gray, 3; *Kenniston v. Blakie*, 121 Mass. 552; *McKinney v. Harvie*, 38 Minn. 18, 35 N. W. 668, 8 Am. St. Rep. 640; *Sims v. Hutchins*, 8 Smed. & M. 328, 47 Am. Dec. 90 (a contrary suggestion in *Hairston v. Jaudon*, 42 Miss. 380, 386, was called absurd and overruled in *Washington v. Soria*, 73 Miss. 665, 673, 19 So. 485, 55 Am. St. Rep. 555); *McDonald v. Lynch*, 59 Mo. 350; *Perkins v. Allnut*, 47 Mont. 13, 130 Pac. 1; *Lane v. Shackford*, 5 N. H. 130; *Abbott v. Draper*, 4 Denio, 51; *Collier v. Coates*, 17 Barb. 471; *Dowdle v. Camp*, 12 Johns. 451; *Quinto v. Alexander*, 123 N. Y. App. D. 1, 107 N. Y. S. 422; *Graham v. Healy*, 154 N. Y. App. D. 76, 138 N. Y. S. 611; *Syme v. Smith*, 92 N. C. 338; *Durham & Co. Improvement Co. v. Guthrie*, 116 N. C. 381, 21 S. E. 952; *Weller v. Dusky*, 51 Okla. 77, 151 Pac. 606; *Shaw v. Shaw*, 6 Vt. 69; *Cobb v. Hall*, 29 Vt. 510, 70 Am. Dec. 432; *Cook v. Griffith*, 78 W. Va. 799, 86 S. E. 879, L. R. A. 1916 D. 466. See also *Johnson v. Puget Mill Co.*, 28 Wash. 515, 68 Pac.

title to personal property under an oral agreement that should be conveyed in exchange has similarly not been allowed to recover the fair value of the personalty, the defendant is willing to convey the land.¹² Recovery for the value of services rendered under an oral agreement within the statute has been generally denied to a plaintiff in default;¹³ but a contrary result has been reached in several jurisdictions. In a leading Massachusetts case,¹⁴ it was there said that to set the oral contract to be set up as matter of defence was in effect to enforce it; and, accordingly, a plaintiff who, owing to his own fault, had failed to perform his side of an enforceable contract, was allowed to recover on principles of quasi-contract for the value of his services. The decision though justly criticized,¹⁵ has been followed in Massachusetts¹⁶ and a few other States.¹⁷ Where the local statute provides that noncompliance with the statute renders an agreement void, an additional reason is found for permitting recovery by the defaulting plaintiff, since it is argued that the agreement is

867; *Thomas v. Brown*, 1 Q. B. D. 714. A few contrary decisions allow recovery. *Nelson v. Shelby Mfg. Co.*, 96 Ala. 515, 11 So. 695, 38 Am. St. Rep. 116; *Scott v. Bush*, 26 Mich. 418, 12 Am. Rep. 311; *Brandeis v. Neustadt*, 13 Wis. 142. See also *Brown v. Pollard*, 89 Va. 696, 17 S. E. 6. In these decisions last cited the court relies on the fact that the local statute made the oral agreement "void," but this seems immaterial.

¹² *Galway v. Shields*, 66 Mo. 313, 27 Am. Rep. 351; *Green v. North Carolina R. Co.*, 77 N. C. 95; *Hoskins v. Mitcheson*, 14 U. C. Q. B. 551. See also *Allis v. Read*, 45 N. Y. 142. There might, however, be an acceptance of a specified undivided fraction, if the bargain was for such a fraction.

¹³ *Swanzy v. Moore*, 22 Ill. 63, 74 Am. Dec. 134 (but see *Collins v. Thayer*, 74 Ill. 138); *Kruger v. Leppel*, 42 Minn. 6, 43 N. W. 484; *Galvin v. Prentice*, 45 N. Y. 162, 6 Am. Rep. 58 (cf. *Hartwell v. Young*, 67 Hun, 472, 22 N. Y. S. 486); *Abbott v. Inskip*, 29

Ohio St. 59; *Mack v. Bragg*, 38 571.

¹⁴ *King v. Welcome*, 5 Gray, 41

¹⁵ Keener, *Quasi-Contracts*, 234 also Woodward, *Quasi-Contracts*,

¹⁶ *Freeman v. Foss*, 145 Mass. 14 N. E. 141, 1 Am. St. Rep. Cf. *Riley v. Williams*, 123 1 506.

¹⁷ In *Bernier v. Cabot*, 71 Me. 36 Am. Rep. 343, the court refused to allow the defendant when sued *quantum meruit* to show that the services in question were rendered under an oral contract, a term of which was that the plaintiff should not sue within two years, and that he should be done so. The case does not cite *Comes v. Butler*, 48 Me. 344, where the court was inconsistently, but with no reason, held that one who had advanced money as part of the price of an oral contract for the purchase of land could not recover it when the seller was ready to convey. See *Comes v. Lamson*, 16 Conn. 246; *Collins v. Thayer*, 74 Ill. 138, 142.

for all purposes, and the situation is left as it would be had there been no agreement.¹⁸ In Wisconsin the court has gone so far as to hold that a plaintiff who has fully performed may reject counter performance for which he bargained, since that bargain is by the statute void, and recover the value of what he has given.¹⁹ The courts which render these decisions, however, lose sight of the fact that an agreement within the Statute of Frauds is not illegal whether void or not; that no contract implied in fact at variance with the oral agreement can be found; and that the only reasonable basis for allowing quasi-contractual recovery is that the plaintiff has not received, and cannot get, what he expected to get as a return for his own performance. If his performance were a gift he would nowhere be allowed to recover pay for it, and to allow a plaintiff who has orally agreed to sell his performance for half its value to recover the full value when he himself is the cause of the breach of the oral agreement, is as objectionable as to allow him to recover the full value when he agreed to perform for nothing.²⁰

It has been pointed out, however, that if one who has partly performed and whose performance is wholly due before that of the other party, is denied relief unless he completes his performance, there may be hardship upon him since he will be compelled to go forward with his own performance without thereby gaining an enforceable right to the counter-performance.²¹ The hardship does not seem very serious since the situation supposed necessarily assumes that if the contract were enforceable its terms are such that the plaintiff would have to perform first relying merely on the acquisition of a

¹⁸ Recovery was therefore allowed in *Nelson v. Shelby Mfg. Co.*, 96 Ala. 515, 11 So. 895, 38 Am. St. Rep. 116 (price paid for land); *Scott v. Bush*, 28 Mich. 418, 12 Am. Rep. 311 (price paid for land); *Brandeis v. Neustadt*, 13 Wis. 142 (price paid for land); *Draheim v. Evison*, 112 Wis. 27, 87 N. W. 795 (services rendered); *Chase v. Hinkley*, 126 Wis. 75, 105 N. W. 230, 110 Am. St. Rep. 896 (services rendered).

¹⁹ *Koch v. Williams*, 82 Wis. 186, 52 N. W. 257. But see *contra*, *Day v.*

Wilson, 83 Ind. 463, 43 Am. Rep. 76; *Riley v. Williams*, 123 Mass. 506; *Galway v. Shields*, 66 Mo. 313, 27 Am. Rep. 351.

²⁰ In Minnesota, contracts within the Statute are declared "void" yet the plaintiff in default is denied recovery. *McKinney v. Harvie*, 38 Minn. 18, 35 N. W. 668, 8 Am. St. Rep. 640; *Kruger v. Leppel*, 42 Minn. 6, 43 N. W. 484.

²¹ *Woodward*, *Quasi-Contracts*, § 98, p. 155, citing *Collier v. Coates*, 17 Barb. 471, 475.

CHAPTER XIX

SATISFACTION OF THE STATUTE

BY ACCEPTANCE AND RECEIPT OR PART PAYMENT

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§ 539. Methods of satisfying the statute.

Section 4 of the English statute specifies but one way of making contracts within its scope enforceable, namely, by a written memorandum of the contract signed by the party to be charged, or his agent; and American statutes have followed the English model, though a few of them have enacted into statute the doctrine of part performance of contracts for the sale of real estate, a doctrine which, as established by courts

of equity, may fairly be called a method of satisfying one clause of Section 4, without authority of statute. Section 17 of the English statute, however, which relates only to contracts for the sale of goods, provides several alternative modes of satisfaction; and wherever contracts for the sale of goods are covered by local statutes of frauds in the United States, these alternative possible methods of satisfaction are expressly permitted. So far as concerns a written memorandum, Sections 4 and 17 are alike; but the additional alternatives permissible by Section 17 for sales of goods alone, may be considered before consideration of the nature of the requirement of a memorandum.

§ 540. Satisfaction of Section 17.

The statute specifies two ways in which contracts or sales within its terms may be made binding, besides the giving of a memorandum: (1) Acceptance of the whole or part of the goods (or choses in action) sold, and actual receipt of the same; (2) payment of earnest money or a portion of the price. There has been elaborate judicial construction of these requirements, which are almost universally stated in substantially the same language in the American statutes.¹ These statutory requirements are obviously additional to what the common law requires; although the same circumstances may sometimes indicate both the formation of a bargain at common law and a satisfaction of the statutory requirements.

In order to recover, therefore, a plaintiff must show a valid contract or sale, at common law, and satisfaction of the statute in one of the three specified ways. Until this has

¹ In Indiana the statute uses simply the word "receive" without reference to acceptance. Burns' Annot. St. (1914), § 7470. In Iowa the corresponding requirement is that part of the goods be "delivered." Code, § 4625. As to the construction of this language, see *Bullock v. Tschergi*, 13 Fed. 345; *Legget & Meyer Co. v. Collier*, 89 Iowa, 144, 56 N. W. 417; *Dierson v. Petersmeyer*, 109 Iowa, 233, 80 N. W. 389; *Smith v. Bloom*, 159 Ia. 592, 141 N. W. 32; *Munroe v.*

Mundy, 164 Iowa, 707, 146 N. W. 819. The first of these cases held delivery to a carrier for the buyer satisfied the statute, and the same conclusion was reached by the Nebraska court, construing the Iowa statute. *Fruit Dispatch Co. v. Gilinsky*, 84 Neb. 821, 122 N. W. 45. The second Iowa decision cited held the contrary. Many American statutes make no reference to earnest but any sum of money paid to bind a bargain of sale would in fact always be a part payment of the price.

been done, the defendant may withdraw without liability.² The requirement of a memorandum is obviously suitable either for a contract to sell or a sale. The other two modes of satisfaction seem more naturally to apply to sales than to executory contracts. It is clear, however, that earnest money, or a portion of the price, may be paid by the buyer before the time when it is agreed that the property shall pass; and if this is done the executory contract must become binding. Even acceptance and actual receipt of the goods may take place before title has passed, though the case is so unusual as to make it appear strange. The seller may, however, deliver to the buyer the goods to which the contract relates and the buyer may accept them though it is agreed that the property shall not pass until some time later. The ordinary case of a conditional sale is an instance of the sort. Such a bargain, though oral, is enforceable if the buyer accepts and receives the goods, though he does not get complete title as yet.³ Also the seller may deliver part of the goods and transfer the property in these, while the contract as to the rest of the goods still remains executory.⁴ Satisfaction of the statute by acceptance and actual receipt of part of the goods⁵ or by part payment makes the entire bargain of the parties enforceable, even though the bargain contains as a part of it another agreement to sell besides that which has been partly performed. Thus if the seller of goods agree as part of the original bargain to take them back if desired, this agreement of repurchase becomes enforceable by the acceptance and receipt or payment by the buyer.⁶ If there has been accept-

² *Smith v. Hudson* 6 B. & S. 431; *Dierson v. Petersmeyer*, 109 Iowa, 233, 80 N. W. 389; *Schwartz v. Church of Holy Cross*, 60 Minn. 183, 62 N. W. 266.

³ *Pinkham v. Mattox*, 53 N. H. 600.

⁴ *Garfield v. Paris*, 96 U. S. 557, 562, 24 L. Ed. 821; *Rickey v. Tenbroeck*, 63 Mo. 563.

⁵ By the words of the statute it is sufficient if part of the goods are accepted and actually received. See *infra*, § 561.

⁶ *Williams v. Burgess*, 10 A. & E.

499; *Gurwell v. Morris* (Cal. App.), 83 Pac. 578; *Hilliard v. Weeks*, 173 Mass. 304, 53 N. E. 818; *Armstrong v. Orlor*, 220 Mass. 112, 107 N. E. 392; *Fremont Carriage Co. v. Thomsen*, 65 Neb. 370, 91 N. W. 376; *Trenholm v. Kloepper*, 88 Neb. 236, 129 N. W. 436; *Johnston v. Trask*, 116 N. Y. 136, 22 N. E. 377, 5 L. R. A. 630, 15 Am. St. Rep. 394; *Fay v. Wheeler*, 44 Vt. 292; *Hankwitz v. Barrett*, 143 Wis. 639, 128 N. W. 430; *Korner v. Madden*, 152 Wis. 646, 140 N. W. 325. Also if that portion of a contract which is within

owner, though as has been shown it need not be an assent to be owner at once.¹¹ It is, however, necessary that goods should be identified in order that there may be an acceptance, and if they are still part of a larger mass there can be no acceptance.¹² It has also been said that if the transaction contemplates that the seller shall do something further to put the goods in deliverable condition, there can be no acceptance.¹³ This statement, however, should perhaps be qualified. It is of course possible if the parties so intend, though the presumed intention is otherwise, for title to pass at common law while the seller still has something to do upon the goods. It would seem equally possible for him to assent to those goods being the goods to which the bargain relates within the Statute of Frauds, and to accept them as such, the seller agreeing to do further work upon them. It has been decided at least that there may be acceptance, though the goods must be counted, weighed, or measured to fix the price.¹⁴ If goods are submitted to the examination of the buyer to determine whether they are the goods he has agreed to take, it seems obvious that there is as yet no acceptance except upon the construction of the statute given by the recent English decisions, to which reference will be made hereafter.¹⁵

¹¹ The buyer "must have done something indicating that he has accepted part of the goods and taken to them as owner," by Lord Campbell, in *Parker v. Wallis*, 5 E. & B. 21, 26. So in *Rohde v. Thwaites*, 6 B. & C. 388, 393, Holroyd, J., said: "The sugars agreed to be sold being part of a larger parcel, the vendors were to select twenty hogsheads for the vendee. That selection was made by the plaintiffs, and they notified it to the defendant, and the latter then promised to take them away. That is equivalent to an actual acceptance of the sixteen hogsheads by the defendant." Where the action of the buyer is ambiguous and may or may not indicate acceptance, his intent is material. *Jarrell v. Young*, 105 Md. 280, 66 Atl. 50.

¹² *Terney v. Doten*, 70 Cal. 399, 11

Pac. 743; *Knight v. Mann*, 118 Mass. 143; *Atherton v. Newhall*, 123 Mass. 141, 25 Am. Rep. 47; *Rodgers v. Phillips*, 40 N. Y. 519.

¹³ *Hinchman v. Lincoln*, 124 U. S. 38, 51, 8 S. Ct. 369, 31 L. Ed. 337; *Brunswick Grocery Co. v. Lamar*, 116 Ga. 1, 42 S. E. 366; *Gilman v. Hill*, 36 N. H. 311; *Outwater v. Dodge*, 7 Cow. 85; *Cooke v. Millard*, 65 N. Y. 352, 22 Am. Rep. 619; *Wegg v. Drake*, 16 U. C. Q. B. 252.

¹⁴ *Daniel v. Hannah*, 106 Ga. 91, 31 S. E. 734; *Macomber v. Parker*, 13 Pick. 175; *Cunningham v. Ashbrook*, 20 Mo. 553. In the latter two cases the goods were delivered to the buyer while still unweighed. In *Daniel v. Hannah*, they were left at an agreed public place.

¹⁵ See *infra*, § 547.

has been followed in the United States,²¹ though expressions may be found which seem, literally interpreted, to indicate a contrary understanding.²² The Uniform Sales Act, therefore, follows the existing law in declaring that acceptance may be either before or after delivery of the goods.²³ Indeed, if the goods in regard to which the parties are dealing are identified, the agreement of the buyer to buy these goods is in itself an acceptance of them.²⁴

§ 544. Acceptance by dealing with the goods as owner.

Though acceptance will ordinarily take place after the buyer has sufficiently examined the goods to understand their nature and quality, it is obviously possible for a buyer to accept goods without making an examination. If he assents to take specified goods as his, there seems no reason to doubt that he has accepted them within the terms of the statute. If, therefore, he does any act in relation to specified goods, which necessarily involves the conclusion that he has taken them as owner, there is an acceptance. Such an act is a resale of the goods by the buyer.²⁵ So mortgaging the goods implies acceptance;²⁶ or as-

which the Legislature has certainly not in terms expressed, that an acceptance prior to the receipt will not suffice."

²¹ *Ex parte Safford*, 2 Low. 563; *Hewes v. Jordan*, 39 Md. 472, 17 Am. Rep. 578; *Ullman v. Barnard*, 7 Gray, 554; *Cross v. O'Donnell*, 44 N. Y. 661, 4 Am. Rep. 721; *Bristol v. Mente*, 79 N. Y. App. Div. 67, 74, 80 N. Y. S. 52; affirmed, without opinion, 178 N. Y. 599, 70 N. E. 1096.

²² See *Jones v. Mechanic's Bank*, 29 Md. 287, 96 Am. Dec. 533; *Black v. Delbridge Co.*, 90 Mich. 56, 51 N. W. 269; *Shepherd v. Pressey*, 32 N. H. 49. In the case first cited, the court said: "There can be no acceptance under the statute without delivery by the seller," and this statement was quoted with approval in *Richardson*

v. Smith, 101 Md. 15, 20, 60 Atl. 612, 70 L. R. A. 321, 109 Am. St. Rep. 552.

Too much importance should not be laid on such expressions, however. This is evident from the fact that, in spite of these remarks by the Maryland court, that very court has followed *Cusack v. Robinson*, when the question was actually involved. See *Hewes v. Jordan*, *supra*, n. 21.

²³ Section 4 (3) of the Act. See *supra*, § 502.

²⁴ See cases referred to in this and the following sections, *passim*.

²⁵ The leading case upon this point is *Morton v. Tibbett*, 15 Q. B. 428. Lord Campbell following the earlier case of *Blenkinsop v. Clayton*, 7 Taunt. 597, held the resale an acceptance, saying: "He exercised an act of ownership over it by reselling

²⁶ *Wylor v. Rothschild*, 53 Neb. 566, 74 N. W. 41.

senting to the deposit of goods in a warehouse for paying part of the price,²⁷ or removing, or other with property as owner.^{28,29} Even detention of the unreasonable time may indicate acceptance.³⁰ In have just been put it will be observed that the b express satisfaction with the goods, he merely as ship of them. If he does this it may be that in tions and even refusal to accept there may, ne an acceptance.³¹ Acts of any sort which not onl assumption of ownership, but also indicate the

it at a profit and altering its destina- tion by sending it to another wharf, there to be delivered to his vendee. The wheat was then constructively in his own possession; and could such a resale and order take place without his having accepted and received the commodity? Does it lie in his mouth to say that he has not accepted that which he has resold and sent on to be delivered to another? At any rate is not this evidence from which such an acceptance and receipt may be inferred by the jury?" To the same effect are *Marshall v. Ferguson*, 23 Cal. 65; *Phillips v. Ocmulgee Mills*, 55 Ga. 633; *Taylor v. Mueller*, 30 Minn. 343, 346, 15 N. W. 413, 44 Am. Rep. 199; *Gray v. Davis*, 10 N. Y. 285; *Roman v. Bressler*, 32 Neb. 240, 49 N. W. 368; *Hill v. McDonald*, 17 Wis. 97. But see *Jones v. Mechanics' Bank*, 29 Md. 287, 96 Am. Dec. 533.

²⁷ *Shaw Lumber Co. v. Manville*, 4 Ida. 369, 39 Pac. 559. See also *Castle v. Swift*, 132 Md. 631, 104 Atl. 187.

^{28,29} *Currie v. Anderson*, 2 E. & E. 592; *Corbett v. Wolford*, 84 Md. 426, 35 Atl. 1088; *Edwards v. Brown*, 98 Me. 165, 56 Atl. 654.

³⁰ *Coleman v. Gibson*, 1 M. & R. 168; *Norman v. Phillips*, 14 M. & W. 277; *Parker v. Wallis*, 5 E. & B. 21; *Bushel v. Wheeler*, 15 Q. B. 442; *Treadwell v. Reynolds*, 39 Conn. 31; *Godkin v. Weber* (Mich.), 114 N. W. 924;

Schwartz v. Church (Minn. 183, 62 N. W. 337); *Stevens*, 65 N. H. 2; *Standard Wall Paper*, N. H. 324, 56 Atl. 7; *Lancaster*, 160 N. Y. 707; *Lauar v. Richmond Institution*, 8 Utah, 3; *Spencer v. Hale*, 30 Dec. 309. Compare *Lincoln*, 124 U. S. 337. But goods delivered by the buyer may be rejected within a reasonable time, it being necessary that notice be given at once. *Black*, 90 Mich. 56, 51 N. W. 1.

³¹ *Schwartz v. Church*, 60 Minn. 183, 63 N. W. 337. In that case altars were furnished to a defendant church and were set up in the church. The church refused to move them. Meantime the altars were used but not in such a manner as to indicate acceptance. It was held that the church's refusal to accept, but there was no unreasonable detention or objections; action was maintained louder than words. See *Scott v. Scott*, 203 N. Y. 36, 38 L. R. A. (N. S.) 38; *Schweitzer*, 147 N. Y. 132, 133 N. Y. S. 644, 64; *Sargent & Co.*, 83 N. Y. 338, 138 Am. St. Rep. 1.

faction with the particular goods furnished him, after examination, even more clearly indicate acceptance.³² In connection with the question of acceptance under the Statute of Frauds by assuming ownership, cases involving acceptance as an indication of transfer of the property apart from the statute may be examined.³³

§ 545. Right of objection.

Much discussion has arisen in regard to the question whether acceptance can take place before the purchaser has lost his right to object. In several cases statements have been made that this is impossible.³⁴ These *dicta* were examined in *Morton v. Tibbett*³⁵ and held to be unfounded. The conclusion of this decision seems to follow inevitably from the decisions in the previous section and from a consideration of the matter upon principle. If a horse is sold with a warranty and the buyer takes him home and uses him, and pays the price, surely there has been an acceptance and receipt; but equally certainly the buyer may still object that the horse does not comply with the warranty.³⁶ Similarly, if there is a contract to sell goods by sample, the buyer may take and use the goods that are offered to him, but this will not preclude him from afterward showing that the warranty implied in a sale by sample was not complied with.³⁷ Again, if the buyer is induced to buy goods by fraud, or a mutual mistake of fact exists as to the nature of the goods, these circumstances could be shown although the buyer had taken to the goods as owner and had paid the price for them.³⁸

§ 546. Right of rejection.

By a curious substitution of a word that seems similar, but means something different, Lord Campbell's decision and

³² *Beaumont v. Brengeri*, 5 C. B. 301; *Richards v. Burroughs*, 62 Mich. 117, 28 N. W. 755; *Gavlin v. MacKenzie*, 21 Or. 184, 27 Pac. 1039; *Schmidt v. Thomas*, 75 Wis. 529, 44 N. W. 771; *Walker v. Boulton*, 3 U. C. Q. B. 252.

³³ See *infra*, §§ 700 *et seq.*

³⁴ *Howe v. Palmer*, 3 B. & Ald. 321; *Hanson v. Armitage*, 5 B. & Ald. 557;

Smith v. Surman, 9 B. & C. 561, 577; *Norman v. Phillips*, 14 M. & W. 277.

³⁵ 15 Q. B. 428.

³⁶ *Remick v. Sandford*, 120 Mass. 309, 316, note.

³⁷ See, *infra*, § 712, also *Edwards v. Brown*, 98 Me. 165, 166, 56 Atl. 654.

³⁸ *Rodgers v. Phillips*, 40 N. Y. 519, per Daniels, J.

decisions, now defines acceptance as meaning any act by the buyer in relation to the goods which recognizes a pre-existing contract.⁴³ These English cases, however, have had no following in the United States.⁴⁴

§ 548. Who may accept.

A buyer may accept the goods by an authorized agent.⁴⁵ The power of the agent to bind his principal depends upon the law of agency. The statute imposes only the limitations immediately to be mentioned. There is a *dictum* in a New York decision that payment to an agent whose authority is derived from the same oral agreement, the validity of which is in question, will not take the agreement out of the statute.⁴⁶ The same reasoning would be applicable to an agent to receive the goods instead of the money,⁴⁷ but this reasoning is open to the criticism applicable to New York decisions upon acceptance and receipt generally, that it attempts to make a rule (which the words of the statute do not justify), that something other than mere oral words is always necessary to take a case out of the statute.⁴⁸ It may be observed also that unquestionably an agent as a broker or auctioneer may be authorized by parol

hardt, 23 Dom. L. R. 805, 34 Ont. L. R. 72, with which compare *Scott v. Melady*, 27 Ont. App. 193.

⁴³ Section 4 (3). The English authorities have now defined acceptance, therefore, as an acceptance of the contract; but the statute says plainly that what is requisite is acceptance of the goods. But a receipt signed by the seller for bags sent by the buyer, into which potatoes, the subject-matter of the contract, were to be put, was held not a sufficient acceptance. *Sumner v. Brown*, 25 Times L. R. 745.

⁴⁴ *Dierson v. Petersmeyer*, 109 Iowa, 233, 80 N. W. 389; *Corbett v. Wolford*, 84 Md. 426, 36 Atl. 1088; *Remick v. Sandford*, 120 Mass. 309; *Mechanical Boiler Co. v. Kellner*, 62 N. J. L. 544, 43 Atl. 599; *Stone v. Browning*, 51 N. Y. 211, 68 N. Y. 598. Compare *Standard Wall Paper Co. v. Towns*,

72 N. H. 324, 56 Atl. 744; *Berkman v. Brower*, 76 N. Y. Misc. 508, 135 N. Y. S. 582; *Strong v. Dodds*, 47 Vt. 348.

⁴⁵ *Simmonds v. Humble*, 13 C. B. (N. S.) 258; *Leavens v. Pinkham*, 164 Cal. 242, 128 Pac. 399; *Jones v. Mechanics' Bank*, 29 Md. 287, 96 Am. Dec. 533; *Snow v. Warner*, 10 Met. 132, 43 Am. Dec. 417; *Gaff v. Homeyer*, 59 Mo. 345; *Vanderbilt v. Central R. R. Co.*, 43 N. J. Eq. 669, 12 Atl. 188; *Outwater v. Dodge*, 6 Wend. 397; *Rogers v. Gould*, 6 Hun, 229; *Wilcox Silver Plate Co. v. Green*, 72 N. Y. 17; *Alexander v. Oneida Co.*, 76 Wis. 56, 45 N. W. 21; *Friedman v. Plows*, 158 Wis. 435, 149 N. W. 218.

⁴⁶ *Hawley v. Keeler*, 53 N. Y. 114, 120.

⁴⁷ See *Alexander v. Oneida Co.*, 76 Wis. 56, 60, 45 N. W. 21.

⁴⁸ This rule is discussed, *infra*, § 554.

to sign a memorandum for the buyer as part of it to which the memorandum relates.⁴⁹ Whatever of the New York decisions, it is at least settled in New York but elsewhere, that the seller himself is not an agent of the buyer to accept. Aside from the strictly possible for the buyer to constitute the seller to appropriate goods to the bargain, and such delivery is sufficient to transfer title at common law, but delivery is not sufficient to constitute an acceptance within the strict principle is necessarily involved in the decision that delivery to a carrier or other bailee for the satisfaction of the statute, even though the seller has delivered and shipped the goods in accordance with the order of the consignee,⁵¹ for the delivery to the carrier for the buyer is clearly a sufficient receipt; what is required is acceptance.⁵² For this reason the delivery of goods in a particular place by the seller, in accordance with the order, does not satisfy the statute unless there is some delivery before or after the delivery.⁵³ Acceptance by or for the buyer is insufficient⁵⁴ unless he is, as partner or otherwise, or impliedly authorized by his co-buyers to act for

§ 549. Parties may withdraw before the satisfaction of the statute.

Until the contract or sale has become enforceable under the statute either party may withdraw; consequently

⁴⁹ See *infra*, § 581.

⁵⁰ See *supra*, § 542; also *Beedy v. Brayman Wooden Ware Co.*, 108 Me. 200, 79 Atl. 721, 36 L. R. A. (N. S.) 76, Ann. Cas. 1913 B. 273; *Peck v. Abbott & Fernald Co.*, 223 Mass. 423, 111 N. E. 890; *Sotham v. Weber*, 116 Mo. App. 104, 92 S. W. 181.

⁵¹ See *infra*, § 556. And a carrier to whose care the goods were consigned at the buyer's request (he having given the consignee directions for forwarding) is not an agent to accept, and therefore his acceptance of a bill of lading does not satisfy the statute. *Meredith v. Meigh*, 2 E. & B. 364.

⁵² *Lloyd v. Wright Jones v. Mechanics' Bldg. Co.*, 96 Am. Dec. 533; *Kennedy v. O'Donnell*, 193 Mass. 500, 79 N. E. 104, 44 N. Y. Rep. 721. See also *Chamberlain v. Milliken*, 7 Lans. 319. The contrary doctrine is supported.

⁵³ *Hart v. Bush*, 82 Me. 262, 95 S. W. 2d 319. The contrary doctrine is supported.

⁵⁴ *Chamberlain v. Milliken*, 7 Lans. 319. The contrary doctrine is supported.

may reject the goods though he has previously accepted them, provided he has not as yet received them,⁵⁵ and on the other hand the seller may refuse to go on with the bargain and a subsequent acceptance by the buyer will be ineffectual.⁵⁶

§ 550. Acceptance under a mistake.

In *Rodgers v. Phillips*,⁵⁷ Daniels, J., said, referring to an acceptance of an alleged bill of lading by the buyer after the goods which it represented had been destroyed: "What they did in this respect was done before they had received any intelligence of the misfortune to the property. And even if prior to that time they had determined to accept the shipment by accepting the bill of lading upon the supposition and belief that the property was then afloat, they became at liberty to rescind their determination and refuse to receive it as soon as they discovered that it had been formed under a mistake of a material fact affecting it." The doctrine thus stated seems open to question. By hypothesis, the requisites at common law for transfer of title have been satisfied and all that is necessary is to satisfy the statute. There seems no reason why the buyer should be protected if the requirements of the statute have actually been satisfied, even though he was induced to satisfy them by a mistaken belief in regard to an essential fact. He is only doing what he ought to do in any event, although he could not be legally compelled to do it. Where a man performs a duty, even if an unenforceable one, such as paying a debt barred by the Statute of Limitations, or accepting goods which he had bought under an oral contract, mistake affords no reason for excusing him.⁵⁸ The case presents a certain analogy to that of a memorandum used to satisfy the Statute of Frauds, though not made for that purpose.⁵⁹ Accordingly, in Massachusetts, the buyer has been held liable upon an

⁵⁵ *Hatch v. Gluck*, 47 N. Y. Misc. Rep. 122, 93 N. Y. S. 508. See *supra*. §§ 540, 542.

⁵⁶ *Smith v. Hudson*, 6 B. & S. 431.

⁵⁷ 40 N. Y. 519.

⁵⁸ *Townsend v. Hargraves*, 118 Mass. 325. See also *infra*, § 561.

⁵⁹ See *infra* § 573. In *Leather Cloth Co. v. Hieronimus*, L. R. 10 Q. B. 140, a letter written after loss of goods to which it related, protesting against being charged for them, was held a sufficient memorandum.

acceptance and receipt of part made under these circumstances.⁶⁰

§ 551. Actual receipt.

There is less opportunity for doubt as to the meaning of actual receipt than there is as to the meaning of acceptance. Whatever difficulties exist in regard to receipt are rather due to the inherent difficulty of determining what is, in fact, possession, than to any doubt as to the meaning of the word "receipt." All cases admit that it means acquisition of possession by the buyer, and in the following sections the question of what is such possession will be considered.⁶¹ A question may arise, however, whether goods admittedly contracted for and accepted and received were due and received under the particular oral contract, enforcement of which is sought.⁶²

§ 552. Forcible taking or giving of possession.

In an early English case⁶³ it was casually remarked by Abbott, C. J.: "I do not mean, however, to say that if the buyer were to take away the goods without the assent of the seller, that would not be sufficient to bind him." But it is probable that it would generally be held that the receipt or possession that the contract requires must be obtained with

⁶⁰ *Townsend v. Hargraves*, 118 Mass. 326. See also *Vincent v. Germond*, 11 Johns. 283.

⁶¹ A custom to regard something as acceptance and receipt is not enough. *Calvert v. Schultz*, 143 Mich. 441, 106 N. W. 1123. As acceptance has reference simply to the buyer's assent to becoming owner, it would seem that any act which, by a custom binding both parties, had been treated as an acceptance would be sufficient for that purpose under the statute; but for actual receipt an external test, of which intent of the parties cannot wholly supply the place, is necessary. Custom might, however, indicate assent to regard a delivery to a third person or at a particular place as a receipt by the buyer, and in *Calvert v.*

Schultz, seems to have done so. The court was doubtless influenced by the fact that the goods were not actually moved and the whole transaction rested in parol. See *infra*, § 553. It does not invalidate receipt that the delivery was made not directly by the seller but by a third person on his order. *First Nat. Bank v. Geske*, 85 Wash. 477, 148 Pac. 593, Ann. Cas. 1917 B. 564.

⁶² See *Van Boskerek v. Torbert*, 184 Fed. 419, 107 C. C. A. 383, Ann. Cas. 1916 E. 171, where a series of contracts for the sale of flour were made, and the question was raised to what contract a particular delivery of flour was to be applied.

⁶³ *Tempest v. Fitzgerald*, 3 B. & Ald. 680.

the assent of the seller.⁶⁴ Certainly a forcible seizure is insufficient.⁶⁵ The frequent use of the word "delivered" in the cases as a substitute for the words of the statute, "actual receipt," seems to indicate that the courts have in mind, at least, receipt acquired by an act on the part of the seller. The converse case arises where the seller attempts to force delivery on the buyer without his knowledge or assent. This was held insufficient in a recent Iowa decision.⁶⁶ The court said: "To take a contract out of the Statute of Frauds the vendor must not only act with the purpose of placing the right of possession in the vendee, but the latter must actually accept with the intention of taking possession as owner."⁶⁷

⁶⁴ *Armour v. Freeman Baking Co.*, (Mich. 1917), 163 N. W. 896; *Young v. Ingalsbe*, 208 N. Y. 503, 102 N. E. 590.

⁶⁵ *Washington Ice Co. v. Webster*, 62 Me. 341, 16 Am. Rep. 462; *Baker v. Cuyler*, 12 Barb. 667; *Brand v. Focht*, 3 Keyes, 409. In *Baker v. Cuyler*, 12 Barb. 667, 669, however, the court said: "Perhaps also, inasmuch as the defendant in taking the wheat claimed a right to do so under the contract, the plaintiffs might on learning the fact, have assented to that claim, and thereby rendered the taking a sufficient partial delivery and acceptance to make the contract binding." In commenting on the decision of *Young v. Ingalsbe*, 138 N. Y. App. D. 587, 122 N. Y. S. 707, 151 N. Y. App. D. 375, 135 N. Y. S. 939, 208 N. Y. 503, 102 N. E. 590, stated *infra*, § 554, n. Professor Burdick says (16 Col. L. Rev. 273, 277):

"The majority of the Appellate Division and the Court of Appeals hold a different view. They interpret the statute to mean that if the seller asserts the validity of the sale, the statute is satisfied by evidence of an act of the buyer in accepting and receiving a part of the goods; but if the buyer asserts the validity of the sale, he must give evidence of an act of

delivery by the seller. Certainly, this is reading into the statute a requirement which is not expressed in words."

⁶⁶ *Dierson v. Petersmeyer*, 109 Iowa, 233, 80 N. W. 389.

⁶⁷ It may be that the court in making this remark was also influenced by the idea that acceptance must be subsequent to delivery, an idea which seems erroneous in view of the authorities cited in § 543, *supra*. The facts of the case make the decision obviously correct, for the buyer had refused to take the goods before the attempted delivery was made without his knowledge, in the place specified in the oral contract. A more difficult case would arise had there been no such prior refusal. Such a case is covered by the language in *Goodwine v. Cadwallader*, 158 Ind. 202, 204, 61 N. E. 939. The court said, quoting with approval from *Dehority v. Paxson*, 97 Ind. 253, 256: "The seller must part with his control with the purpose of vesting the right of property in the buyer who must receive with such intent on his part." Neither case, however, presented facts of the sort under discussion. See also *McMillan v. Heaps*, 85 Neb. 535, 123 N. W. 1041; *Drake Hardware Co. v. DeWitt*, 142 N. Y. App. Div. 189, 126 N. Y. S. 868.

If it be admitted that possession, taken without authority by the buyer, cannot be treated by him as actual receipt within the statute, it may yet be asked whether the other party may so treat it. It would seem that he might. The question has not arisen, but in a Wisconsin decision it was held that where the buyer fraudulently obtained goods from a bailee of the seller, the seller might treat this as receipt by the buyer, and acceptance of an offer which the seller had made.⁶⁸

§ 553. Receipt of goods in the hands of a third person.

There is no doubt that goods may be received within the meaning of the statute while still remaining in the hands of a third person as bailee.⁶⁹ It is necessary, of course, that the buyer assent to the bailment that is made for him.⁷⁰ It is also essential, in order to make out actual receipt by the buyer in such case, that there should be assent on the part of the bailee to hold for the buyer.⁷¹ This assent of the bailee may be given, it would seem, either by attornment by the bailee to the buyer after the purchase, or by a negotiable promise of the bailee prior to the bargain to hold the goods for any one whom the bailor should nominate, as in a negotiable warehouse receipt, since after the negotiation of the receipt the promise of the warehouseman by its terms runs directly to the indorsee. The goods, though they may not be in the hands of a bailee at the time of the bargain, may be subsequently delivered to him. Whether they are then "received" by the buyer depends upon the terms on which the bailee receives them. If he

⁶⁸ *Somers v. McLaughlin*, 57 Wis. 358, 362, 15 N. W. 442. The court said: "It was fraud upon the plaintiff if the defendant obtained the possession of the mare from James [the bailee] by suppressing the real bargain. In such case, if the possession is obtained by fraud, it may be treated by the vendor as a delivery to complete the sale at his option."

⁶⁹ *Daniel v. Hannah*, 106 Ga. 91, 95, 31 S. E. 734. See also cases in the four following notes.

⁷⁰ *Calvert v. Schultz*, 143 Mich. 441, 106 N. W. 1123. In this case there

seems to have been evidence of assent subsequent to the arrangement between the seller and the bailee, but the court held it insufficient, probably because of the doctrine referred to in the next section.

⁷¹ *Bentall v. Burn*, 3 B. & C. 423; *Farina v. Home*, 16 M. & W. 119; *Stevens v. Stewart*, 3 Cal. 140; *Gooch v. Holmes*, 41 Me. 523; *Townsend v. Hargraves*, 118 Mass. 325; *Bassett v. Camp*, 54 Vt. 232. But see *King v. Jarman*, 35 Ark. 190, 37 Am. Rep. 11; *Sahlman v. Mills*, 3 Strob. 384, 51 Am. Dec. 630.

receives them for the buyer there is receipt;⁷² but, on the other hand, if the goods are still subject to the seller's orders, though in the bailee's hands, there is no actual receipt by the buyer.⁷³

§ 554. New York rule.

In a leading case in New York⁷⁴ which has had great subsequent influence, the court laid down a rule more stringent than that suggested in the preceding paragraph. Wright, J., said: "The uniform doctrine of the cases, however, has been that in order to satisfy the statute there must be something more than mere words; that the act of accepting and receiving required to dispense with a note in writing implies more than a simple act of the mind." It may be readily admitted that the last sentence of this quotation is sound. The preceding sentence, that mere words are necessarily insufficient, is not so clear. In the case itself the court held that lumber on a dock apart from other lumber could not, as matter of law, be received by the buyer though the dock was, apparently, a public or quasi-public place. The lower court had left the matter to the jury with the instruction, "that if they were satisfied that it was the intention of the parties to consider the lumber delivered at the time of the bargain, and that nothing further was agreed or contemplated to be done in order to change the title in or possession of the lumber, the plaintiff was entitled to recover; that the sale was not within the Statute of Frauds and did not require any note or memorandum in writing, provided they should find from the evidence that there was a delivery and acceptance of the lumber at the time of the bargain." The majority of the upper court held that the statute could not have been satisfied, since the alleged delivery con-

⁷² *Dodsley v. Varley*, 12 A. & E. 632; *Cusack v. Robinson*, 1 B. & S. 299; *Schroder v. Palmer Hardware Co.*, 88 Ga. 578, 15 S. E. 327; *Moore v. Hays*, 12 Ind. App. 476, 40 N. E. 638; *Smith v. Bloom*, 159 Iowa, 592, 141 N. W. 32; *Mundy v. Scott*, 164 Iowa, 707, 146 N. W. 819; *Snow v. Warner*, 10 Met. 132, 43 Am. Dec. 417; *Vander-*

bilt v. Central R. R., 43 N. J. Eq. 669, 12 Atl. 188.

⁷³ *Shelton v. Thompson*, 96 Mo. App. 327, 70 S. W. 256. See also *Scully v. Smith*, 110 N. Y. App. Div. 88, 96 N. Y. S. 998.

⁷⁴ *Shindler v. Houston*, 1 N. Y. 261, 49 Am. Dec. 316.

sisted merely of words. This decision and the rule on which it is based have been followed in New York⁷⁵ and some other States,⁷⁶ but it seems to commend itself neither as a construction of the statute nor as a practical working rule. The aim of the statute doubtless was to require certain things, because in general these things would supplement or be a substitute for parol evidence; but the statute did not and could not well do away with parol evidence altogether nor prevent the decision of cases turning sometimes solely upon parol evidence. It did not attempt to do this, it simply prescribed certain requisites; one of them is actual receipt. If the buyer is, as a matter of fact, in possession and control of goods, the fact that he acquired the possession without any act other than words is immaterial. Where property is bulky it will not infrequently happen that transfer of possession will be made by the statement of the seller that he relinquishes ownership and control to the buyer and the assent of the buyer to receive this. As a practical matter the New York rule is a bad one, for it is not always easy to deal with bulky property otherwise than as the parties did in the case under discussion. They should not be penalized for adopting the only natural and reasonable means of delivery. The language of this decision has been elsewhere criticised.⁷⁷ It is perhaps doubtful whether the enactment by New York of the Uniform Sales Act will involve any change in the rule of the courts of the State on this matter.⁷⁸

⁷⁵ *Marsh v. Rouse*, 44 N. Y. 643; *Hallenback v. Cochran*, 20 Hun, 416; *Drake Hardware Co. v. DeWitt*, 142 N. Y. App. Div. 189, 126 N. Y. S. 868; *Young v. Ingalsbe*, 138 N. Y. App. D. 587, 122 N. Y. S. 707, 151 N. Y. App. D. 375, 135 N. Y. S. 939, 208 N. Y. 503, 102 N. E. 590; *Hinchman v. Lincoln*, 124 U. S. 38, 8 S. Ct. 369, 31 L. Ed. 337. The decision last cited came up from the Circuit Court for the Southern District of New York and involved a discussion of New York law.

⁷⁶ *Brunswick Grocery Co. v. Lamar*, 116 Ga. 1, 42 S. E. 366; *Walker v. Malsby Co.*, 134 Ga. 399, 67 S. E. 1039;

Dehority v. Paxson, 97 Ind. 253; *Gorman v. Brossard*, 120 Mich. 611, 79 N. W. 903; *Calvert v. Schultz*, 143 Mich. 441, 106 N. W. 1123; *Yeiter v. Campau*, 174 Mich. 94, 140 N. W. 479; *Friedman v. Plous*, 158 Wis. 435, 149 N. W. 218. See also *Edwards v. Grand Trunk R. R. Co.*, 54 Me. 105.

⁷⁷ *Browne*, *Statute of Frauds*, § 320. *Burdick*, 16 Col. L. Rev. 273. See also *Wilson v. Hotchkiss*, 171 Cal. 617, 154 Pac. 1, L. R. A. 1916 F. 389, Ann. Cas. 1917 B. 570.

⁷⁸ See *Bogert*, *Sales in New York*, p. 26. But see *Professor Burdick's* article, 16 Col. L. Rev. 273, 279.

§ 555. Receipt by delivery at a specified place.

If the agreement of the parties is that the goods shall be delivered at a particular place, which is not in the control of any one, but to which the buyer has access and from which he may take the goods when he pleases without asking permission of any one, there is receipt within the statute.⁷⁸ If the goods at the time of the bargain are already lying in this place, the statement by the seller that he delivers them is likewise good delivery by the seller and receipt by the buyer,⁷⁹ unless where the New York rule, requiring more than mere words to satisfy the statute, prevails.⁸⁰

§ 556. Receipt by delivery to a carrier.

When goods, at the time unspecified, have been ordered from a distance or are to be selected and appropriated by the seller and shipped to the buyer by a carrier, the statute is not satisfied by the delivery to the carrier. There is actual receipt but no acceptance.⁸¹ It has sometimes been thought to make

⁷⁸ *Cusack v. Robinson*, 1 B. & S. 299; *Bulkley v. Waterman*, 13 Conn. 328; *Daniel v. Hannah*, 106 Ga. 91, 31 S. E. 734; *Barkalow v. Pfeiffer*, 38 Ind. 214; *Whaley v. Gale*, 48 Mich. 193, 12 N. W. 33; *Somers v. McLaughlin*, 57 Wis. 358, 362, 15 N. W. 442. See also *Castle v. Swift*, 132 Md. 631, 104 Atl. 187. But see *Finney v. Appgar*, 31 N. J. L. 266. And compare *Howard v. Borden*, 13 Allen, 299.

⁷⁹ *Leonard v. Davis*, 1 Black, 476, 17 L. Ed. 222; *Calkins v. Lockwood*, 17 Conn. 154, 42 Am. Dec. 729; *Boyn-ton v. Veazie*, 24 Me. 286; *Jewett v. Warren*, 12 Mass. 300, 7 Am. Dec. 74; *Carter v. Willard*, 19 Pick. 1. See also *Tansley v. Turner*, 2 Bing. N. C. 151; *Cooper v. Bill*, 3 H. & G. 722.

⁸⁰ The facts of *Shindler v. Houston*, 1 N. Y. 261, 49 Am. Dec. 316, necessarily involved this question. The same point was decided in the same way in a later Michigan decision. *Gorman v. Brossard*, 120 Mich. 611, 79 N. W. 903. In this case the agree-

ment related to a quantity of curb-stone lying where the seller had deposited it, completing a sale of bulky goods. See also *Ladnier v. Ladnier*, 90 Miss. 475, 43 So. 946; *Cooke v. Millard*, 65 N. Y. 352, 22 Am. Rep. 619; *Brewster v. Taylor*, 63 N. Y. 587.

⁸¹ *Hanson v. Armitage*, 5 B. & Ald. 557; *Acebal v. Levy*, 10 Bing. 376; *Meredith v. Meigh*, 2 E. & B. 364; *Hart v. Bush*, E. B. & E. 494; *Booth v. A. Levy & Co.*, 21 Cal. App. 427, 131. Pac. 1062; *Billin v. Henkel*, 9 Colo. 394, 13 Pac. 420; *Lloyd v. Wright*, 25 Ga. 215; *Brunswick Grocery Co. v. Lamar*, 116 Ga. 1, 4, 42 S. E. 366; *Keiwert v. Meyer*, 62 Ind. 587, 30 Am. Rep. 206; *Hausman v. Nye*, 62 Ind. 485, 30 Am. Rep. 199; *Jones v. Mechanics' Bank*, 29 Md. 287, 96 Am. Dec. 533; *Worthington v. Lipsitz*, 131 Md. 254, 101 Atl. 625; *Frostburg Min. Co. v. New England Glass Co.*, 9 Cush. 115; *Johnson v. Cuttle*, 105 Mass. 447, 7 Am. Rep. 545; *Kemensky v. Chapin*, 193 Mass. 500, 79 N. E. 781; *Gatiss*

by the seller to his own order, though the bill of lading is indorsed and sent forward with a draft for the price, delivery to the carrier is no receipt by the buyer, and, therefore, though the goods were identified and assented to before shipment, the statute is not satisfied.⁸⁵ If the goods arrive at their destination and the buyer sends a truckman to haul them to the buyer's place of business, even then there may be no acceptance, for the buyer's dealing with the goods is as consistent with a temporary possession for the purpose of inspection as with an assumption of ownership.⁸⁶

§ 557. Receipt of goods in the hands of buyer.

It sometimes happens that at the time of a bargain the goods in question are already in the possession of the buyer. Under these circumstances the goods will generally be identified and no difficulty can arise in regard to acceptance. As the buyer has possession it would seem proper to hold that he has also actual receipt of the goods. This is well settled in England⁸⁷ and the English rule has been followed in the United States.⁸⁸ It will be observed, however, that these cases are obnoxious to the New York rule, to which reference has been made above,⁸⁹ for the whole transaction rests in parol. Accordingly, several decisions of the lower courts in New York have held, under such circumstances, that the statute was not satisfied;⁹⁰

4 Am. Rep. 721. But not if the seller refuses to let the car in which the goods are loaded go forward until the goods are paid for. *Scully v. Smith*, 110 N. Y. App. Div. 88, 96 N. Y. S. 998. Delivery of identified goods to a third person other than a carrier, if in accordance with the buyer's order satisfies the statute. *Munroe v. Mundy*, 164 Ia. 707, 146 N. W. 819.

⁸⁵ *Fort Worth Packing Co. v. Consumers Meat Co.*, 86 Md. 635, 39 Atl. 746.

⁸⁶ *Standard Wall Paper Co. v. Towns*, 72 N. H. 324, 56 Atl. 744.

⁸⁷ *Edan v. Dudfield*, 1 Q. B. 302.

⁸⁸ *Wilson v. Hotchkiss*, 171 Cal. 617, 154 Pac. 1; *Devine v. Warner*, 75 Conn.

375, 379, 53 Atl. 782, 96 Am. St. Rep. 211, 76 Conn. 229, 56 Atl. 562; *Couillard v. Johnson*, 24 Wis. 533; *Snider v. Thrall*, 56 Wis. 674, 14 N. W. 814. See also *Smith v. Bryan*, 5 Md. 141, 59 Am. Dec. 104; *Norton v. Simonds*, 124 Mass. 19.

⁸⁹ See § 554.

⁹⁰ *Dorsey v. Pike*, 50 Hun, 534; *Follett Wool Co. v. Utica Trust Co.*, 84 N. Y. App. Div. 151; *Linde v. Huntington*, 37 N. Y. Misc. Rep. 212, 75 N. Y. S. 161. In the case last cited the goods had been put into the possession of a prospective buyer for examination, and after temporary examination the buyer declined the goods; but later when the buyer offered to sell

deny broadly that the seller can receive for the buyer.⁹⁵ Such decisions, however, are at variance with the English law. The early decisions seem to have gone almost to the length of holding that the mere making of a bargain and assenting to the transfer of the property in specified goods, of itself, operated as a receipt, since the seller thereby became bailee for the buyer by operation of law;⁹⁶ but later, though the possibility was still admitted of actual receipt taking place while the seller still retained the goods, it was held that unless the seller had surrendered the lien allowed an unpaid vendor and held wholly as bailee for the buyer, there was no receipt within the statute.⁹⁷ The same test has been adopted in jurisdictions which do not adopt the New York requirement of something other than words.⁹⁸ The seller in possession will rarely have parted with his lien unless he has either been paid or has given credit. In either of these events, without any express words, it seems that the holding of the seller is necessarily wholly as agent for the buyer, and if it be admitted that the seller may act as the buyer's agent to receive, there seems no reason to question that there has been an actual receipt. Moreover, as payment satisfies the statute,⁹⁹ receipt, where the goods have

jection that such act be done by the vendor as the agent of the vendee." *E. g.*, as in *Tift v. Wight & Welosky Co.*, 113 Ga. 681, 39 S. E. 503, by segregating the goods and marking them with the purchaser's name.

⁹⁵ *Brunswick Grocery Co. v. Lamar*, 116 Ga. 1, 42 S. E. 366. (Cf. preceding note.) See also *Ficklin v. Tinder*, 161 Mo. App. 283, 143 S. W. 853.

⁹⁶ *Chaplin v. Rogers*, 1 East, 192, note; *Anderson v. Scott*, 1 Campb. 235, note; *Hodgson v. Le Bret*, 1 Campb. 233; *Elmore v. Stone*, 1 Taunt. 458; and *Blenkinsop v. Clayton*, 7 Taunt. 597. In *Blackburn, Contract of Sale* (1st ed.), p. 33, after referring to these decisions, the author says: "In all these cases there seems to have been ample evidence of an acceptance of the goods but scanty evidence of any actual receipt, if by that is to be understood a taking of

possession; indeed, in *Blenkinsop v. Clayton*, as reported, there seems to have been none. After the decision of that last case, the current of authority set the other way."

⁹⁷ *Tempest v. Fitzgerald*, 3 B. & Ald. 680; *Bill v. Bament*, 9 M. & W. 36; *Lillywhite v. Devereux*, 15 M. & W. 285; *Marvin v. Wallis*, 6 E. & B. 726.

⁹⁸ *Ex parte Safford*, 2 Low. 563; *Terney v. Doten*, 70 Cal. 399, 11 Pac. 743; *Devine v. Warner*, 76 Conn. 229, 56 Atl. 562; *Edwards v. Brown*, 98 Me. 165, 56 Atl. 654; *Safford v. McDonough*, 120 Mass. 290; *Rodgers v. Jones*, 129 Mass. 420; *Kirby v. Johnson*, 22 Mo. 354; *Sotham v. Weber*, 116 Mo. App. 104, 92 S. W. 181; *Clark v. Labreche*, 63 N. H. 397; *Reinhart v. Gregg*, 8 Waah. 191, 193, 35 Pac. 1075; *Janvrin v. Maxwell*, 23 Wis. 51.

⁹⁹ *Infra*, § 565.

been paid for, is immaterial. The fact that at the expiration of the period of credit the lien will revive if the price has not been paid is immaterial. In the meantime the right of the buyer to demand the goods has been absolute, and actual receipt, for however short a period, is enough.¹ In regard to the sufficiency of the test provided by the sellers' lien, it should also be observed that by contract in many jurisdictions the seller may reserve an equitable lien independent of actual possession; but such a lien will not, of itself, prevent actual receipt by the buyer.²

§ 559. Symbolic receipt.

It is not always possible in the case of bulky goods, or goods at a distance, for the seller to transfer possession of the goods themselves immediately and, under the Statute of Frauds as well as in other branches of the law of sales, where delivery is impossible, the delivery of the symbol has in some cases been recognized as sufficient. The typical case always given is the delivery of a key of a room, or building, in which the goods are stored.³ Likewise where iron was lying in a separate

¹ *Kelly v. Brooks*, 25 Ala. 523.

² *Dodsley v. Varley*, 12 A. & E. 632. In this case the goods after the purchase were deposited on the premises of a third person, an agreement being made that they should not be removed by the buyer until paid for. The buyer exercised various rights of ownership over the goods where they were stored and the court held there was actual receipt, saying: "We think that, upon this evidence, the place to which the wools were removed must be considered as the defendant's warehouse, and that he was in actual possession of it there as soon as it was weighed and packed; that it was thenceforward at his risk, and if burned must have been paid for by him. Consistently with this, however, the plaintiff had not what is commonly called a lien, determinable on the loss of possession, but a special interest, sometimes, but improperly, called a

lien, growing out of his original ownership, independent of the actual possession, and consistent with the property being in the defendant. This he retained in respect of the term agreed on, that the goods should not be removed to their ultimate place of destination before payment. But this lien is consistent, as we have stated, with the possession having passed to the buyer, so that there may have been a delivery to and actual receipt by him. This, we think, is the proper conclusion upon the present evidence; and there will be no rule."

³ *Atwell v. Miller*, 6 Md. 10, 61 Am. Dec. 294; *Shindler v. Houston*, 1 N. Y. 261, 49 Am. Dec. 316; *Gray v. Davis*, 10 N. Y. 285. See also *Vining v. Gilbreth*, 39 Me. 496; *Packard v. Dunsmore*, 11 Cush. 282; *Wilkes v. Ferris*, 5 Johns. 335, 4 Am. Dec. 364; *Barr v. Reitz*, 53 Pa. St. 256. In the cases last cited the question of deliv-

mass and the seller said, "I deliver this iron to you." ⁴ Similar words in regard to logs floating in a stream are sufficient.⁵ So where cattle are running on a range, branding them and turning them loose again is sufficient.⁶ A growing crop has also been held capable of such a transfer of possession as to satisfy the statute.⁷ In these cases it will be observed that though the goods themselves are not changed from the position which they occupied before the bargain, that position is one which puts the goods as fully in the actual physical control of the buyer as of any other person; but cases may be supposed where this is not true. For instance, where goods are at sea no actual delivery is possible, but the goods are in the possession of the captain of the vessel, who for this purpose is the agent of the seller. It may be doubted whether in such a case there can be actual receipt of the goods by the buyer without a negotiable bill of lading, although there are doubtless decisions holding that there is a delivery so far as to satisfy common-law requisites of delivery between buyer and seller, or even so far as to bind creditors of the seller.

§ 560. Documents of title.

By far the most important kind of symbolic delivery is that made by bills of lading and warehouse receipts. There are surprisingly few cases raising the question, but upon principle it seems clear that delivery of a non-negotiable document of title, though frequently called symbolic delivery, in cases not involving the Statute of Frauds, can hardly be considered as actual receipt of the goods by the buyer. If the buyer is the consignee or person to whom delivery is to be made according to the terms of the document, and the buyer has authorized or ratified this, there is actual receipt by the bailee on behalf of the buyer, by virtue of the shipment,⁸ not by virtue of the ery did not relate to the Statute of Frauds.

⁴ *Calkins v. Lockwood*, 17 Conn. 154, 42 Am. Dec. 729.

⁵ *Leonard v. Davis*, 1 Black, 476, 17 L. Ed. 222; *Boynton v. Veasie*, 24 Me. 286; *Jewett v. Warren*, 12 Mass. 300, 7 Am. Dec. 74; *Carter v. Willard*, 19 Pick. 1.

⁶ *Walden v. Murdock*, 23 Cal. 540, 83 Am. Dec. 135.

⁷ *Farmers' Savings Bank v. Newton*, 154 Iowa, 49, 134 N. W. 436. The Iowa statute, however, simply requires "delivery."

⁸ See *supra*, § 556.

immediately upon its assignment—no attornment being necessary. He is, therefore, agent of the buyer as soon as the buyer becomes the indorsee of the document.¹⁰

§ 561. Part of the goods.

By the terms of the statute acceptance and receipt of part of the goods suffice, and it is immaterial how small the part may be. It is, therefore, sufficient if the buyer receives a sample of the goods, provided the sample is part of the bulk; that is, if it diminishes the quantity of goods subsequently to be delivered to the buyer.¹¹ But otherwise where the sample is merely to show what the goods are like.¹² A sample given merely for the purpose of examination is of course insufficient.¹³ It is immaterial when the part is received and an executory contract for unspecified goods may be made binding by the specification and acceptance and receipt of a portion of the goods under this contract, though the remainder is unspecified.¹⁴ It is essential in order to make acceptance and receipt of part suffice, that the part be accepted and received as only a part of the goods. So that if the buyer when taking part declines to take more, the statute is not satisfied;¹⁵ nor is it satisfied if the seller in delivering part of the goods repu-

¹⁰ *Audenried v. Randall*, 3 Cliff. 99; *Mueller v. Guye*, 12 Mo. App. 588; *Wadhams v. Balfour*, 32 Or. 313, 51 Pac. 642. In *Wadhams v. Balfour* the receipt does not seem to have been negotiable, but the court held its delivery sufficient. In *Meredith v. Meigh*, 2 E. & B. 364, the court intimates that retention by the consignee, of a bill of lading might satisfy the statute.

¹¹ *Hinde v. Whitehouse*, 7 East, 558; *Gardner v. Grout*, 2 C. B. (N. S.) 340; *Gilliat v. Roberts*, 19 L. J. Ex. 410; *Scott v. T. W. Stevenson Co.*, 130 Minn. 151, 153 N. W. 316; *Moore v. Love*, 57 Miss. 765; *Brock v. Knower*, 37 Hun, 609.

¹² *Morton v. Tibbett*, 15 Q. B. 428; *Dierson v. Petersmeyer*, 109 Iowa, 233, 80 N. W. 389; *Richardson v. Smith*, 101 Md. 15, 60 Atl. 612, 70

L. R. A. 321, 109 Am. St. Rep. 552; *Moore v. Love*, 57 Miss. 765.

¹³ *Mechanical Boiler Co. v. Kellner*, 62 N. J. L. 544, 43 Atl. 599.

¹⁴ *Scott v. Eastern Counties Ry. Co.*, 12 M. & W. 33; *Cavanaugh v. D. W. Ranlet Co.*, 229 Mass. 366, 118 N. E. 650; *Crystal Ice Co. v. Huldiday*, 106 Miss. 714, 64 So. 658; *Rickey v. Tenbroeck*, 63 Mo. 563; *Gabriel v. Kildare Elevator Co.*, 18 Okla. 318, 90 Pac. 10; *Garton Toy Co. v. Buswell Lumber & Mfg. Co.*, 150 Wis. 341, 136 N. W. 147. See, however, *May v. Ward*, 134 Mass. 127; *Ladnier v. Ladnier*, 90 Miss. 475, 43 So. 946.

¹⁵ *Atherton v. Newhall*, 123 Mass. 141, 25 Am. Rep. 47. See also *Dixon v. Yates*, 5 B. & Ad. 313; *Pratt v. Chase*, 40 Me. 269, 273.

by acceptance and actual receipt is not suitable and resort must be had to the other methods prescribed.

§ 563. Acceptance and receipt present questions of fact.

It is for the jury to determine in a doubtful case whether there has been acceptance and receipt.²² If, however, there is no evidence justifying the jury in finding more than one way, the court may properly decide the question.²³

§ 564. "Or give something in earnest to bind the contract."

At the present day, earnest as distinguished from part payment is seldom or never given. Formerly a small payment was sometimes made to bind the bargain which was not regarded as part of the price.²⁴ This would perhaps still be binding and satisfy the statute, but the possibility of earnest as distinguished from part payment is now of little practical importance.²⁵ The only question that has arisen in modern times in regard to the meaning of earnest is whether a sum of money deposited with a third person as a forfeit to secure the performance of a bargain, but not to be applied as part payment is earnest within the meaning of the statute. It was held not to be.²⁶ If money

²² *Edan v. Dudfield*, 1 Q. B. 302; *Lillywhite v. Devereux*, 15 M. & W. 285; *Morton v. Tibbett*, 15 Q. B. 428; *Hinchman v. Lincoln*, 124 U. S. 38, 48, 8 S. Ct. 369, 31 L. Ed. 337; *Waite v. McKelvy*, 71 Minn. 167, 73 N. W. 727; *Houghtaling v. Ball*, 19 Mo. 84, 59 Am. Dec. 331; *Lauer v. Richmond Institute*, 8 Utah, 305, 31 Pac. 397; *Becker v. Holm*, 89 Wis. 86, 61 N. W. 307.

²³ *Hinchman v. Lincoln*, 124 U. S. 38, 48, 8 S. Ct. 369, 31 L. Ed. 337; *Richardson v. Smith*, 101 Md. 15, 60 Atl. 612, 70 L. R. A. 321, 109 Am. St. Rep. 552.

²⁴ See *Bach v. Owen*, 5 T. R. 409, where the buyer paid a halfpenny to bind the bargain, and this was held sufficient to transfer the property in the horse which was the subject of the sale.

²⁵ See *Howe v. Hayward*, 108 Mass. 54, 11 Am. Rep. 306; *Jennings v. Dunham*, 60 Mo. App. 635.

²⁶ *Noakes v. Morey*, 30 Ind. 103; *Howe v. Hayward*, 108 Mass. 54, 11 Am. Rep. 306; *Jennings v. Dunham*, 60 Mo. App. 635. In the latter case the court said, at p. 638: "Originally this 'earnest' was not necessarily a part payment. It was a custom under the common law, and seems also to have been a custom in other countries than England to give something to bind a bargain. In some countries some act was performed. Story on Sales, § 273. Benjamin states in his work on Sales, § 196, that one species of earnest in the Roman law was a payment of a sum which if the sale was carried out was to be credited on the price, but which carried the understanding that it was forfeit money

ever, the requirement of the statute would seem not to be satisfied by negotiable paper given for the price until the paper is paid or unless it was taken in absolute payment.³³ The buyer's note³⁴ or check³⁵ not generally being taken in absolute payment will, therefore, generally not be sufficient. But a negotiable instrument given as absolute payment is sufficient;³⁶ and so is the return to the seller of a note previously made by him.³⁷ A detriment incurred in reliance on the oral contract, but not part of the price is obviously insufficient.³⁸ The most difficult question of part payment is where the seller is indebted to the buyer on a previous account and contracts to sell, or

526, 5 N. E. 666, 55 Am. Rep. 222; *White v. Drew*, 56 How. Pr. 53. In *Driggs v. Bush*, 152 Mich. 53, 115 N. W. 985, 15 L. R. A. (N. S.) 654, 125 Am. St. Rep. 389, the defendant agreed to sell and the plaintiff to buy certain hay at \$10 a ton. The hay was to be baled by the plaintiff and then transported by the defendant to an adjoining town. The plaintiff sent men to the defendant's premises who with his assent baled the hay, and the plaintiff paid them for the work. The defendant afterward refused to carry out the contract. It was held that the property had not passed to the buyer, and that, therefore, the baling of the hay inured to the benefit of the defendant, and that this benefit received in accordance with the contract was a part payment taking the case out of the statute.

³³ A check drawn by the buyer and afterward paid by the bank was held to satisfy the statute in *Hunter v. Wetsell*, 84 N. Y. 549, 38 Am. Rep. 544. And in *Parker v. Crisp*, [1919] 1 K. B. 481; *McLure v. Sherman*, 70 Fed. 190, and *Logan v. Carroll*, 72 Mo. App. 613, a check, though not cashed, was held to suffice. See also *Rohrbach v. Hammill*, 162 Ia. 131, 143 N. W. 872, where a check was held a payment of purchase money sufficient to take a contract for the sale of land out of the statute; but in *Hess-*

berg v. Welsh, 147 N. Y. S. 44, the court held a check on which payment was stopped not part payment in the absence of proof that the check itself was agreed upon as payment, rather than a means of payment.

³⁴ *Krohn v. Bants*, 68 Ind. 277; *Ireland v. Johnson*, 18 Abb. Pr. 392.

³⁵ *Groomer v. McMillan*, 143 Mo. App. 612, 128 S. W. 285; *Bates v. Dwinell*, 101 Neb. 712, 164 N. W. 722. (The buyer returned the check without presenting it.) Cf. *McLure v. Sherman*, 70 Fed. 190, and cases *supra*, in note 33. *A fortiori* an order which is not a negotiable bill of exchange is not part payment. *Johnson v. Morrison*, 163 Mich. 322, 128 N. W. 243.

³⁶ *Combs v. Bateman*, 10 Barb. 573; and where a check is the agreed mode of payment, even though not strictly absolute payment, it seems sufficient. *Summers v. Wood*, 131 Ark. 345, 198 S. W. 692.

³⁷ *Norton v. Simonds*, 124 Mass. 19.

³⁸ Where plaintiff orally contracted to buy defendant's stock and defendant agreed to employ plaintiff, that plaintiff gave up his position to go to work for defendant was not earnest or "part payment." *Hewson v. Peterman Mfg. Co.*, 76 Wash. 600, 136 Pac. 1158, 51 L. R. A. (N. S.) 398, Ann. Cas. 1915 D. 346.

300 CANCELLATION OF THE SURRENDER

sells, goods, in satisfaction of the claim in whole or in part. The leading case upon this point is *Walker v. Nussey*,³⁹ where the goods were not delivered and the court held that by terms of the bargain the old claim was not to be extinguished until the goods should be delivered and that, therefore, there was no payment. Pollock, C. B., said, however: "Had the parties positively agreed to extinguish the debt of £4 odd, and receive the plaintiff's goods *pro tanto* instead of it, the debt might have been satisfied without the ceremony of paying to the defendant and repaying it by him. But the actual contract did not amount to that, and there has been no part payment within the statute." There seems no reason on principle to question the correctness of this *dictum*. It has been approved in Vermont⁴⁰ and finds support elsewhere.⁴¹ But generally it has either been overlooked or not proved convincing in subsequent decisions, for the courts decide, or at least say on the most part, that a mere agreement that the old account should be canceled is not enough.⁴² This leads to the rather curious result that though as a matter of common law the whole price has been paid by the cancellation of an indebtedness, there has not been any part payment within the statute because the satisfaction of the price is effected wholly in parole. The statute puts no limitation on the way that

³⁹ 16 M. & W. 302.

⁴⁰ *Dow v. Worthen*, 37 Vt. 108.

⁴¹ *Peake v. Conlan*, 43 Iowa, 297; *Howe v. Jones*, 57 Iowa, 130, 8 N. W. 451, 10 N. W. 299; *Cotterill v. Stevens*, 10 Wis. 422. In the case last cited the arrangement was triangular, the buyer agreeing to assume a debt of the seller's to a third person who assented to the transaction. This novation was held to amount to payment within the statute.

⁴² *Norton v. Davison*, [1899] 1 Q. B. 401; *Galbraith v. Holmes*, 15 Ind. App. 34, 43 N. E. 575; *Gorman v. Brossard*, 120 Mich. 611, 79 N. W. 903; *Matthiessen v. McMahon's Adm.*, 38 N. J. L. 536; *Artcher v. Zeh*, 5 Hill, 200; *Walrath v. Richie*, 5 Lans. 362; *Brabin v. Hyde*, 32 N. Y. 519;

Young v. Ingalsbe, 138 N. Y. App. 587, 122 N. Y. S. 707 (reported in subsequent stages, 151 N. Y. App. 375, 135 N. Y. S. 939, 208 N. Y. 102 N. E. 590); *Milos v. Covace*, 40 Or. 239, 66 Pac. 914. In none of these cases, as in *Walker v. Nussey*, there was merely an agreement to extinguish the debt later. Lord Mansfield in *Norton v. Davison*, uses language similar to that in *Shindler v. Houston*, 1 N. Y. 261, 49 Am. Dec. 101, that mere words are insufficient to satisfy the statute, though it is perfectly settled in England that words may be sufficient, *e. g.*, where the goods are already in the possession of the buyer or where they become bailee for the buyer. See §§ 90, 91.

price should be paid and it seems an unnecessary piece of judicial legislation for courts to make the requirements of the statute more stringent than the Legislature has done. This might be expected, however, in New York, in view of the rule laid down by the courts of that State in regard to acceptance and receipt,⁴³ and in other jurisdictions which have followed New York, in that matter. Even though a mere oral agreement to cancel a debt is held insufficient, the surrender of a note representing the buyer's claim is sufficiently tangible to amount to part payment,⁴⁴ as is indorsement upon a note,⁴⁵ or an entry on books of account.⁴⁶ Payment to a third person, in accordance with an agreement made with the seller that the price shall be so paid, is enough,⁴⁷ and of course payment to the seller's agent is enough,⁴⁸ if the agent was authorized to receive it, or if the principal knowing the facts took the benefit of it.⁴⁹ This has been so held even though a local statute required that authority to enter into a contract required in law to be in writing can only be given in writing.⁵⁰ Payment to an agent for several sellers who were entitled to share the money paid satisfies the statute as to each of the sales.⁵¹ So payments made on a general account and applicable to the price of several lots of goods take all the transactions out of the statute.⁵²

⁴³ See *supra*, § 553.

⁴⁴ *Norton v. Simonds*, 124 Mass. 19; *Sharp v. Carroll*, 66 Wis. 62, 28 N. W. 832.

⁴⁵ *Dieckman v. Young*, 87 Mo. App. 530.

⁴⁶ *Norwegian Plough Co. v. Hanthorn*, 71 Wis. 529, 37 N. W. 825.

⁴⁷ *Johnson v. Tabor*, 101 Miss. 78, 57 So. 365; *Brady v. Harrahy*, 21 U. C. Q. B. 340. See also *Stoddard v. Graham*, 23 How. Pr. 518.

⁴⁸ *Hawley v. Keeler*, 53 N. Y. 114. The limitation which this case seeks to impose on the appointment of an agent by requiring that the agency shall not arise from the same parol agreement which it is sought to validate has been previously criticised. See § 81.

⁴⁹ But not otherwise. *City Drug Co. v. American Soda Fountain Co.*, 13 Ga. App. 485, 79 S. E. 376.

⁵⁰ *Case v. Kramer*, 34 Mont. 142, 85 Pac. 378. In this case, an agent orally employed to sell cattle was instructed to require a part payment of the purchase price. The agent procured a purchaser who made a partial payment. It was held, that the contract was valid notwithstanding Civ. Code, § 3085, declaring that authority to enter into a contract required by law to be in writing can only be given in writing.

⁵¹ *Burhans v. Corey*, 17 Mich. 282.

⁵² *Berwin v. Bolles*, 183 Mass. 340, 67 N. E. 323.

CHAPTER XX

SATISFACTION OF THE STATUTE BY A MEMORANDUM IN WRITING

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§ 567. Some note or memorandum in writing of the contract or sale.

The requirement of a writing is the only method of satisfying

any clause of the fourth section of the statute and is a permissible way of satisfying the seventeenth section. Consequently, in determining the sufficiency of a memorandum in writing, decisions under one clause or section are generally in point for the decision of similar questions under any other clause or section. The wording of any section under which a case comes up should, however, be observed, for many of the statutes in regard to agreements concerning land and other matters within the statute, require the "contract" to be in writing in order to be enforceable, while sections relating to the sale of goods, with almost perfect uniformity, are satisfied by a "note or memorandum."¹ The difference between a contract in writing and a memorandum of a parol contract is important. Thus a note or memorandum may be made at any time prior to the beginning of the action² and as will appear from subsequent discussion, need not be made with the intent of making a memorandum. The parol evidence rule also affects differently a contract in writing from a memorandum in writing. The former is necessarily the only complete statement of the contract and the only evidence in regard to it, but a written memorandum may be shown by parol to be inaccurate or inadequate, and hence not a compliance with the statute.³

¹ The Statute of Georgia (Code of 1915), § 3222, requires the "promise" to be in writing, but the Supreme Court of Georgia seems to lay no stress on this difference from the ordinary form of the statute. See *Foster v. Leeper*, 29 Ga. 294; *Phillips v. Ocmulgee Mills*, 55 Ga. 633. In these cases memoranda made subsequently to an oral bargain, and in the former case in the nature of an admission of a past contract rather than an expression of a present promise, were held sufficient. See, however, *Jackson v. Strowger Telephone Exchange*, 108 Ga. 646, 34 S. E. 207.

² See *supra*, § 538.

³ See the distinction taken in cases where the "contract" was required to be in writing. *Halsell v. Renfrow*, 202 U. S. 287, 26 S. Ct. 610, 50 L. Ed. 1032;

Zimmerman v. Zehendner, 164 Ind. 466. Also in cases where some "note or memorandum" only was necessary. *Ingraham v. Strong*, 41 Ill. App. 46; *Catterlin v. Bush*, 39 Or. 496, 59 Pac. 706, 65 Pac. 1064. In the latter case the court said: "The memorandum and the contract or agreement are not to be confounded as one and the same thing. The memorandum is understood to be a note or minute informally made of the agreement, which may have but a verbal existence, expressing briefly the essential terms, and was never intended to stand as and for the agreement itself. The necessary elements are that it must contain the essential terms of the contract, expressed with such a degree of certainty that it may be understood without recourse to parol evidence to show the

§ 568. Form of memorandum.

The memorandum may be in any form, and an enumeration of particular cases that have arisen is not exclusive, but merely illustrative. The memorandum may of course be in the form of a carefully prepared written contract, but it may also be, in whole or in part, in the form of a letter or letters,⁴ receipts,⁵ an invoice or statement of account,⁶ a bill or note,⁷ an undelivered deed,⁸ a will delivered by the maker to one to whom he had promised a devise,⁹ a revoked and undelivered will,¹⁰ a bill in equity,¹¹ an advertisement,¹² records of municipal officers,¹³ or of a private corporation,¹⁴ entries in books of account¹⁵ or memorandum books of any kind.¹⁶ Telegrams

intentions of the parties. Mere formal or nonessential terms will be implied, but the elements necessary to a completed contract must be intelligently expressed, though ever so briefly."

⁴ Many cases of this sort may be found in following sections, and see *C. W. Hull Co. v. Marquette Cement Mfg. Co.*, 208 Fed. 260, 125 C. C. A. 460. So, *Dewar v. Mintoft*, [1912] 2 K. B. 373; *Nickerson v. Bridges*, 216 Mass. 416, 103 N. E. 939; *Harvey v. Bross*, 216 Mass. 57, 104 N. E. 350; *Herman v. Wacker*, 96 Neb. 102, 147 N. W. 127; *Croghan v. Worthington Hardware Co.*, 115 Va. 497, 79 S. E. 1039.

⁵ *Evans v. Prothero*, 1 De G. M. & G. 572; *Williams v. Morris*, 95 U. S. 444, 24 L. Ed. 360; *Littell v. Jones*, 56 Ark. 139, 19 S. W. 497; *Eppich v. Clifford*, 6 Colo. 493; *Ellis v. Bray*, 79 Mo. 227; *Kidder v. Flanders*, 73 N. H. 345, 61 Atl. 675; *Gordon v. Collett*, 102 N. C. 532, 9 S. E. 486. All these decisions related to contracts to sell land.

⁶ *Barry v. Coombe*, 1 Pet. 640, 7 L. Ed. 295 (land); *Linton v. Williams*, 25 Ga. 391 (goods).

⁷ *Reynolds v. Kirk*, 105 Ala. 446, 17 So. 95 (land); *Phillips v. Ocmulgee Mills*, 55 Ga. 633 (goods); *Work v. Cowhick*, 81 Ill. 317 (land); *Little v. Pearson*, 7 Pick. 301, 19 Am. Dec. 289 (land).

⁸ See *infra*, § 579.

⁹ *Naylor v. Shelton*, 102 Ark. 30, 143 S. W. 117; *Brinkner v. Brinkner*, 7 Pa. 53, 55; *Torgerson v. Hauge*, 34 N. Dak. 616, 159 N. W. 6.

¹⁰ *In re McGinley's Est.*, 257 Pa. 478, 101 Atl. 807. Cf. *Watkins v. Watkins*, 82 N. J. Eq. 483, 89 Atl. 253.

¹¹ *Thomas J. Baird Co. v. Harris*, 209 Fed. 20, 126 C. C. A. 217.

¹² *Kelly v. Fischer*, 263 Ill. 184, 105 N. E. 21; *Laforme v. Bradley*, 77 N. H. 128, 88 Atl. 1000.

¹³ *Bourland v. Peoria County* 16 Ill. 538; *Grimes v. Hamilton County*, 37 Iowa, 290; *McManus v. Boston*, 171 Mass. 152, 50 N. E. 607; *Stevens v. Muskegon*, 111 Mich. 72, 69 N. W. 227, 36 L. R. A. 777; *Curtis v. Portsmouth*, 67 N. H. 506, 39 Atl. 439 (all these decisions related to contracts concerning land); *Argus Co. v. Albany*, 55 N. Y. 495, 14 Am. Rep. 296 (not to be performed within a year).

¹⁴ *Lamkin v. Baldwin Mfg. Co.*, 72 Conn. 57, 43 Atl. 593, 1042, 44 L. R. A. 786 (land and goods); *Tufts v. Plymouth Mining Co.*, 14 Allen, 407 (not to be performed within a year). Cf. *Asbury v. Mauney*, 173 N. C. 454, 92 S. E. 267.

¹⁵ *Sarl v. Bourdillon*, 1 C. B. (N. S.) 188 (goods); *Newell v. Radford*, L. R. 3 C. P. 52 (goods).

¹⁶ *Champion v. Plummer*, 1 B. & P.

though a memorandum might not indicate to a person unacquainted with trade usages which party was buyer and which seller, yet if a person cognizant of such usages would be able to determine the relation of the parties, parol evidence is admissible to show this and the memorandum is sufficient.²² The names of the parties need not necessarily appear in the body of the memorandum. A signature may serve not only as an authentication, but as a description;²³ and an address on a letter may supply a defect in the letter itself as a memorandum.²⁴ The name of one or both of the contracting parties may be that of an agent, and such a memorandum will bind the principals.²⁵ But it is essential that by the terms of the memorandum either the principal or the agent be named as a party. If the agent by the terms of the memorandum is contracting in such terms as exclude him from personal liability,²⁶ the memorandum is insufficient.²⁷

of sale. This was held insufficient since the name on the margin was not stated to be that of the buyer.

²² Thus in *Newell v. Radford*, L. R. 3 C. P. 52, the following memorandum was held sufficient:

Mr. Newell, 32 sacks culasses at 39s., 280 lbs., to wait orders.

JUNE 8. JOHN WILLIAMS.
And in *Salmon Falls Mfg. Co. v. Goddard*, 14 How. 446, 14 L. Ed. 493, the following was held sufficient:

Sept. 19,—W. W. Goddard, 12 mos.
300 bales S. F. drills . . . 7¼
100 cases blue do. . . . 8¾
Credit to commence when ship sails;
not after Decr. 1 — delivered free
of charge for truckage.

The blues, if color satisfactory to purchasers.

R. M. M.

W. W. G.

²³ See, e. g., cases in the preceding note.

²⁴ *Pearce v. Gardner*, [1897] 1 Q. B. 688.

²⁵ "If a written contract is made in this form, 'A. B. agrees to sell Black-acre to C. D. for 1000 l.' then E. F. the principal of A. B. can sue G. H. the

principal of C. D. on that contract." *Commins v. Scott*, L. R. 20 Eq. 11, 15, by Jessell, M. R., quoted with approval in *Filby v. Hounsell*, [1896] 2 Ch. 737, by Romer, J. See also *infra*, § 577.

²⁶ See *supra*, § 285.

²⁷ *Potter v. Duffield*, L. R. 18 Eq. 4. A memorandum signed by B "on behalf of the vendor" was held insufficient for not naming the vendor. To the same effect is *Jarrett v. Hunter*, 34 Ch. D. 182. If B had signed his name without more the memorandum would have been good. See *supra*, n. 25; and *infra*, § 577. *Grafton v. Cummings*, 99 U. S. 100, 25 L. Ed. 366, must be explained on the same ground as the English cases cited above, though the court does not cite the cases holding memoranda sufficient which contain merely the agent's name (see *infra*, § 577), and does not consider the possibility of the words "auctioneer and agent" appended to the agent's signature being treated merely as *descriptio personæ*. See *supra*, § 296.

§ 570. Contents of memorandum—Considerat

In a case decided near the beginning of century,²⁸ the Court of Kings Bench held that to pay a debt of another could not be enforced without a memorandum simply stated the promise but did not require consideration, though the consideration was fully evidenced. In *Ellenborough* rested the decision mainly on a distinction he took between the word "agreement" as used in the first section of the statute, and the word "promise" in the second. In the memorandum of the "agreement" he said required to be stated what the promisee was to do, or had done, as well as what the promisor was to do. This distinction was, however, not insisted on in later English cases, and it is probably not the words "agreement," "contract," "promise," which are loosely both in English and American statutes, but the inferences of legislative intent.²⁹ Nevertheless, the decision was followed, though rested on another ground, that the memorandum should contain all the terms of the bargain necessary for a complete cause of action, without aid of parol evidence.³⁰ It was suggested in some cases,³¹ that the Statute of Frauds in requiring consideration was merely following a rule of common law, generally applicable to writings. Best, C. J., said

²⁸ *Wain v. Warlters*, 5 East, 10.

²⁹ The fourth section of the English statute provides against the bringing of an action, (1) to charge an executor on his "special promise," or (2) a guarantor on his "special promise," or (3) a person on "any agreement," in consideration of marriage, or (4) on any "contract or sale" of lands, or (4) upon "any agreement" not to be performed within a year, "unless the agreement . . . or some memorandum or note thereof" is in a signed writing.

In commenting on this language, Abbott, C. J., said in *Saunders v. Wakefield*, 4 B. & Ald. 595, 599:—"Now in the former part of the section, we find the words, special promise, agreement, contract, or sale. I read,

therefore, the latter part as if all those precedents were incorporated in it, to the word agreement, and to stand thus, "unless special promise, contract, or agreement, which such action shall be in writing, &c." Also see the remark in *Whitby*, 4 Sneed, 473.

³⁰ *Saunders v. Wakefield*, 595; *Morley v. Booth*, 112; *Hawes v. Armstrong*, 761; *Jenkins v. Reynold*, 14; *James v. Williams*, 14; *Raikes v. Todd*, 8 Ad. 112; *Richardson*, 15 M. & W. 112.

³¹ *Morley v. Booth*, 112.

the Statute of Frauds declared that no person should be charged with the debt of another except on an agreement in writing, if the clause in the statute had not expressed (as I think it does) that the *whole* agreement should be in writing, the law of evidence would have rendered it necessary the whole should have been in writing, by declaring, as it uniformly has done, that nothing could be added to the terms expressed in writing by parol testimony. Applying the principles of common law to the statute, which is a safe mode of construing acts of the legislature, I say, as I said in *Saunders v. Wakefield*, that if I had never heard of *Wain v. Walters* I should have held, that a consideration must appear on the face of the written instrument." No authority is cited, however, for the statement that executed consideration for a written contract could not be proved at common law, and there seems to be no authority warranting such a conclusion. It is clear enough at the present day at any rate that though such consideration for a written contract not within the Statute of Frauds is not stated or is misstated in the writing, it may be proved without violating the parol evidence rule.³²

In 1856 a statute repealed in England the requirement that consideration must be stated in a memorandum of a guaranty.³³ Except in this case, however, it is still said to be the rule of the English law that the memorandum must show the consideration for the contract.³⁴ This statement must, however, be accepted with some qualification. A memorandum which states all the terms of a bargain which were agreed upon expressly, need not state those which are implied in fact; where an agreement to buy or sell is made without a fixed price, the memorandum need not state that the contract was for a reasonable price, though that is the legal effect of the agreement.³⁵

In the United States some courts have followed the doctrine of *Wain v. Walters*.³⁶

³² *Supra*, § 115.

³³ Mercantile Law Amendment Act, 19 & 20 Vic. c. 97.

³⁴ 7 Halsbury's Laws of England, 374.

³⁵ *Hoadley v. M'Laine*, 10 Bing. 482.

³⁶ 5 East, 10; *Drovers' Deposit Nat. Bank v. Tichenor*, 200 Fed. 318 (guaranty); *Dillworth v. Holmes Furniture &c. Co.* (Ala. App.), 73 So. 288 (guaranty); *Ellison v. Jackson Water Co.*,

In the greater number of jurisdictions, ho have declined to follow the English rule, s ground that the local statute in question word "agreement"; sometimes on other gro

12 Cal. 542; *Weldin v. Porter*, 4 *Houst.* 236; *Buckley v. Beardslee*, 2 *South.* 570, 8 *Am. Dec.* 620; *Kerr v. Shaw*, 13 *Johns.* 236 (warranty of quiet enjoyment); *Hargroves v. Cooke*, 15 *Ga.* 321 (guaranty), (but see *Turner v. Lorillard Co.*, 100 *Ga.* 645, 28 *S. E.* 383, sale of goods); *Patmore v. Haggard*, 78 *Ill.* 607, (sale of land. Because the statute required "contract" to be in writing. The court held a memorandum of a guaranty need not state consideration, because statute used the word "promise" in that connection); *Ordeman v. Lawson*, 49 *Md.* 135 (guaranty); *Emerson v. Aultman*, 69 *Md.* 125, 14 *Atl.* 671; *Nichols v. Allen*, 23 *Minn.* 542; *Siemers v. Siemers*, 65 *Minn.* 104, 67 *N. W.* 802, 60 *Am. St. Rep.* 430 (promise in consideration of marriage). (See also *Alger v. Minnesota L. & T. Co.*, 135 *Minn.* 235, 159 *N. W.* 565, 160 *N. W.* 765, guaranty); *O'Bannon v. Chumaseo*, 3 *Mont.* 419; *Drake v. Seaman*, 97 *N. Y.* 230 (guaranty); *Cooley v. Lobdell*, 82 *Hun.* 98, 31 *N. Y. S.* 202, 153 *N. Y.* 596, 600, 47 *N. E.* 783; *Union Nat. Bank v. Leary*, 77 *N. Y. App. D.* 332, 79 *N. Y. S.* 217 (guaranty); *Stephens v. Winn*, 2 *Nott & McC. L.* 372 (guaranty); *Parry v. Spikes*, 49 *Wis.* 384, 5 *N. W.* 794, 35 *Am. Rep.* 782 (guaranty indorsed on note); *Commercial Nat. Bank v. Smith*, 107 *Wis.* 574, 83 *N. W.* 766 (guaranty indorsed on promissory note); *Klee v. Stephenson*, 130 *Wis.* 505, 110 *N. W.* 479; *Palsgrave v. Murphy*, 14 *U. Can. C. P.* 153.

³²⁰ *Violet v. Patton*, 5 *Cranch*, 142, 3 *L. Ed.* 61 (indorsement of note, court relies on the statute; also on the fact that note stated it was "for value received"); *Dunlap* 231, 37 *C. C. A.* Illinois statute); *Ala.* 129 (guaranty *Westmoreland v.* 457 (guaranty); *Conn.* 81 (guaranty *McCormick v. B.* 688, 78 *Atl.* 335 882 (guaranty); *Fla.* 281 (guaranty *Ga.* 52; *Patmore* 607 (guaranty); *Ill. App.* 53 (guaranty *Trout*, 6 *J. J. Mar.* *Ewing v. Stanley*, 69 *S. W.* 724 (sale of goods); *Boardman*, 29 *Williams v. Robinson* of goods), 40 *Am. St. Rep.* 430, 17 *N. Y.* 123 (guaranty or *DeCamp v. Scofield*, *N. W.* 962 (guaranty); *Miss.* 91 (guaranty); *Mo.* 303 (sale of goods); *Ruzick*, 79 *Mo.* 227; *Neb.* 589, 101 *N. W.* 101, *Goodnow v. Bond*, 101 *N. W.* 101 (guaranty); *Brown v. Ford*, 47 *Atl.* 412 (guaranty); *Tinglof*, 76 *N. W.* 101 (sale of land)]; *Ashtabula*, 114 (guaranty); *Masten*, 88 *N. C.* 101, *Reed v. Evans*, 17 *Okla.* 101, *Shively v. Black*, 101 *N. W.* 101 (guaranty); *Hopkinson*, 147 (guaranty); *S. C.* 101, *Shively v. Black*, 101 *N. W.* 101 (guaranty); *Fulton v. Robinson*, 101 *N. W.* 101 (guaranty); *Winston*, 33 *Tex.* 101, *S. W.* 227 (sale of goods); *Gleed*, 33 *Vt.* 405; *C.*

States the matter has been settled by statutes some of which enact that consideration must be stated.³⁷ Others enact either broadly that it need not be stated, or more commonly, specifically that it need not be stated in case of a guaranty.³⁸ An examination of the matter on principle will help to a proper conclusion as to the meaning and the merits of the conflicting rules.

§ 571. How far a statement of the consideration should on principle be included in the memorandum.

The matter may be considered either from the standpoint of the technical language of the statute, or from the standpoint of practical desirability. Doubtless if the language of the statute has a clear meaning, it must control even if the results reached by following that reasoning are unfortunate. But if the words of the statute are open to more than one construction, that possible construction which effects the general

Leigh, 85, 100, 103; *Saunders v. Bank of Mecklenburg*, 112 Va. 443, 71 S. E. 714, Ann. Cas. 1913 B. 982.

³⁷ *Lindsay v. McRae*, 116 Ala. 542, 22 So. 868; *Eppich v. Clifford*, 6 Col. 493 (sale of land); *Sackett v. Palmer*, 25 Barb. 179 (guaranty); *Castle v. Beardsley*, 10 Hun, 343 (guaranty); (The New York statute was repealed, but the same result is still reached because the court holds this to be in accordance with the common law. *Union Nat. Bank v. Leary*, 77 N. Y. App. D. 332, 79 N. Y. S. 217); *Bogard v. Barhan*, 56 Oreg. 269, 108 Pac. 214; *Taggart v. Hunter*, 78 Oreg. 139, 152 Pac. 871, Ann. Cas. 1918 A. 128; *Parks v. Elmore*, 59 Wash. 584, 110 Pac. 381 (sale of goods under Oregon statute). *Stimson's American Statute Law*, Sec. 4142, gives Alabama, Nevada, and Oregon, as having this statutory requisite. See also *Twohy Mercantile Co. v. Ryan Drug Co.*, 94 Wis. 319, 68 N. W. 963 (guaranty).

³⁸ *Reid v. Diamond Plate Glass Co.*, 85 Fed. 193, 29 C. C. A. 110 (Michigan;

sale of goods); *Ullsperger v. Meyer*, 217 Ill. 262, 264, 75 N. E. 482, 2 L. R. A. (N. S.) 221, 3 Ann. Cas. 1032; *Knapp v. Beach*, 52 Ind. App. 573, 101 N. E. 37 (sale of goods); *Camp v. Moreman*, 84 Ky. 635, 2 S. W. 179 (sale of land); *Campbell v. Preece*, 133 Ky. 572, 118 S. W. 373 (sale of land); *Haskell v. Tukesbury*, 92 Me. 551, 554, 43 Atl. 500 (guaranty); *Hieston v. National City Bank*, 132 Md. 389, 104 Atl. 281; *Hayes v. Jackson*, 159 Mass. 451, 34 N. E. 683 (sale of land); *Desmarais v. Taft*, 210 Mass. 560, 97 N. E. 96 (sale of land); *Ruzicka v. Hotovy*, 72 Neb. 589, 101 N. W. 328 (sale of land). *Stimson's American Statute Law* gives the following States as having statutory provisions that the memorandum need not mention the consideration: Illinois, Indiana, Kentucky, Maine, Massachusetts, Michigan, New Jersey, Virginia. These statutes do not in all cases, however, include all kinds of contract which are within the statute.

stated merely as a promise to pay \$5,000. It is indeed too clear for argument that an express condition which qualifies a promise is itself part of the promise. Even though a promise is subject to no express condition, the promisor's obligation may be qualified by an implied condition. If A promises \$5,000 in consideration of B's promise to convey Blackacre, A is no more bound to pay the price until he receives the conveyance than if he had qualified his promise by an express condition.⁴¹ It is therefore fair to construe a provision that a promise shall not be enforceable without a written memorandum as requiring the memorandum to contain a statement of all conditions, implied as well as express, qualifying the promise. The result of such a rule will be that generally executory performance due from the plaintiff as well as that due from the defendant must be stated in the memorandum; not as consideration, however, but as condition. The distinction is illustrated in a leading case.⁴² The memorandum there was—"We agree to give E 19 d. per lb. for 30 bales of Smyrna cotton customary allowance, cash 3%, as soon as our survey is complete." This was signed by the defendant. It will be observed that this memorandum does not state any counter promise to sell. It does, however, state the proposed price or consideration for the defendant's performance. If the statement of the consideration for the defendant's promise is essential, the memorandum is inadequate. Nor can it be inferred from the memorandum what the consideration was, or, indeed, that there was any consideration for the promise. It is equally possible to suppose that the paper was evidence of an option for which E had given cash consideration, or that E had made a counter promise to sell, or that the paper was an offer without present consideration. The full terms of the bargain, therefore, were not stated; but the defendant's promise is stated in full with the condition which qualifies it of payment of a certain price. Not only is executed consideration no part of a "promise," but it seems that such consideration is not part of a "contract" or "agreement." When an offer for a unilateral contract is made, the offer is conditional on performance of the act requested as consider-

⁴¹ See *infra*, § 835.

⁴² *Egerton v. Mathews*, 6 East, 307.

ation, but when that act has been performed the contract and the promise of the obligor are absolute and a memorandum may express the whole contract, though it makes no mention of the consideration. The same principle may be applicable in a bilateral contract after performance on one side; for a transaction which was originally bilateral may become a unilateral contract by the acceptance of full performance by one side.⁴³ Accordingly, here too, a memorandum of the promise which stated it in absolute terms would be an accurate statement of the promise in the second or unilateral contract, though it would not be an accurate statement of the promise in the first or bilateral contract. The memorandum, it is true, is made before the unilateral contract arises, but it is no valid objection to a memorandum that it was made before the contract.⁴⁴ The result therefore is that it is a reasonable construction of the language of the statute to conclude that the executory performance which will be due from each party must be stated in the memorandum, but that so much of the bargain as has been fully executed need not be stated. This result is supported by the weight of authority in the United States, as shown by the decisions cited in the preceding section. It seems too, that this result is practically the most desirable. Where performance on one side has been rendered there is a double reason, aside from the technical words of the statute, why no statement of the performance should be necessary in the memorandum. In the first place, something has been done; not merely said. The transaction does not rest wholly in parol.⁴⁵ In the second place, the in-

⁴³ See *supra*, §§ 49, 106.

⁴⁴ Thus a written offer is generally held a sufficient memorandum. See *infra*, § 579.

⁴⁵ In *Andersen v. Young*, 74 N. H. 428, 69 Atl. 122, a deed which was ineffectual to pass title was used as a memorandum though the consideration for the transfer did not appear in the deed. The court said (at p. 431): "The defendant further contends that the memorandum required by the statute of frauds must be sufficient not

only to identify the parties and the land, but also the price, without a resort to parol evidence; and that while it may be presumed that the deed states a consideration and acknowledges its receipt, such a statement is not a statement of the agreed price and as such conclusive upon the parties. An objection similar to this was interposed in the case of *Fugate v. Hansford*, 3 Littell, 262, where the memorandum did not state the price, but contained a statement acknowledging that the

justice of the situation created is serious if a party who has fully performed cannot recover. This injustice is so obvious that in the seventeenth section, the statute expressly provides that either part payment of the price, or part delivery of the goods, satisfies the statute; while under the fourth section of the statute, equity has elaborated a doctrine for the enforcement of oral contracts for the sale of land where there has been part performance;⁴⁶ and in contracts not to be performed within a year, many courts have held the statute inapplicable where there has been full performance on one side.⁴⁷

In such cases as are not covered by these doctrines, where there has been part performance and the contract is unenforceable because of the Statute of Frauds, recovery is generally allowed on the theory of quasi-contract.⁴⁸ None of these principles, however, help one who has advanced money or goods on the faith of a guaranty. His performance is not sufficient to make the contract enforceable, nor can he get quasi-contractual relief against the guarantor, since the latter has derived no benefit from the advance, though he himself has incurred a detriment at the guarantor's request. It is for this reason that a rule requiring a statement of executed

vendor had 'received value in full,' and the court in answer to the objection said: 'Where the contract is executory on both sides, it is doubtless necessary that the land sold and the price should be both evidenced by some memorandum in writing and signed by the party to be charged, as the statute requires; but where the contract is executed on the part of the purchaser, by the payment of the price, and that fact is evinced by written evidence, as in this case, it would seem, according to the reason of the thing, sufficient, without stating the precise price. There is in such a case nothing to be ascertained by parol proof, for the purpose of enforcing such a contract; and, of course, the danger of frauds and perjuries in setting up parol agreements, to guard against which was the object of the statute, is not in such a case to be apprehended. We cannot, therefore,

think that the statute constitutes a good defence." To the same effect see: *Sayward v. Gardner*, 5 Wash. 247, 255, 31 Pac. 761, 2 Reed St. Frauds, s. 593, 20 Cyc. 269, note 62.

In *Carpenter v. Tinglof*, 76 N. H. 454, 84 Atl. 51, the court in denying validity as a memorandum to a receipt stating that \$50 had been received as part payment for a certain estate, said that a statement of the consideration was necessary in the memorandum "except when the consideration has been paid, and the writing contains an acknowledgment that payment has been made in full." It would seem that if payment has in fact been made in full, the memorandum should be sufficient though it does not so state.

⁴⁶ See *supra*, § 494.

⁴⁷ See *supra*, § 504.

⁴⁸ See *supra*, §§ 534-537; Woodward, Quasi-Contracts, §§ 93-108.

accurately since the statement will be mere surplusage. This has indeed been so held.⁵¹ If the misstatement of the consideration involves a misstatement of the defendant's obligation, as it is likely to, if the consideration is executory, the result is an unfortunate one, since the defendant is held upon promise which does not correctly state his legal duty, and the whole object of the statute seems in great measure frustrated.⁵² Yet even where consideration is said to be necessary, a statement of a fictitious and formal consideration has been held sufficient.⁵³ Such decisions in effect hold that though a statement of consideration is necessary, the statement need not be an accurate one.

§ 573. What is a sufficient statement of the consideration.

No sooner had it been decided in England that a statement of consideration in the memorandum was essential, than the courts were called upon to decide what was a sufficient statement; and it was held there and has been held in the United States that an express statement is unnecessary if by a necessary or even probable inference of fact the memorandum indicates the consideration. Thus a written offer stating the consideration which is to be given is a sufficient memorandum.⁵⁴ A writing which warrants the inference that the consideration for the defendant's promise was a mutual promise by the plaintiff, sufficiently expresses consideration though the

⁵¹ *Hayes v. Jackson*, 159 Mass. 451, 34 N. E. 683. See also *Campbell v. Preece*, 133 Ky. 572, 118 S. W. 373.

⁵² See dissenting opinion, *Hayes v. Jackson*, 159 Mass. 451, 34 N. E. 683. Also compare the application of the parol evidence rule to statements of consideration in contracts in writing which are not within the statute. See *supra*, § 115.

⁵³ See the following section.

⁵⁴ *Stadt v. Lill*, 9 East, 348 ("I guarantee the payment of any goods which J. S. delivers to J. N."). *Choate v. Hoogstraet*, 105 Fed. 713, 46 C. C. A. 174 (under Wisconsin statute); *McDonald v. Wood*, 118 Ala. 589, 24

So. 86; *Hargroves v. Cook*, 15 Ga. 321; *Hutton v. Padgett*, 26 Md. 228; *Church v. Brown*, 21 N. Y. 315; *City Bank v. Phelps*, 86 N. Y. 484; *Balfour v. Knight*, 86 Ore. 165, 167 Pac. 484; *Young v. Brown*, 53 Wis. 333, 10 N. W. 394; *Coxe v. Milbrath*, 110 Wis. 499, 86 N. W. 174; *Miami County Nat. Bank v. Goldberg*, 133 Wis. 175, 113 N. W. 391; *Nash v. Hartland*, 2 Ir. L. 190. See also *infra*, § 579. In *Quaker Oats Co. v. North*, 102 N. Y. Misc. 108, 168 N. Y. S. 145, a request to forbear was held sufficiently implied in a written promise of guaranty, though not expressed.

no debt had been incurred to the promisee.⁶⁰ The principle which is thus applied is not different from that universally applicable in the construction of written documents.⁶⁰

A desire to account satisfactorily for the enforcement of promises on negotiable paper to answer for the debt of another seems responsible for a line of decisions holding that the words "for value received" are a sufficient statement of consideration in a memorandum of guaranty in jurisdictions where a statement of the consideration is required. So far as concerns the recognized negotiable secondary obligations on negotiable instruments these decisions themselves would not be troublesome, for such obligations by the custom of merchants are withdrawn from the operation of the Statute of Frauds.⁶¹ But the statement in such cases of the sufficiency of the words "for value received" has been upheld by decisions not only relating to guaranties written on negotiable paper,⁶² though such a guaranty is not negotiable, but even guaranties on a separate paper or of a non-negotiable debt have been sustained in the same way.⁶³ Such decisions are of course absurd. If a statement of the consideration is necessary at all it is necessary in order to indicate the exact terms of the agreement,—to furnish written evidence of those terms in order to establish

⁶⁰ *Haigh v. Brooks*, 10 A. & E. 309.

⁶¹ For illustrations of the admission of parol evidence to indicate whether words in a memorandum related to a future or past transactions see—*Butcher v. Steuart*, 11 M. & W. 857; *Goldshede v. Swan*, 1 Exch. 154; *Lysaght v. Walker*, 5 Bligh (N. S.), 1, 27; *Bainbridge v. Wade*, 16 Q. B. 89; *D'Wolf v. Rabaud*, 1 Pet. 476, 7 L. Ed. 227; *Walrath v. Thompson*, 4 Hill, 200. In *Union Nat. Bank v. Leary*, 77 N. Y. App. Div. 332, 79 N. Y. S. 217, parol evidence was admitted and held to show that a memorandum of guaranty stating no consideration, was in fact given for forbearance.

⁶² See *supra*, § 458.

⁶³ *Moses v. Lawrence County Bank*, 149 U. S. 298, 37 L. Ed. 743; *Dillworth v. Holmes Furniture &c. Co.*

(Ala. App.), 73 So. 288; *Brooks v. Morgan*, 1 Harr. (Del.) 123; *Emerson v. Aultman*, 69 Md. 125, 14 Atl. 671; *Osborne v. Baker*, 34 Minn. 307, 25 N. W. 606, 57 Am. Rep. 55; *Connecticut Mut. L. Ins. Co. v. Cleveland &c. R. Co.*, 41 Barb. 9; *Miller v. Cook*, 23 N. Y. 495; *Day v. Elmore*, 4 Wis. 190. See also *Jansen v. Kuensie*, 145 Wis. 473, 130 N. W. 450, Ann. Cas. 1912 A. 1241.

⁶³ *Flowers v. Steiner*, 108 Ala. 440, 19 So. 321 (assignment of stock as security); *Smith v. Northrup*, 80 Hun, 65, 29 N. Y. S. 851 (a guaranty of a mortgage debt on a separate paper); *Dahlman v. Hammel*, 45 Wis. 466 (a guaranty of several promissory notes on a separate paper); *Cheney v. Cook*, 7 Wis. 413, 423 (contract for sale of land).

the plaintiff's case, and such general words of satisfaction are of as little use for this purpose as would be if contained in the promise. That "for value received the undersigned promise of value," would certainly not be acceptable.⁶⁴ A general statement that consideration has been held sufficient, but an erroneous statement that consideration has also been held enough to state that the consideration must be stated in writing seems to rest in part at least on the idea that a written instrument is estopped to show the truth in contradiction of one recited in the instrument. This view has been previously criticized.⁶⁵ That should be resorted to in order to escape from a requirement that consideration must be stated in the memorandum tends at least to show that any requirement that consideration is executed, that it should be stated in the memorandum is undesirable. In spite of these cases, it is to be supposed that any general rule can be accepted that a recitation in a memorandum of any fictitious or untrue consideration will satisfy a local requirement that consideration must be stated. Certainly if the consideration is executory, it must be accurately stated.⁶⁷

§ 574. Contents of memorandum—Price.

It might seem that price was the equivalent of

⁶⁴ In *Osborne v. Baker*, 34 Minn. 307, 308, 25 N. W. 606, 57 Am. Rep. 55, Mitchell, J., said: "If this was a new question, we have not much doubt but that we would hold with the respondent that the words 'for value received,' which acknowledge the receipt of consideration, do not express the consideration. But we think that, under the authorities, the question is foreclosed, and is really no longer an open one. So far as the question has ever been passed upon by the courts of this country, it has been invariably held, so far as we can ascertain, that the words 'for value received' sufficiently express the consideration to amount to

a compliance with the requirements of the statute." See also *more*, 4 Wis. 190, 1

⁶⁵ *Lawrence v. M* 426, 11 L. Ed. 320; 2 Cal. 460; *Bollin*, Ala. 558; *Childs v.* 14.

⁶⁶ See *supra*, § 115

⁶⁷ In *Raikes v. To* a memorandum was because the actual consideration was proved by parol different from that which had been inferred from itself.

and that what has been said in regard to the necessity of stating the consideration states sufficiently the requisite in regard to price. This is not wholly true, however. The price is a word ordinarily used with reference only to sales of land or personal property; but the wages or salary paid under a contract of employment are in effect a price, and in a broad sense the term may be used for any exchange given or agreed to be given on one side for the performance on the other. But consideration is not primarily the price for performance, but the price of the promise. The consideration of most unilateral contracts is indeed not only pay for the promise, but is the contemplated exchange for the performance of the promise.⁶⁸

In bilateral contracts, however, the consideration on each side is always a promise while the price for performance on one side is not the promise on the other side, but its performance. Generally the obligation on one side will be expressly or impliedly conditional on performance of the other side of the contract. Accordingly it will generally be impossible to state accurately the obligation of one party to the contract without stating the price to be paid on the other side. How far a requirement that the promise with all its qualifications express or implied must be stated may be inconsistent with a rule which denies that consideration need be stated in the memorandum has already been discussed. The only satisfactory solution if consideration need not be stated, seems to be that if the price has been paid it need not be stated in the memorandum; but that otherwise the requirement of an exact statement of the defendant's obligation will require a statement of the price or exchange for the defendant's performance. In contracts for the sale of goods, as payment of the price, or any part of it, is an alternative method of satisfying the statute there is no necessity in any jurisdiction for stating a price which has already been paid under such a contract. If, however, a

⁶⁸ This is true if the promise in the unilateral contract is unconditional. When B gives S \$100 as consideration for S's promise to sell a horse, the \$100 is not only consideration for the promise but it is the price which the parties have agreed upon as the equivalent or

exchange for the horse, but if B paid \$100 for a promise to insure his house, or to guarantee claims due him, or for an option on property, the money, though consideration for the promise, would not be the price or exchange for the performance of the promise.

In contracts within the statute other than those for the sale of goods, the rule concerning the statement of consideration, whatever that may locally be, must be applicable to

Thomas, J., plainly indicated the opinion that section 2 of the statute applies in all cases, pointing out that this does not mean that when the parties are reversed the oral agreement will be sufficient to sustain an action." Field, C. J., with whom Knowlton, J., concurred, wrote an elaborate dissenting opinion, saying in part: "I do not know whether the majority of the court intend to make a distinction between contracts of sale described in the first section of Pub. Sta. c. 78 [land], and contracts of sale described in the fifth section [goods, wares, and merchandise]. . . . When the whole contract or promise of the defendant is to do a certain thing, and this is an absolute promise, resting upon a consideration which has been executed, there is some reason in saying that the memorandum signed by the defendant need not contain the consideration or inducement of the contract or promise. But in a contract executory on both sides, where the promises are mutual, and each is the consideration of the other, the promises are conditional, and one party agrees to perform his part of the contract only on condition that the other will perform his part, and it cannot be known what the promise of the one is without knowing the express or implied promise of the other. A promise to convey land because the promisor has actually received \$1,000 is not the same as a promise to convey land if the promisee will pay \$1,000 on receiving the conveyance, and a promise to convey land for \$1,000 to be paid on delivery of the deed is not the same as a promise to convey land for \$10,000 to be paid on the delivery of the deed. The conditions on which the vendor agrees to convey are often many and complicated, and involve the assump-

tion of mortgages and the performance of other acts. If a mere acknowledgment in writing by the vendor that he has agreed to convey specific land to the vendee on terms which are not expressed is sufficient to satisfy the Statute of Frauds, then it is open to the vendee to prove by oral testimony the price to be paid, and all the other terms of the contract to be performed by him, and the statute will no longer prevent frauds and perjuries. If it is a condition of the promise of the vendor that it is not to be performed unless at the time of the performance the vendee pays money and gives or assumes mortgages, the condition qualifies the promise and is a part of it, and the writing should contain all that is essential to show what the promise or contract on the part of the vendor in fact was. The decision of the court seems to me in part great to nullify the statute." The rule which the majority of the courts here enforce has been applied in contracts for the sale of land in Nebraska and Texas. *Ruzicka v. Hotovy*, 72 Neb. 589, 101 N. W. 328; *Dyer v. Winston*, 33 Tex. Civ. App. 412, 77 S. W. 227, on the ground that a memorandum need not contain all the terms of the bargain between the parties. See *supra*, § 575, n. *ad fin.* But in New York after the repeal of a statutory requirement that the consideration must be expressed in the memorandum, the court said, in dealing with a bilateral contract to employ and to serve: "The agreement of the defendants in this case was not merely to pay so much money to plaintiff. It was to pay him that money for his services as salesman to be thereafter rendered. For what the payment was to be made constituted a material and essential element of the agreement

unilateral contracts where the price is the ex performance of the promise. In bilateral contr ble to hold, and would doubtless generally be though a statement of the plaintiff's promise is a statement of the performance which the plain in exchange for the defendant's performance n since the giving of the plaintiff's performanc defendant's obligation.

§ 575. Contents of memorandum—Other tern tract.

The property to which a sale, or contract t must be described in the memorandum.⁷² So contract appearing in the memorandum seems upon its face, if, in fact, there were additio memorandum is insufficient.⁷³ Thus, if th

on the part of the defendants; an im portant condition of the contract on their side. Their agreement was not absolute to pay the money. It was conditioned upon the rendition of the stipulated services. Any memorandum which omits the condition falsifies the agreement they actually made and represents them as agreeing to pay the money absolutely when they did not so contract. It is no answer that the omitted condition, coupled with the other party's promise of performance, constituted a consideration for his own agreement, and so need not be expressed." *Drake v. Seaman*, 97 N. Y. 230, 235. In New York it is to be observed that at least no statute providing that the consideration need not be expressed embarrassed the court. In Michigan, however, though construing the statute of that State as enacting that the consideration in a contract for the sale of goods need not be expressed, the Circuit Court of Appeals, nevertheless, held that the price, if agreed upon by the parties, must be stated. *Reid v. Diamond Plate Glass Co.*, 85 Fed. 193, 29

C. C. A. 110. See *brook*, 191 Mass. 5 where the court h orandum signed t which misstated tl good, because the e authorized to sign su

⁷² *Peoria Grape S* cock, 67 Fed. 80 Meigs, 4 Cush, 4 Patton &c. Co., 10 S. E. 1088; *May v.* 127; *New England* ard Worsted Co., 1 N. E. 112, 52 Am. S. v. *Graham*, 193 Mic 616 (contract for missions); *Leesley v* Co., 162 Mo. App. 1 *Llewellyn v. Sunnys* Pa. 517, 89 Atl. 57 cited in the following

⁷³ *Thomas J. B* Harris, 209 Fed. 217 (land); *Stewart* 541, 45 S. E. 398. the latter case refer round bales of co said: "If nothing i

ranty,⁷⁴ or a condition of approval by the buyer,⁷⁵ or a term of credit, or security,⁷⁶ or if the place or time of delivery is agreed upon, these must be included in the memorandum.⁷⁷ But if no time is agreed upon the law will imply a reasonable time and the memorandum need contain no reference to time;⁷⁸ and simi-

might be that evidence could have been introduced to show what was the standard weight and trade meaning of square bale and round bale. Pol. Code, § 1 (4); Civil Code, § 3675 (2). But the petition shows that the parties themselves agreed that the bales should be of a particular weight. It, therefore, appears that there was a parol agreement, when the law requires that the contract of sale shall be in writing (Civil Code, § 2693, par. 7); by which it of course means the entire contract, with all stipulations and provisions which have been assented to by the parties at the time of the sale." See also *Hamby v. Truitt*, 14 Ga. App. 515, 81 S. E. 593. So in another Georgia decision the writing stated a contract for the sale of a given number of pounds of "ribs." The evidence showed that the term "ribs" is ambiguous, there being several distinct kinds of "ribs" known to the trade, and the plaintiff understood from the parol agreement that the ribs referred to were of a particular kind and of average weight. It was held the writing did not sufficiently identify its subject-matter, nor contain the entire agreement. *Borum v. Swift & Co.*, 125 Ga. 198, 53 S. E. 608. See also *Wagniere v. Dunnell*, 29 R. I. 580, 73 Atl. 309, and the cases in the following notes.

⁷⁴ *Fisher v. Andrews*, 94 Md. 46, 50 Atl. 407.

⁷⁵ *Boardman v. Spooner*, 13 Allen, 353.

⁷⁶ *Lester v. Heidt*, 86 Ga. 226, 12 S. E. 214, 10 L. R. A. 108 (land); *Norris v. Blair*, 39 Ind. 90, 10 Am. Rep. 135; *Fisher v. Andrews*, 94

Md. 46, 50 Atl. 407; *Morton v. Dean*, 13 Met. 385 (land); *Ebert v. Cullen*, 165 Mich. 75, 130 N. W. 185, 33 L. R. A. (N. S.) 84 (land); *Nichols v. Burcham*, 177 Mich. 601, 143 N. W. 647; *Davis v. Shields*, 26 Wend. 341; *Soles v. Hickman*, 20 Pa. St. 180 (land). The terms "regular" and "net," attached to the prices named in a memorandum, may be given a meaning by parol evidence. *Olson v. Sharpless*, 53 Minn. 91, 55 N. W. 125.

⁷⁷ *Fisher v. Andrews*, 94 Md. 46, 50 Atl. 407; *Kriete v. Myer*, 61 Md. 558; *Gault v. Stormont*, 51 Mich. 636, 17 N. W. 214 (land); *Smith v. Shell*, 82 Mo. 215, 52 Am. Rep. 365; *Lehenbeuter Co. v. McCord*, 65 Mo. App. 507; *Kidder v. Flanders*, 72 N. H. 345, 61 Atl. 675; *Davis v. Shields*, 26 Wend. 341. In *Willis v. Ellis*, 98 Miss. 197, 53 So. 498, the court erroneously held a memorandum of a contract for the sale of goods sufficient, which incorrectly stated the place of delivery, saying: "The statute only requires that the contract for the sale be evidenced by writing, and in order to make a perfect contract of sale, within the meaning of the statute, no place of delivery need be stated therein, since in the absence of such stipulation, the law fixes a place of delivery. This being true, the place of delivery is not an essential feature of a contract of sale."

⁷⁸ *McClurg v. Crawford*, 209 Fed. 340, 126 C. C. A. 266; *Albion Lumber Co. v. Lowell*, 20 Cal. App. 782, 130 Pac. 858, 864; *Nickerson v. Bridges*, 216 Mass. 416, 103 N. E. 939; *Kidder v. Flanders*, 73 N. H. 345, 61 Atl. 675. See also cases in the preceding notes.

§ 576. Certainty of description—General principle.

The question often arises whether a memorandum states with sufficient certainty the bargain to which it relates. Even though all the terms are included, they may be written in such an abbreviated way or with such brief description of the property that it is not apparent to an uninstructed person what the meaning of the writing may be. The question involved is the same whether the abbreviated description is of the parties, the goods, or other terms of the bargain. The general rule applicable to such cases was thus stated in a decision in Massachusetts:⁸⁴ "While parol evidence is not competent to contradict or vary the terms of such a memorandum to show what is intended, we are of opinion that the situation of the parties and the surrounding circumstances at the time when the contract was made may be shown to apply the contract to the subject-matter." It has been further held that abbreviations used by the parties or a private code could be translated and the meaning of them shown by parol evidence.⁸⁵ A memorandum of a contract to answer for the debt

other hand, it is considered by some of the authorities that the object of the statute, so far as lands are concerned, was to abrogate parol titles, and that this was sufficiently accomplished by a memorandum of the promise to convey the land, to be signed by the vendor, without requiring the other terms of the agreement to be stated. We need not decide which is the better reason, for we regard it as now settled, in this state, that all the terms of the contract need not appear in the memorandum."

In Alabama it is now requisite that the memorandum shall state the terms of the bargain including the exact terms of payment. *Nelson v. Shelby*, 96 Ala. 515, 11 So. 695, 38 Am. St. Rep. 116. The Missouri decisions cited by the Texas court have been also overruled. *Ringer v. Holtzclaw*, 112 Mo. 519, 20 S. W. 800; *Biest v. Versteeg Shoe Co.*, 97 Mo. App. 137, 155, 70 S. W. 1081.

In Nebraska, however, it has been held, following the authority of the Texas cases, that a memorandum of the sale of land was valid though it failed to specify which quarter of a named section of land was intended; and though it did not state the terms and conditions on which payment of the price was to be made. *Ruzicka v. Hotovy*, 72 Neb. 589, 101 N. W. 328. In *North v. Loomes*, [1919] 1 K. B. 378, 385, Younger, J., expressed the opinion that in a suit for specific performance the defendant could not successfully set up the statute where the memorandum omitted a term of the bargain which was wholly for the plaintiff's advantage, and which he was willing to give up.

⁸⁴ *New England Wool Co. v. Standard Worsted Co.*, 165 Mass. 328, 332, 43 N. E. 112, 52 Am. St. Rep. 516.

⁸⁵ The leading case upon this point is *Salmon Falls Mfg. Co. v. Goddard*, 14 How. 446, 14 L. Ed. 493. In that

or default of another must describe the debt with sufficient certainty to enable it to be proved, need not state all the terms of the contract, the debtor performance of which is guaranteed, if the contract is oral. It is sufficient if that contract is confirmed from the writing when applied to the

case the following memorandum was held sufficient:

Sept. 19,—W. W. Goddard, 12 mos.

300 bales S. F. drills..... 7¼

100 cases blue drills..... 8¾

Credit to commence when ship sails;
not after Dec. 1—delivered free of
charge for truckage.

R. M. M.

W. W. G.

The blues, if color is satisfactory to purchaser.

So in *Bibb v. Allen*, 149 U. S. 481, 37 L. Ed. 819, the memorandum relied on was made up of slip contracts. The court said: "It is no valid objection to these 'slip contracts,' executed in duplicate, that the sales purported to be made on account of 'Albert,' 'Alfred,' 'Alexander,' 'Amanda,' and 'Winston,' etc., which names were adopted by the defendants, and which represented them and their account. Parol evidence was clearly competent to show that these fictitious names, which defendants had adopted, represented them as the parties for whose account the sales were made." And in *Newell v. Radford*, L. R. 3 C. P. 52; *American Mfg. Co. v. Midland Steel Co.*, 101 Fed. 200; *Sanborn v. Flagler*, 9 Allen, 474, initials used to designate the parties were held sufficient. In *Haskell v. Tukesbury*, 92 Me. 551, 43 Atl. 500, 69 Am. St. Rep. 529 (guarantee), "Friend Geo." and "Pop Dyer" were held sufficient designations. So in *Lee v. Cherry*, 85 Tenn. 707, 4 S. W. 835, 4 Am. St. Rep. 800 (land), "Mr. Lee" was held to be sufficient description of one of the parties. In *Heffron v. Armsby*, 61 Mich. 505, 28 N. W. 672, "300

cases M. B. corn description. In *Co. v. Standard*, 328, 43 N. E. 11 "F. C." was description of a In *Maurin v. L.* N. W. 72, 65 memorandum re 96, sold Maurice 5,000, 1-0 Jul., I upheld. On the *Mendel*, 73 Ga. to allow proof of the firm of M. decision seems to be observed to del an incomplete firm intended, meant an individual firm. The decision See also *Frank v. Flash v. Ross*, 880, 102 Div. 880, 102 *stroth v. J. C.* 162 N. Y. App. 224; *Flegel v. De* Pac. 178, 135 Whether a man agreed upon oral therefore, wholly out parol evidence good memorandum perhaps been set

⁶⁶ *Pearce v. R.* 125 Ga. 444, 54 Piser, 163 Ill. App. son, 65 Ia. 423, v. Butler, 167 52.

⁶⁷ *Littman v.* Misc. 255, 165 N

memorandum of a contract of employment is not insufficient for failing to describe the nature of the employee's duties, if it provides that the existing arrangement shall "continue in force."⁸⁸ On the other hand, reference in the memorandum to an oral bargain between the parties to the transaction is not sufficient to justify proof of the terms of that bargain in order to complete deficiencies in the writing.⁸⁹

§ 577. Certainty of description of parties.

It is within the principle allowing definition of terms, that if a memorandum names A as one of the parties to the transaction, though A can be held personally liable,⁹⁰ it may, if desired, be shown by parol that A was agent for B in an action brought either by B or against him.⁹¹ The same doctrine is

⁸⁸ *Marks v. Cowdin*, 226 N. Y. 138, 123 N. E. 139.

⁸⁹ *People's Outfitting Co. v. Wheeling Mattress Co.*, [Ind. App.] 118 N. E. 827; *Howard v. Innes*, 253 Pa. 593, 98 Atl. 761; *Marks v. Cowdin* 226 N. Y. 138, 123 N. E. 139, 141. In *Lipschitz v. Grace*, 104 N. Y. Misc. 55, 171 N. Y. S. 330, a memorandum of sale after stating the parties, the goods and the price added, "Terms as had" presumably meaning the same credit was to be given as in a previous transaction. The memorandum was held bad.

⁹⁰ *Higgins v. Senior*, 8 M. & W. 834; *Meyer v. Redmond*, 205 N. Y. 478, 98 N. E. 906, 41 L. R. A. (N. S.), 675, affg. 141 N. Y. App. Div. 123, 125 N. Y. S. 1052.

⁹¹ *Wilson v. Hart*, 7 Taunt. 295; *Trueman v. Loder*, 11 A. & E. 589; *Salmon Falls Mfg. Co. v. Goddard*, 14 How. 446, 14 L. Ed. 493; *Haskell v. Tukesbury*, 92 Me. 551, 43 Atl. 500, 69 Am. St. Rep. 529; *Kingsley v. Siebrecht*, 92 Me. 23, 42 Atl. 249, 69 Am. St. Rep. 486; *Williams v. Bacon*, 2 Gray, 387; *White v. Dahlquist Mfg. Co.*, 179 Mass. 427; *Tobin v. Larkin*, 183 Mass. 389, 67 N. E. 340; *Haubelt v. Rea & Page Co.*, 77

Mo. App. 672; *Dykens v. Townsend*, 24 N. Y. 57; *Langstroth v. J. C. Turner Lumber Co.*, 162 N. Y. App. D. 818, 148 N. Y. S. 224; *Wellman v. Horn*, 157 N. C. 170, 72 S. E. 1010; *Thayer v. Luce*, 22 Ohio St. 62; *Brodhead v. Reinbold*, 200 Pa. St. 618, 623, 50 Atl. 229, 86 Am. St. Rep. 735. But see *Ward v. Hasbrouck*, 169 N. Y. 407, 62 N. E. 434. In *Filby v. Hounsell*, [1896] 2 Ch. 737, 740, *Romer, J.*, said: "And true it is that the plaintiff's name as vendor does not appear in the offer of purchase of September 24, 1895, signed by the defendant, and that you cannot gather who the vendor is from the auction form of contract or particulars which are sufficiently referred to for identification in the offer. But the offer does contain the names of the contracting parties. The offer is to Frank Jolly & Co., and I think it makes no difference that the offer is made to them as agents for an undisclosed principal. For the purpose of satisfying the Statute of Frauds it appears to me sufficient, so far as parties are concerned, that the written contract should show who the contracting parties are, although they or one of them may be agents or agent for others,

him personally.⁹² If, however, the agent's name appears on the paper, not as that of a contracting party, his name will not serve as a substitute for the name of his principal as a party to the contract.⁹³

So, a misnomer of a party in a memorandum is not fatal if it can be proved who was really intended.⁹⁴ Instead of naming the parties they are sometimes described, and if the description is sufficiently definite, the memorandum is good.⁹⁵ On the other hand, it is obvious that this principle must have some limitation. A description of the sellers by the word "sellers," or "vendors," is obviously insufficient.⁹⁶ So such a description as H "and those associated with him,"⁹⁷ or the "clients"

⁹² *Tobin v. Larkin*, 183 Mass. 389, 67 N. E. 340. See *supra*, § 285.

⁹³ *Potter v. Duffield*, L. R. 18 Eq. 4; *Lovesey v. Palmer*, [1916] 2 Ch. 233; *Grafton v. Cummings*, 99 U. S. 100, 25 L. ed. 366; *Nichols v. Johnson*, 10 Conn. 192; *O'Sullivan v. Overton*, 56 Conn. 102, 14 Atl. 300; *McGovern v. Hern*, 153 Mass. 308, 26 N. E. 861, 10 L. R. A. 815, 25 Am. St. Rep. 632; *Sherburne v. Shaw*, 1 N. H. 157, 8 Am. Dec. 47. All the cases just cited related to sales at auction, and it was held that the auctioneer's name appearing as that of the auctioneer was insufficient to supply the place of the name of his principal. The doctrine was thus expressed in *McGovern v. Hern*, *supra*: "The trouble with the memorandum in the case before us is that the seller is not named nor described. Sullivan Bros. were indicated in one corner of the paper as the auctioneers, and it cannot be fairly considered that they were anything else. Their function as auctioneers was recognized in the memorandum, as something distinct from that of parties contracting for unnamed principals."

⁹⁴ *Allen v. Burnett*, 92 S. C. 95, 75 S. E. 368.

⁹⁵ *Sale v. Lambert*, L. R. 18 Eq. 1; *Rossiter v. Miller*, 5 Ch. D. 648. In these cases the word "proprietor"

was held sufficient. *Catling v. King*, 5 Ch. D. 660. In this case, "Trustee selling under a trust for sale," was held sufficient. In *Carr v. Lynch*, [1900] 1 Ch. 613, the words "In consideration of you this day having paid me the sum of £50," was held to furnish sufficient description of the buyer as it furnished means of identifying him. The court saying: "It is quite plain that the person who paid the 50£ is the person who is to get the further lease, and it is not disputed that it was Jayne who paid the money." Compare with these decisions the case of *Selby v. Selby*, 3 Meriv. 2, where the signature to a letter "your affectionate mother," was held an insufficient signature. This decision is criticised by Browne, *Statute of Frauds*, § 362. The question whether such words are a sufficient signature is not precisely the same question as whether the description of a party to the bargain is sufficient to make the memorandum a complete statement of all the terms of the transaction.

⁹⁶ *Catling v. King*, 5 Ch. D. 665; *McGovern v. Hern*, 153 Mass. 308, 26 N. E. 861, 10 L. R. A. 815, 25 Am. St. Rep. 632.

⁹⁷ *Seymour v. Cushway*, 100 Wis. 580, 76 N. W. 769, 69 Am. St. Rep. 957.

or "client" of A.⁸⁸ These descriptions are absolutely accurate and if parol evidence of all surrounding circumstances admitted, it would probably be evident what the meaning of the description was. But this is not sufficient. The description in the writing itself is too general.⁸⁹

§ 578. Certainty of description of property.

The same kind of question arises in regard to a description of the property sold. The land or goods to be sold, or a debt to be guaranteed, must be sufficiently described for reliable identification. A distinction should be noticed between sales or contracts to sell specific goods, and contracts to sell goods of a certain kind. In a contract of the latter kind a memorandum need be no more definite than the contract itself; if the contract is definite enough to be enforced, a memorandum which states the contract as it was made will be sufficient. And, on the other hand, if the memorandum is more general than the actual contract, the memorandum will be insufficient, though seeming good on its face because not fully stating the contract the parties made.² Where, however, the sale is

⁸⁸ *Lovesey v. Palmer*, [1916] 2 Ch. 233; *Newberry v. Brown*, 20 Dom. L. R. 896. Cf. *Andrews v. Calori*, 38 Can. S. C. 588.

⁸⁹ In *Jarrett v. Hunter*, 34 Ch. D. 182, 184, Kay, J., said: "The law on this subject at present is this: If the vendor is described in the contract as 'proprietor,' 'owner,' 'mortgagee,' or the like, the description is sufficient, although he is not named; but if he is described as 'vendor,' or as 'client' or 'friend' of a named agent, that is not sufficient; the reason given being, in the language of Lord Cairns, that the former description 'is a statement of matter of fact, as to which there can be perfect certainty, and none of the dangers struck at by the Statute of Frauds can arise;' *Rossiter v. Miller*, 3 App. Cas. 1124, 1141; *Sale v. Lambert*, L. R. 18 Eq. 1; *Potter v. Duffield*, L. R. 18 Eq. 4, 8, the reason against the latter description being that, in order

to find out who is vendor, client, or friend, you must go into evidence which there might possibly, *Potter v. Duffield*, be a conflict of evidence. That, says the late Master of the Rolls in the last-named case, 'is what the Act says shall not be proved by parol evidence.' 'I should be thrown,' he continues, 'on the evidence to decide who sold the property, who was the party to the contract, and the Act requiring that fact to be proved by writing.'"

¹ Thus a writing stating that the signer released "all claim upon the will" of K is a sufficient memorandum of a contract to that effect, even if the interest in real or personal property is thereby affected. *Koenig v. Koenig*, Kans. 761, 142 Pac. 261. Cf. *Frost v. Alward*, 176 Cal. 691, 114 P. 379.

² See *supra*, § 575; also *Atwood v. Mfg. Co. v. Midland Steel Co.*

tract relates to specific property, there can be no question about lack of definiteness in the contract itself so far as concerns the property to which the bargain relates; the question is wholly whether the memorandum sufficiently describes this property. This question has risen more frequently in regard to sales of real estate than in regard to sales of personal property; still there are a few decisions in regard to goods.³ It will be seen from the decisions cited below that the American courts have required greater particularity in descriptions of real estate than in descriptions of goods. In the cases relating to real estate it may be that too great stress is laid upon a description that will identify beyond possibility of doubt the subject-matter of the sale. "John Smith" in a memorandum does not identify, beyond a peradventure, a party so designated, but it is a suffi-

Fed. Rep. 200, where billets "4 x 5 or 5 x 5" was held sufficient description.

³ *New England Wool Co. v. Standard Worsted Co.*, 165 Mass. 328, 43 N. E. 112. In this case the property described was "about 2,000 to 2,500 lbs. F. C." The property in regard to which the parties were bargaining was in fact, 2,443 lbs. of "F. C." wool. The court held the description sufficient because when it was shown "who and where the parties were at the time of making the contract, and what property the plaintiff had on hand of the kind described, it is clear without more that the memorandum referred to the 2,443 lbs. of wool on hand." No doubt the court is right in saying that it was possible to translate the memorandum when the surrounding circumstances and the time and place of the bargain was shown but that would also be true of a memorandum which read: "I have sold you the goods you looked at, at the usual price," but it may be doubted whether this memorandum would be sufficient. In *Burgess Sulphite Fibre Co. v. Broomfield*, 180 Mass. 283, 62 N. E. 367, the words, "all your iron which

you may desire to sell," were held a sufficient description of iron on the premises of the plaintiff's mill. In *Brewer v. Horst-Lachmund Co.*, 127 Cal. 643, 60 Pac. 418, 50 L. R. A. 240, the subject-matter of the sale was a certain lot of hops. Samples had been given from these hops and, in accordance with a custom in the trade, samples were designated by a number—in this case, "13." The reference to the goods in a telegram as "13" was held a sufficient description of them. A more extreme case is *Macdonald v. Longbottom*, 1 E. & E. 977, where evidence was admitted to show that the words, "your wool," referred to certain particular wool which the plaintiff had under his control at the time of the contract. In *Shardlow v. Cotterell*, 20 Ch. D. 90 (C. A.), Lush, L. J., said (at p. 97): "Suppose a horsedealer having a great number of horses offers one of them for sale; the horse is trotted out and approved of, but the parties differ about the price. Suppose the next day the seller writes and says, 'I will let you have that horse for £50,' and the buyer writes to accept the offer, would not parol evidence be admissible to show what horse was meant?"

English cases seem to require less definiteness of description than the American.⁵ Even in the United States, "Descrip-

v. Evans, 48 Miss. 247, 12 Am. Rep. 372, "a piece of property on the corner of Main and Pearl streets, city of Natchez, county of Adams, State of Mississippi," was held insufficient, because there was no reference in the memorandum itself to anything extrinsic that would define which corner was intended. The court said, however: "Extraneous evidence so referred to, and any other evidence in connection with it, which may serve to identify and fix the limits of the land intended is admissible and proper. There would appear to be no limit in that direction except what is to be found in the general reference of the contract. For example, if a contract purports to embrace all the land owned by the vendor in a certain county, it would be admissible to prove any and all the land owned by him in that county." In *Mellon v. Davison*, 123 Pa. St. 298, 16 Atl. 431, "a lot of ground fronting about 190 feet on the P. R. R. in the 21st ward, Pittsburgh, Pa.," was held insufficient, though the seller owned but one piece of land in the ward named. See also *Rineer v. Collins*, 156 Pa. St. 342, 27 Atl. 28. In *Thompson v. New South Coal Co.*, 135 Ala. 630, 34 So. 31, 62 L. R. A. 551, 93 Am. St. Rep. 49, "coal lands," was held an insufficient description. See also *Ryan v. United States*, 136 U. S. 68, 34 L. Ed. 447; *Roberts v. Bennett*, 166 Ky. 588, 179 S. W. 605, L. R. A. 1916 C. 1098; *Daniels v. Rogers*, 108 N. Y. App. Div. 338, 96 N. Y. S. 642; *Penshorn v. Kunkel* (Tex. Civ. App.), 90 S. W. 719. On the other hand—in *Campbell v. Preece*, 133 Ky. 572, 118 S. W. 373, the court held a description sufficient which described the land in question merely as the lands which the buyer had previously sold to the seller. Cf. *Howard v. Innes*, 253 Pa. 593, 98 Atl. 761.

In *Henderson v. Perkins*, 94 Ky. 307, 14 Ky. L. Rep. 782, 21 S. W. 1035, "my home place and storehouse" was held sufficient. See also *Bates v. Harris*, 144 Ky. 400; *Matherley v. Wright*, 171 Ky. 264, 188 S. W. 385; *Harvey v. Bross*, 216 Mass. 57, 104 N. E. 350; *Anderson v. Hall*, 273 Mo. 309, 188 S. W. 79; *Beaton v. Fussell* (Tex. Civ. App.), 166 S. W. 458; *Spaulding v. Smith* (Tex. Civ. App.), 169 S. W. 627.

⁵In *Ogilvie v. Foljambe*, 3 Meriv. 53, the description "Mr. Ogilvie's house" was thought to be sufficient. In *Bleakley v. Smith*, 11 Sim. 150, "The property in Cable St." was held to be sufficient. In *Shardlow v. Cotterell*, 20 Ch. D. 90, (C. A.), there was an auction sale, and the memorandum was contained in the following receipt signed by the auctioneer: "Received of Mr. A. Shardlow the sum of £21 as deposit on property purchased at £420 at Sun Inn, Pinxton, on the above date. Mr. George Cotterell, Pinxton, owner."

Jessel, M. R., said: "I consider that any two specific terms are enough to point out sufficiently what is sold. For instance, 'the estate of A. B. in the county of C.' or 'the estate of A. B. which he bought of C. D.,' or 'the estate of A. B. which was devised to him by C. D.,' would be sufficiently specific. If so, why should not 'the property which A. B. bought of C. D. on the 29th of March, 1880,' be sufficient? Would anybody doubt that in a will 'the property which I bought of C. D. on the 29th of March 1880,' would be a sufficient description? If it is so in a will why not in a contract? I am at a loss to understand the reasoning on which the learned Judge in the Court below proceeded.

Let us look at the words in the present case. 'Property purchased at £420 at the Sun Inn, Pinxton, on the

tions of real property, omitting the town, county, or state where the property is situated, have been held sufficient where the deed or writing provides other means of identification.”⁶ The particularity of description essential in a memorandum must ultimately resolve itself into one of degree. This has been so well expressed by an English writer that his remarks are quoted below.⁷

above date’ (that is the 29th of March, 1880), ‘Mr. George Cotterell, Pinxton, owner.’ There are here not two, but three specific terms, that on a given day it was sold at a given place, and that it belonged to Mr. George Cotterell. It appears to me that this is an amply sufficient description. True there may be a dispute about what the property was, but so there always may be. It is admitted that the word ‘house’ would have been sufficient, but that term would no more have excluded a dispute than the word ‘property.’ I am of the opinion, therefore, that the receipt alone contains enough to determine what the thing sold was.”

⁶ *Flegel v. Dowling*, 54 Ore. 40, 46, 102 Pac. 178, citing: *Crotty v. Effler*, 60 W. Va. 258, 54 S. E. 345; *Hawkins v. Hudson*, 45 Ala. 482; *Webb v. Mullins*, 78 Ala. 111; *Garden City Sand Co. v. Miller*, 157 Ill. 225, 41 N. E. 753; *Lloyd v. Bunce*, 41 Iowa, 660; *Mee v. Benedict*, 98 Mich. 260, 57 N. W. 175, 22 L. R. A. 641, 39 Am. St. Rep. 543; *Norfleet v. Russell*, 64 Mo. 176; *McCullough v. Olds*, 108 Cal. 529, 41 Pac. 420; *Tewakbury v. Howard*, 138 Ind. 103, 37 N. E. 355; *Robeson v. Hornbaker*, 3 N. J. Eq. 60; *Quinn v. Champagne*, 38 Minn. 322, 37 N. W. 451.

In *Crotty v. Effler*, 60 W. Va. 258, 54 S. E. 345, it is said (at p. 263): “Although the state, county, and district may be omitted from the description, it is essential that the land agreed to be sold be so described as to be capable of being distinguished from other lands. It is not necessary that

the contract should contain such a description as, without the aid of extrinsic testimony, to ascertain precisely what was agreed to be sold.”

⁷ F. Vaughan Hawkins, Esq., on the Principles of Legal Interpretation with Reference Especially to the Interpretation of Wills, 2 Judicial Soc. Papers, 298 (pp. 326 *et seq.*): “The other limit of interpretation of which I have spoken is the result of the necessity of there being a sufficient written expression; the meaning of the words cannot be added to or corrected beyond a certain point, or the words cease to be capable of bearing the interpretation to be put upon them; and though the intent may be known, there is no expression in which it can clothe itself. It cannot be too often repeated that legal interpretation is not a mere ascertaining of the intent; it acts only by putting a meaning consistent with the intent, upon the words. And the answer to the question, What is a sufficient written expression? will vary largely with different classes of writings, and under different systems of jurisprudence. In this respect it is manifest that private documents must be interpreted more strictly than public. A deed or will made by a private person is made with the knowledge of the command of the law, which requires the writer to express himself fully and completely, and gives validity to the instrument only on the condition of reasonable compliance with the demand which it has imposed. On the other hand a document, such as a treaty, which as to its form is almost

§ 579. Intent to make a memorandum is not requisite.

As the purpose of the statute is to require a formality of proof in order to make a contract enforceable, not to impose a

wholly independent of everything but the will of the contracting parties, leaves the amount of the expression much less determinate; and, although an intention must fail of effect which has no corresponding expression of any kind in the document, yet the interpreter must resort very much to the inferred will of the parties themselves for a criterion of sufficiency of expression, which thus becomes almost wholly merged in the general inquiry after the probably intention,—meaning as I do, by *intention*, wherever it occurs in this paper, not a mere inchoate act of the mind, that which a person intended to do, but took no step toward doing, but something which as a mental act was complete, and which the writer endeavored to express by the words he made use of, although those words in fact express his meaning more or less imperfectly. In the interpretation of writings where the latitude allowed to the interpreter is considerable, and particularly where direct evidence of intention not contained in the writing is admitted, the question of what is a sufficient written expression becomes evidently of great practical importance. If a perfectly definite intent can be collected by the aid only of collateral evidence of it, coupled with the meaning of the words, it is probable that the latter element, that of the meaning of the words, bears a sufficiently great proportion to the former, to assure the interpreter that the words will bear the meaning and express it sufficiently. But this security does not exist where parol declarations of intention, for example, are admissible. The undoubted fact that no general definition of what is in such cases a sufficient expression can be fixed upon beforehand is made use

of by Sir James Wigram as a constant argument against admitting evidence of intention generally. 'Once admit,' says he (p. 128), 'that the person or thing intended by the testator need not be adequately described in the will, and it is impossible to stop short of the conclusion that a mere mark will in every case supply the place of a proper description.' Surely there is no impossibility such as here contended. It is reasonable to say that if a testator, for instance, describes a person by his surname and Christian name, that is a sufficient description to satisfy the letter of the law, though it may in fact be insufficient completely to identify the person intended. If, on the other hand, a testator should say, 'I give so and so to *my son*,' when he has nine sons, it would probably be right to decide that such a description was not a sufficient one, since it was one which the writer must have known or ought to have known, would prove ambiguous, and to allow of an addition to which by parol testimony would be to offer a great temptation to perjury. It is evident that a line must be drawn somewhere, and when necessary it will doubtless be drawn in practice; but as yet the boundary of testamentary interpretation on this side is somewhat imperfect, and there is no rule forbidding the introduction of parol testimony of intention to fill up even such a manifestly inadequate description as that I have last supposed. Many questions on the sufficiency of expression arise upon the interpretation of informal writings, as, for instance, contracts; what part of a contract required by law to be in writing need be expressed in the writing; how far usages and customs of trade may be imported, and the like. In fact all the most dif-

new rule of law as to what constitutes a valid immaterial with what purpose the requirement is fulfilled. In this connection, however, it

difficult problems of interpretation arise upon the limits of it, upon the extent to which the meaning of words may be modified by other signs of the intent; upon the contest in short, as it is often termed, between the letter and the spirit. Into the principles which questions of this nature involve, I will not at present enter more minutely; they will suggest themselves in relation to the different classes of legal writings to any one who clearly appreciates the real nature of the process of what I have called inferential interpretation, a process in reality simple, and which, like reasoning, is practiced correctly every day by persons who have never considered what it is they do, when they perform it, but which can never be understood so long as it is confounded with the mere grammar and dictionary operation of ascertaining the meaning of words. One consideration, however, I will not pass over: I mean the great differences which exist in the measure of interpretation as applied under different judicial systems and by different judicial minds, and the consequent necessity for accumulating a certain mass of decisions, in order to supply a uniform standard, and to fix the nearest approach to absolute correctness by striking an average of opinions through a long series of years. It is sometimes said, in relation particularly to testamentary interpretation, that authorities can be of no service, that to quote cases is to construe one man's nonsense by another man's nonsense, and that all a judge has to do is to read the writing and endeavor to make out from it the meaning of the testator. Now, if interpretation were, like the determination of the meaning of words whose signification is fixed, something that

can be done with a single conclusion as to which one man would say, the study of might indeed be in truth, it would say that no author sulted on a question judge ought to act of what was equitable circumstances are one case could never right to do in a shows that the line will be fixed at very different persons; no legal subject with liabilities of individuality more strongly lems of construction result of the decision of judges, each bears on the views ceded him, a system is built up, which is much nearer approach than if each interpreter set up his own standard was right to go in a tive expression, or to a conviction of tinguished from mere conjecture. *Rules of matters, the expedient be more doubtful; but construction there system of rational that these are only a comparison of the important cases, an average of a large number of minds, will not, I think any one who considers to be, as I have described of reasoning from pre-*

portant to distinguish decisions under statutes which require the "contract" to be in writing.⁸ Such statutes can hardly be satisfied unless the writing was made by the parties as the expression of the contract, but the requirement of a "note or memorandum" is satisfied by a letter in which, the writer after stating the bargain, repudiates it,⁹ or refuses to enter into a written contract.¹⁰ So a letter written by the party to be charged to his own agent, or any other third person, is enough if it contains the terms of the bargain.¹¹ It should follow that a docu-

ment of remedying, by a sort of equitable jurisdiction, the imperfections of human language and powers of using language, a process whose limits are necessarily indefinite and yet continually requiring to be practically determined,—and not, as it is not, a mere operation requiring the use of grammars and dictionaries, a mere inquiry into the meaning of words."

⁸ The statutes relating to the sale of goods do not use this word, but a number of statutes relating to agreements in regard to land do. See *supra*, § 567.

⁹ *Welford v. Beazely*, 2 Atk. 503; *Bailey v. Sweeting*, 9 C. B. (N. S.) 843; *Wilkinson v. Evans*, L. R. 1 C. P. 407; *Buxton v. Rust*, L. R. 7 Ex. 1, 279; *Elliott v. Dean*, Cab. & E. 283; *Dewar v. Mintoft*, [1912] 2 K. B. 373; *Drury v. Young*, 58 Md. 546, 42 Am. Rep. 343; *Heideman v. Wolfstein*, 12 Mo. App. 366; *Cash v. Clark*, 61 Mo. App. 636; *Spencer-Turner Co. v. Robinson*, 55 N. Y. Misc. 280, 105 N. Y. S. 98; *Poel v. Brunswick-Balke-Collender Co.*, 159 App. Div. 365; 144 N. Y. S. 725; *Spiegel v. Lowenstein*, 162 N. Y. App. D. 443, 147 N. Y. S. 655; *Willis v. Imperial Underwear Co.*, 159 N. Y. S. 729; *Louisville Varnish Co. v. Lorick*, 29 S. C. 633, 8 S. E. 8; *Martin v. Haubner*, 26 Can. S. C. 142. See *Westmoreland v. Carson*, 76 Tex. 619, 13 S. W. 559.

¹⁰ *Grant v. New Departure Mfg. Co.*, 85 Conn. 421, 83 Atl. 212 (con-

tract not to be performed within a year).

¹¹ *Moore v. Hart*, 1 Vern. 110; *Ayliffe v. Tracy*, 2 P. Wms. 65; *Owen v. Thomas*, 3 Myl. & K. 353; *Gibson v. Holland*, L. R. 1. C. P. 1; *Beckwith v. Clark*, 188 Fed. 171, 110 C. C. A. 207; *Woodruff Oil & Co. v. Portsmouth & Co.*, 246 Fed. 375, 158 C. C. A. 439; *Moss v. Atkinson*, 44 Cal. 3; *Jacobson v. Hendricks*, 83 Conn. 120, 75 Atl. 85; *Spangler v. Danforth*, 65 Ill. 152; *Wood v. Davis*, 82 Ill. 311; *Gaines v. McAdam*, 79 Ill. App. 201; *Fugate v. Hansford's Ex.*, 2 Litt. 262; *Kleeman v. Collins*, 9 Bush, 460; *Drury v. Young*, 58 Md. 546, 552, 42 Am. Rep. 343; *Townsend v. Hargrave*, 118 Mass. 325, 335; *Moore v. Mountcastle*, 61 Mo. 424; *Truskett v. Rice Bros. Live Stock, etc., Co.* (Mo. App.), 180 S. W. 1048; *Cunningham v. Williams*, 43 Mo. App. 629; *Cash v. Clark*, 61 *id.* 636; *Marks v. Cowdin*, 226 N. Y. 138, 123 N. E. 139, 141; *Mizell v. Burnett*, 4 Jones L. 249; *Nicholson v. Dover*, 145 N. C. 18, 58 S. E. 444, 13 L. R. A. (N. S.) 167; *Lee v. Cherry*, 85 Tenn. 707, 4 S. W. 835, 4 Am. St. Rep. 800; *Kearby v. Hopkins*, 14 Tex. Civ. App. 166, 36 S. W. 506; *Singleton v. Hill*, 91 Wis. 51, 64 N. W. 588. But see the contrary decisions: *First Bank v. Sowles*, 46 Fed. Rep. 731; *Steel v. Fife*, 48 Iowa, 99, 30 Am. Rep. 388; *Morrow v. Moore*, 98 Me. 373, 57 Atl. 81, 99 Am. St. Rep. 410; *Kinloch v. Savage*, *Speers' Eq.* 464; *Buck v. Pickwell*, 27 Vt. 157, 167.

ment retained wholly within the control of the party charged may also be a good memorandum. By hypothesis bargain at common law is complete, and written evidence alone is necessary. There seems no reason for doubting sufficiency of an undelivered writing for this purpose and view finds support in many cases.¹² It has, however, been in a number of cases most of which relate to real estate, a document remaining wholly unpublished in the possession of the writer could not be used as a memorandum.¹³ A some

¹² *Alford v. Wilson*, 95 Ky. 506, 26 S. W. 539 (land); *Allen v. Stalley* (Ky.), 119 S. W. 755 (land); *Drury v. Young*, 58 Md. 546, 42 Am. Rep. 343 (goods); *Johnson v. McCue*, 34 Pa. St. 180 (agreement to devise.) See also *Witman v. Reading*, 191 Pa. St. 134, 43 Atl. 140 (land). An undelivered deed under this rule has been held a sufficient memorandum. *Jenkins v. Harrison*, 66 Ala. 345; *Johnson v. Jones*, 85 Ala. 286, 4 So. 748; *Griel v. Lomax*, 89 Ala. 420, 6 So. 741; *Ryder v. Johnson*, 153 Ala. 482, 45 So. 181; *Shelinsky v. Foster*, 87 Conn. 90, 87 Atl. 35; *Ames v. Ames*, 46 Ind. App. 597, 91 N. E. 509 (land); *Cannon v. Handley*, 72 Calif. 133, 144, 13 Pac. 315 (cf. *Holland v. McCarthy*, 173 Calif. 597, 160 Pac. 1069); *Hart v. Carroll*, 85 Pa. St. 508; *Bowles v. Woodson*, 6 Gratt. 78; *Parrill v. McKinley*, 9 Gratt. 1, 58 Am. Dec. 212. See also *Barr v. Johnson*, 102 Ark. 377, 144 S. W. 527; *Kopp v. Reiter*, 146 Ill. 437, 34 N. E. 942, 22 L. R. A. 273, 37 Am. St. Rep. 156; *Schneider v. Anderson*, 75 Kans. 11, 88 Pac. 525, 121 Am. St. 356; *Thayer v. Luce*, 22 Ohio St. 62; *Cooper v. Thomason*, 30 Or. 161, 174, 45 Pac. 296; *Campbell v. Thomas*, 42 Wis. 437, 24 Am. Rep. 427; *Popp v. Swanke*, 68 Wis. 364, 31 N. W. 916. See also *Lithograph Bldg. Co. v. Watt*, 96 Ohio St. 74, 117 N. E. 25; or a letter of acceptance, mailed but never received. *Van Boakerck v. Torbert*, 184 Fed. 419, 107 C. C. A. 383. See also

decisions holding corporation insufficient, *supra*, § 568. But if it is made to an assignee of the property at the latter's request it is insufficient to render enforceable the contract between promisor and promisee. *Johnson*, 102 Ark. 477, 144 S. W.

¹³ *Remington v. Linthicum*, 184, 93, 10 L. Ed. 364; *Steel v. Fife*, 48 Iowa, 99, 30 Am. Rep. 388; *Burger v. Adams*, 92 Ky. 26, 17 162 (but see *McBrayer v. Cobb*, Ky. 479, 18 S. W. 123; *Allen v. Wilson*, 95 Ky. 506, 26 S. W. Dickinson v. Wright, 56 Mich. N. W. 312; *Chesebrough v. Fife*, 72 Mich. 438, 40 N. W. 747; *Johnson v. Brook*, 31 Miss. 17, 66 Am. 547; *Montauk Assoc. v. Daly*, N. Y. App. Div. 101, aff'd., without opinion, 171 N. Y. 659, 63 N. E. Grant v. Levan, 4 Pa. St. 393. See *Callanan v. Chapin*, 158 Mass. 117, 32 N. E. 941. According to such jurisdictions an undelivered document is insufficient, not only as a conveyance but as a memorandum of a conveyance to convey. *Freeland v. Charn*, Ind. 132, 134; *Steel v. Fife*, 48 Iowa, 99, 30 Am. Rep. 388; *Logsdon v. Fife*, 54 Iowa, 448, 6 N. W. 715; *Richter v. Isaacs* (Ky.), 118 S. W. 1003; *Johnson v. Moore*, 98 Me. 373, 57 Atl. Am. St. Rep. 410; *Merriam v. L. Cush.* 151; *Parker v. Parker*, 1409; *Ducett v. Wolf*, 81 Mich. N. W. 829; *Kroll v. Diamond Co.*, 113 Mich. 196, 71 N. W.

similar question arises in regard to the sufficiency of a written offer to constitute a memorandum, for at the time that such a writing is made, the writer does not deliver the writing as then binding him. The obligation does not arise until the offer is accepted. The writing, therefore, cannot have been delivered as a memorandum of a contract; but it is generally held that such an offer, though accepted orally, satisfies the statute.¹⁴

Comer v. Baldwin, 16 Minn. 172; *Johnson v. Brook*, 31 Miss. 17, 66 Am. Dec. 547; *Wier v. Batdorf*, 24 Neb. 83, 38 N. W. 22; *Soward v. Moss*, 59 Neb. 71, 80 N. W. 268; *Schneider v. Vogler* (Neb.), 97 N. W. 1018; *Brown v. Brown*, 33 N. J. Eq. 650; *Cagger v. Lansing*, 43 N. Y. 550; *Allebach v. Goddalk*, 116 Pa. St. 329, 9 Atl. 444. See also *Henderson v. Beard*, 51 Ark. 483, 11 S. W. 766; *Swain v. Burnette*, 89 Cal. 564, 26 Pac. 1093; *Sullivan v. O'Neal*, 66 Tex. 433, 1 S. W. 185. So an undelivered will. *In re McGinley's Est.*, 257 Pa. 478, 101 Atl. 807.

In *Lowther v. Potter*, 197 Fed. 196, the court, while conceding that an undelivered writing might be a valid memorandum, held that an undelivered deed which contained no recital of a previous contract, could not be. If a deed is delivered in escrow, the terms of the delivery may everywhere be shown by parol. *Manning v. Foster*, 49 Wash. 541, 96 Pac. 233, 18 L. R. A. (N. S.) 337 and note. *Moore v. Ward*, 71 W. Va. 393, 76 S. E. 807, 43 L. R. A. (N. S.) 390.

¹⁴ *Egerton v. Mathews*, 6 East, 307 (goods); *Hoadly v. M'Laine*, 10 Bing. 482 (goods); *Reuss v. Pickaley*, L. R. 1 Ex. 342 (promise not to be performed within year); *Stewart v. Ed-dowes*, L. R. 9 C. P. 211 (goods); *Gradle v. Warner*, 140 Ill. 123, 29 N. E. 1118 (land); *Schaefer v. Whitham*, 146 Ia. 64, 124 N. W. 763 (goods); *Doherty v. Hill*, 144 Mass. 465, 11 N. E. 581 (land); *Lydig v. Braman*, 177 Mass. 212, 218, 58 N. E. 696 (goods); *Howe v. Watson*, 179 Mass. 30, 60 N. E. 415

(promise to will property); *Austrian v. Springer*, 94 Mich. 343, 54 N. W. 50, 34 Am. St. Rep. 350 (goods); *Kessler v. Smith*, 42 Minn. 494, 44 N. W. 794 (goods); *Waul v. Kirkman*, 27 Miss. 823 (promise to pay debt of another); *Willis v. Ellis*, 98 Miss. 197, 53 So. 496; *Lash v. Parlin*, 78 Mo. 391 (goods); *McAusland v. Rieser*, 82 N. J. Eq. 614, 90 Atl. 261; *Argus Co. v. Albany*, 55 N. Y. 496, 14 Am. Rep. 296 (promise not to be performed within a year); *Mason v. Decker*, 72 N. Y. 595, 28 Am. Rep. 190 (goods); *Bristol v. Mente*, 79 N. Y. App. Div. 67 (goods); *Fox v. Hawkins*, 150 N. Y. App. Div. 801, 135 N. Y. S. 245 (land); *Thayer v. Luce*, 23 Ohio St. 62 (land); *Himrod Co. v. Cleveland Co.*, 22 Ohio St. 451 (promise not to be performed within a year); *Cameron Coal & Mercantile Co. v. Universal Metal Co.*, 26 Okl. 615, 110 Pac. 720, 31 L. R. A. (N. S.) 618; *Friendly v. Elwert*, 57 Or. 599, 105 Pac. 404; *Lee v. Cherry*, 85 Tenn. 707, 4 S. W. 835, 4 Am. St. Rep. 800 (land); *Bailey v. Leishman*, 32 Utah, 123, 89 Pac. 78 (goods); *Lowber v. Connit*, 36 Wis. 176 (land); *Hawkinson v. Harmon*, 69 Wis. 551, 35 N. W. 28 (goods). But see *contra*, *Banks v. Harris Mfg. Co.*, 20 Fed. 667 (goods); *Cable Co. v. Hancock*, 2 Ga. App. 73, 58 S. E. 319 (goods); *Wilkerson v. Patton Sash, etc., Co.* 10 Ga. App. 697, 73 S. E. 1088; *McGhee Cotton Co. v. Herrine*, 10 Ga. App. 700, 74 S. E. 66; *American Leather Co. v. Porter*, 94 Iowa, 117, 62 N. W. 658 (goods). Even a lapsed written offer which had been orally renewed was

at the time of signature, or by reference. Thus, if documents are pinned together it is enough.¹⁹ So a letter and the envelope in which it was sent may be taken together and the envelope used to show the name of the person to whom the letter was addressed when that name did not appear in the letter itself.²⁰ So a memorandum in a book which does not contain the name of the seller is sufficiently connected with a leather cover upon which the seller's name is stamped, to allow the name to be treated as part of the memorandum.²¹ So a writing indorsed upon the back of another may be taken as part of it.²² A more extreme case is suggested in an English decision;²³ a signature to one of several sheets which are together at the time but not in any way united. It seems doubtful whether both papers could be used in such a case, though if both sheets were put in one envelope possibly that would be a sufficient connection between them.

¹⁹ *Tallman v. Franklin*, 14 N. Y. 584 (land). See also *Busch v. Hart*, 62 Ark. 330, 35 S. W. 534 (written contract not within statute).

²⁰ *Pearce v. Gardner*, [1897] 1 Q. B. 688. In *Coe v. Tough*, 116 N. Y. 273, however, where two documents were put in the same envelope the court, though holding the papers could be read together because of reference of one to the other, did not mention the inclusion of the papers in the same envelope as a reason for its holding.

²¹ *Jones v. Joyner*, 82 L. T. (N. S.) 768.

²² *Jelks v. Barrett*, 52 Miss. 315 (land). See also *Gage v. Cameron*, 212 Ill. 146, 172, 72 N. E. 204. The contrary was decided in *Wilstach v. Heyd*, 122 Ind. 574, 23 N. E. 963, following *Ridgway v. Ingram*, 50 Ind. 145, 19 Am. Rep. 706. In these Indiana cases the face of the memorandum contained no description of the property, but a description was indorsed on the back. This was held insufficient on the ground that an indorsement was no better than a separate paper, and if it contained no reference to the face could not be used.

The decisions seem clearly wrong. Of course, if a signed indorsement refer to the face of the document there can be no difficulty in reading the two together. *Flowers v. Steiner*, 108 Ala. 440, 19 So. 321 (contract of married woman); *Thomas v. Drennen*, 112 Ala. 670, 20 So. 848 (land); *Corning v. Loomis*, 111 Mich. 23, 69 N. W. 85 (land); *Tunstall v. Cobb*, 109 N. C. 316, 14 S. E. 28 (land).

²³ *Kenworthy v. Schofield*, 2 B. & C. 945. "It occurred to me at first that this might be likened to the case of a will consisting of several detached sheets, when a signature of the last, the whole being on the table at the time, would be considered a signing of the whole; but there the sheet signed is a part of the whole." The case decided that the signature of an auctioneer in his book was not sufficiently connected with the conditions of the sale contained in another document, and being in the same room, since there was no reference in the book to the memorandum. See *contra* (erroneously), *McBrayer v. Cohen*, 92 Ky. 479, 18 S. W. 123.

made; it is certainly enough if a plain reference is made by a document signed by the party to be charged, whatever its nature, to any other writing.²⁸ What certainty of reference is necessary, and how far parol evidence may be used to identify a document referred to in a signed writing, present questions entirely analogous to those discussed previously²⁹ in regard to the necessary certainty of description of the parties, subject-matter, and terms of the contract. While occasionally expressions may be found that parol evidence is not admissible to identify a document so referred to, this is erroneous both on

on a deed which was signed but not delivered. *McIlvaine, J.*, in delivering the opinion of the court, said: "That several writings, though executed at different times, may be construed together, for the purpose of ascertaining the terms of a contract and for the purpose of taking an action founded thereon out of the operation of the Statute of Frauds, is fully settled. 3 Taunt. 169; 1 Bing. 8; 3 Myl. & K. 353; 14 How. (U. S.) 447; 14 N. Y. 584. In such cases, however, the mutual relation of the several writings to the same transaction must appear in the writings themselves, parol evidence being inadmissible for the purpose of showing their connection. If one only of such papers be signed by the party to be charged in the action, the rule seems to be that special reference must be made therein to those papers that are not so signed; but if the several papers relied on be signed by such party, it is sufficient if their connection and relation to the same transaction can be ascertained and determined by inspection and comparison. In this case, upon inspection and comparison of the memorandum and the deed, although no reference is made in either to the other, we find with reasonable certainty that they do relate to the same transaction, and contain fully the terms of a contract of bargain and sale between the parties. The coincidences of names,

dates, amount of purchase money, and reference to and description of fractional lots, are quite sufficient. But when these coincidences are considered in connection with the averments and admissions in the pleadings, and the *res gesta*, we arrive at a degree of certainty far beyond that which is required in determining civil issues."

²⁸ *Griffiths Cycle Co. v. Humber*, [1899] 2 Q. B. 414; *Drovers Bank v. Albany Bank*, 44 Fed. Rep. 183 (guarantee); *Woodruff v. Butler*, 75 Conn. 679, 55 Atl. 167 (land); *Tippins v. Phillips*, 123 Ga. 415, 51 S. E. 410 (land); *Turner v. Lorillard Co.*, 100 Ga. 645, 28 S. E. 383, 62 Am. St. Rep. 345 (goods); *North v. Mendel*, 73 Ga. 400, 54 Am. Rep. 879 (goods); *Wills v. Ross*, 77 Ind. 1, 40 Am. Rep. 279 (guarantee); *Savage v. Robinson*, 93 Me. 262, 44 Atl. 926 (guarantee); *Olson v. Sharpless*, 53 Minn. 91, 55 N. W. 125 (goods); *Swallow v. Strong*, 83 Minn. 87, 85 N. W. 942 (land); *Waul v. Kirkman*, 27 Miss. 283 (land); *Fisher v. Kuhn*, 54 Miss. 480, 483; *Meek v. Hurst*, (Mo. 1916), 191 S. W. 68; *Fowler Elevator Co. v. Cottrell*, 38 Neb. 512, 57 N. W. 19 (goods); *Hickey v. Dole*, 66 N. H. 336, 31 Atl. 900, 49 Am. St. Rep. 614 (land); *Laforme v. Bradley*, 77 N. H. 128, 88 Atl. 1000 (land); *Beury v. Fay*, 73 W. Va. 460, 80 S. E. 777.

²⁹ § 576.

principle and authority.³⁰ It has been decided by the court in *Long v. Millar* (C. A.), 4 C. P. D. 450; *Oliver v. Hunting*, 44 Ch. D. 205; *Dewar v. Mintoft*, [1912] 2 K. B. 373; *Beckwith v. Talbot*, 95 U. S. 289, 24 L. Ed. 496; *Turner v. Lorillard Co.*, 100 Ga. 645, 28 S. E. 383, 62 Am. St. Rep. 345; *Analey v. Green*, 82 Ga. 181, 7 S. E. 921; *Wilkinson v. Taylor Mfg. Co.*, 67 Miss. 231, 7 So. 356; *Gough v. Williamson*, 62 N. J. Eq. 526, 50 Atl. 323. In *Beckwith v. Talbot*, Mr. Justice Bradley said: "It is undoubtedly a general rule that collateral papers adduced to supply the defect of signature of a written agreement under the Statute of Frauds should on their face sufficiently demonstrate their reference to such agreement without the aid of parol proof. But the rule is not absolute. *Johnson v. Dodgson*, 2 M. & W. 653; *Salmon Falls Mfg. Co. v. Goddard*, 14 How. 446, 14 L. Ed. 493. There may be cases in which it would be a violation of reason and common sense to ignore a reference which derives its significance from such proof. If there is ground for any doubt in the matter, the general rule should be enforced. But where there is no ground for doubt, its enforcement would aid, instead of discouraging fraud. Suppose an agreement be made out and signed by one of the parties, the other being absent

On the following day executed out as prepared by let you know adopt it." Would the parties should adopt it? And yet required to show meant."

³¹ *Freeland v. ...* 28 N. E. 226, 12 St. Rep. 244 (*Johnson v. Weld*, 204 589; *Cole v. New Hun*, 394.

³² See *Fletcher v. ...* Ill. 554, 88 N. E. 128 Tenn. 705, 16 1915 C. 400. cited in the pre- fendant agreed portion of a build- who was to rece- received, a lease from its owner, defendant agreed portion of the bui- bargaining, subje- conditions of the made to the plai- that this memor- ant would have

³⁰ *Bauman v. James*, L. R. 3 Ch. 508; *Long v. Millar* (C. A.), 4 C. P. D. 450; *Oliver v. Hunting*, 44 Ch. D. 205; *Dewar v. Mintoft*, [1912] 2 K. B. 373; *Beckwith v. Talbot*, 95 U. S. 289, 24 L. Ed. 496; *Turner v. Lorillard Co.*, 100 Ga. 645, 28 S. E. 383, 62 Am. St. Rep. 345; *Analey v. Green*, 82 Ga. 181, 7 S. E. 921; *Wilkinson v. Taylor Mfg. Co.*, 67 Miss. 231, 7 So. 356; *Gough v. Williamson*, 62 N. J. Eq. 526, 50 Atl. 323. In *Beckwith v. Talbot*, Mr. Justice Bradley said: "It is undoubtedly a general rule that collateral papers adduced to supply the defect of signature of a written agreement under the Statute of Frauds should on their face sufficiently demonstrate their reference to such agreement without the aid of parol proof. But the rule is not absolute. *Johnson v. Dodgson*, 2 M. & W. 653; *Salmon Falls Mfg. Co. v. Goddard*, 14 How. 446, 14 L. Ed. 493. There may be cases in which it would be a violation of reason and common sense to ignore a reference which derives its significance from such proof. If there is ground for any doubt in the matter, the general rule should be enforced. But where there is no ground for doubt, its enforcement would aid, instead of discouraging fraud. Suppose an agreement be made out and signed by one of the parties, the other being absent.

signed paper does refer to an unsigned paper it may do so in such a way as will not incorporate the contents of the latter under the signature of the former. Thus A's letter may refer to B's which contains an accurate statement of the contract, but if A's letter repudiates B's statement of the contract A has certainly not signed a memorandum which will bind him. To have this effect, A's letter must not only refer to B's, but by implication at least indicate assent to the accuracy of B's statement.³³ It may be supposed, however, that the statement in B's letter is inaccurate, and a correction of it in A's reply is in accordance with the facts. Here A's letter is a sufficient memorandum to charge him and such statements in B's letter as A did not contradict in his reply will be incorporated in the reply.³⁴

§ 582. Separate documents—Incorporation by necessary inference.

Until comparatively recently the authorities did not extend the right to make out a memorandum from separate documents, some of which were unsigned by the defendant, beyond the case of reference by a document so signed to one not so signed. Both in England and in the United States, however, an extension has been made by some decisions. The basis of these decisions is either that the documents on being placed together necessarily indicate that they relate to the same transaction, or

referred to a future oral bargain between the plaintiff and a third person. Suppose A. agrees to buy goods of B. at the price which B. has to pay C. for them, or on the same terms and conditions that B. has to make with C. Such a memorandum contains the whole of the bargain between A. and B., and ought to satisfy the Statute of Frauds, irrespective of whether B.'s arrangement with C. was oral or written. In the case just put as well as in the Massachusetts decision, the parties had made a contract and had made a full memorandum of all its terms; there was nothing for further agreement between them. See *Bowers*

v. Ocean Accident, etc., Corp., 110 N. Y. App. Div. 691, 694, 97 N. Y. S. 485. In the supposititious case put in the text, on the other hand, the parties had not come to a full agreement when the party to be charged signed. In such a case it seems hard to see how the signature, unless newly adopted in some way, can authenticate the subsequent writing.

³³ *Wilson v. Lewiston Mill Co.*, 150 N. Y. 314, 44 N. E. 959, 55 Am. St. Rep. 680; *Harby v. Wilson* (S. Car.), 90 S. E. 183.

³⁴ *Willis v. Ellis*, 98 Miss. 197, 53 So. 498.

made by each succeeding letter to the preceding, but this is not invariably the case, and in a telegraphic correspondence it is perhaps not common.³⁸ It seems impossible to justify this extension of the doctrine in regard to several documents. There is no difficulty in making out a written memorandum, all evidently relating to the same transaction, but the memorandum is not signed by the party to be charged. A simple illustration will indicate this. A writes a letter to B, saying: "I will sell you the property of which we spoke yesterday for \$5,000 cash." B replies: "I understand that you will sell me the following described property of which we spoke yesterday (describing the property) at \$5,000 cash. I hereby accept your proposition." According to the doctrine here criticized B's reply could be read with A's letter to charge A; they evidently refer to the same transaction, and the description of the property contained in B's letter could be incorporated in A's writing. But it is obvious that A has never authenticated the description by his signature, and to allow the description written by B to be used by B in enforcing the contract against A, is nothing other than to allow B to write an essential term of the memorandum himself and charge A with it as written.³⁹ It is, however, permissible to use so many of the letters of the party to be charged as evidently relate to the same transaction, irrespective of any reference in them to one another, provided they are all signed.⁴⁰ It is not enough, therefore, that there be a continuous correspondence between the parties. It is essential to examine specifically the papers not signed by the parties to be charged, which it is sought to incorporate with the paper or papers that are so signed, and determine whether the unsigned papers have been adopted by the signed papers.⁴¹ The only extension of

of his subsequent correspondence, yet the court admitted it as part of the correspondence, saying broadly: "It is sufficient if the contract can be plainly made out in all its terms from any writing of the party or from his correspondence."

³⁸ See *Brewer v. Horst-Lachmund Co.*, 127 Cal. 643, 60 Pac. 418, 50 L. R. A. 240; *Cobb v. Glenn Lumber Co.*, 57 W. Va. 49, 49 S. E. 1005, 110

Am. St. Rep. 734, and many decisions collected in 50 L. R. A. 240, note.

³⁹ This case is suggested by the decision of *Watson v. Baker*, 71 Tex. 739, 9 S. W. 867. Compare the correct decision of *Wilson v. Lewiston Mills Co.*, 150 N. Y. 314, 44 N. E. 959.

⁴⁰ See *supra*, § 581.

⁴¹ This doctrine is upheld by *Fowler Elevator Co. v. Cottrell*, 38 Neb.

the doctrine requiring an express reference in that seems permissible is where the signed of the signature can be shown from its context an adoption of a then existing unsigned paper

§ 583. Separate documents—Reference to action.

Recent English cases have adopted a doctrine far as the doctrine criticized in the preceding a signed document refers to the transaction in signed memorandum describing the transaction treated as incorporated therewith.⁴³ One or more exceptions have been made in the United States.⁴⁴

512, 57 N. W. 19 (goods); *Brown v. Whipple*, 58 N. H. 229; *Wilson v. Lewiston Mill Co.*, 150 N. Y. 314, 44 N. E. 959; *Darling v. Cumming*, 92 Va. 521, 23 S. E. 880. *Devine v. Warner*, 76 Conn. 229, 56 Atl. 562, also supports the requirements suggested by the text but goes still further (without justification) in requiring a mutual reference between the papers.

⁴³ This is well illustrated by a New Jersey decision, *Baldwin v. Trowbridge*, 62 N. J. Eq. 468, 50 Atl. 494, where a check signed by the defendant was held to establish a memorandum of a trust. The amount of the check was taken from entries in an account-book kept by the bookkeeper of the defendant, the party to be charged, and the entries contained the data necessary for a memorandum. It is reasonably clear that the maker of a check by making it for the amount indicated in the account-book authenticated with his signature the entries in the book.

⁴⁴ *Long v. Millar* (C. A.), 4 C. P. D. 450. The defendant signed the following receipt: "Received of Mr. George Long the sum of thirty-one pounds as a deposit on the purchase

of three plots of land. £31 0 0. The plaintiff was incorporated in the memorandum of the transaction and which contained the bargain. It is the receipt does not mention at all, but the transaction. See also *St. Ch. D. 305*; *Olive Ch. D. 205*, where the papers were signed and the charge was charged.

⁴⁵ *Smith v. Colling*. In this case these signed by the defendant terms agreed upon were held sufficient for the plaintiff to make a memorandum of those terms with *v. Talbot*, 95 U. 496. In this case referred to a previous case was held that an agreement was made by the signed paper seems sound for the plaintiff seems to have referred rather than to the which the writing

beyond what seems permissible, for the signature of the party to be charged does not authenticate an unsigned memorandum of the purchase merely because the signed paper makes some reference to the purchase. The signature vouches for the fact that there was a purchase, but it does not vouch for the terms of the purchase as described in the unsigned paper.⁴⁶

§ 584. Consistency of separate documents.

It is sometimes said that separate papers constituting a memorandum must be consistent with each other in order to be used.⁴⁶ Reflection shows that there are obvious limits to any such principle. In the first place it is necessary to distinguish between a written contract and a memorandum of an oral contract. If each of two inconsistent writings purports to be a written contract a difficulty arises which has no relation to the Statute of Frauds, but has to do either with lack of mutual assent or a mistaken expression thereof. If there was lack of mutual assent, which would happen if without fault on either side one party intended one form and so expressed himself, and the other party another form and so expressed himself, there is no bargain.⁴⁷ If on the other hand one form of expression was that which the parties intended⁴⁸ and the other form was due to mistake, the case is one for equitable reformation of the incorrect instrument and as a court of law could reach the same result by giving effect to the accurately expressed writing and disregarding the other, it is possible that it would do so. If, however, writings which are merely memoranda of

McBrayer v. Cohen, 92 Ky. 479, 18 S. W. 123, is still more open to the criticism made in the text.

⁴⁶ This view is supported by Llewellyn v. Sunnyside Coal Co., 242 Pa. 517, 89 Atl. 575, and by Wright v. Harrison, 137 Tenn. 157, 192 S. W. 716; Darling v. Cumming, 92 Va. 521, 23 S. E. 880. In the case last cited the words "according to an understanding between us" were held an insufficient reference to an unsigned paper containing a statement of the bargain between the parties.

⁴⁷ Benjamin, Sales (5th ed.), 244; Mechem, Sales, § 427.

⁴⁸ Thornton v. Kempster, 5 Taunt. 786. See *supra*, § 94.

⁴⁹ In Meyer v. Redmond, 205 N. Y. 478, 98 N. E. 906, affg. 141 N. Y. App. Div. 123, 125 N. Y. S. 1052, an auctioneer signed a contract for goods sold by him without disclosing his principal. In his sales book, he made a memorandum naming the principal. It was held this did not relieve him from liability on the paper delivered to the purchaser.

the contract are inconsistent, no such difficulty or more papers express accurately the oral parties, it is obviously no valid ground of objection. There are other papers in existence which express accurately. The statute requires nothing more than an accurate memorandum; if that exists the statute is satisfied. As parol evidence is always admissible to show the true intention of the parties, a memorandum, which is not a written contract, does not express the bargain,⁵⁰ it must be equally accurate. That a writing is an accurate memorandum which are cited in support of the requirement for the most part go no farther than this. A memorandum complete in itself and professing to incorporate another paper also insufficient in itself, must incorporate the latter paper in its entirety. If this will render the memorandum repugnant in its terms the papers have been held inadmissible. But the correctness of even this cannot be admitted as a rule. Suppose a writing signed by the party refers to another writing for all the terms of the contract, and this one fact the signed paper states the unsigned paper inaccurately. There is no objection to the memorandum to charge the signer of the second

§ 585. Signature.

All sections, both of the English and American, require signature. It was early held that the signature at the end of the writing, and there is no objection to the signature may be put at any place in the writing.

⁴⁹ See *Morton v. Clark*, 181 Mass. 134, 63 N. E. 409; s. c., 184 Mass. 555, 69 N. E. 309; *Willis v. Ellis*, 98 Miss. 197, 53 So. 498.

⁵⁰ See *supra*, § 575.

⁵¹ In *Cooper v. Smith*, 15 East, 103, a letter of the defendants was sought to be used in connection with an entry in the plaintiff's books, but the letter was inconsistent with the books. In this case neither document was a complete memorandum and the letter did not adopt and incorporate the entry in

the books. This was the basis of the decision. In *Smith v. Surman*, a letter from the plaintiff was not to incorporate a letter from the defendant which it contradicted. *ton v. Rust*, L. R. 10, 11; *ton v. Morton*, 10 L. R. 116, also *infra*, § 116.

⁵² *Willis v. Ellis*, 98 So. 498.

ute expressly requires subscription.⁵³ Some of these decisions have gone very far in holding a name written in the memorandum to be a signature when there seemed little to indicate that the name was written for the purpose of signing or authenticating the writing, and the English court, following such decisions to their logical conclusion, has held "that a signature to a document which contains the terms of a contract is available for the purpose of satisfying the statute though put *alio intuitu* and not in order to attest or verify the contract."⁵⁴ No decisions in the United States have gone to this extreme length.⁵⁵ In New York and some other States the statute has been changed from the English model so far as to require that the signature be "subscribed." Under a statute in this form there can be no doubt that the signature must be at the end of the writing.⁵⁶ The signature may be in an abbreviated form, as by

⁵³ *Lemayne v. Stanley*, 3 Lev. 1; *Knight v. Crockford*, 1 Esp. 190; *Holmes v. Mackrell*, 3 C. B. (N. S.) 789; *Barry v. Coombe*, 1 Pet. 640, 7 L. Ed. 295; *Nichols v. Johnson*, 10 Conn. 192; *Kilday v. Schanecupp*, 91 Conn. 29, 98 Atl. 335, L. R. A. 1917 A. 151; *McConnell v. Brillhart*, 17 Ill. 354, 65 Am. Dec. 661; *De Vares v. Corea*, 202 Ill. App. 465; *Drury v. Young*, 58 Md. 546, 42 Am. Rep. 343; *Penniman v. Hartsborn*, 13 Mass. 87; *Hawkins v. Chace*, 19 Pick. 502; *Traylor v. Cabanné*, 8 Mo. App. 131; *Merritt v. Clason*, 12 Johns. 102, 7 Am. Dec. 286; *Wellman v. Horn*, 157 N. C. 170, 72 S. E. 1010; *Burris v. Starr*, 165 N. C. 657, 81 S. E. 929, Ann. Cas. 1914 D. 71; *Tingley v. Bellingham Co.*, 5 Wash. 644, 32 Pac. 737, 33 Pac. 1055; *Anderson v. Wallace Lumber Co.*, 30 Wash. 147, 70 Pac. 247.

⁵⁴ *Griffiths Cycle Co. v. Humber*, [1899] 2 Q. B. 414, 418; *Jones v. Victoria Dock Co.*, 2 Q. B. D. 314. Compare *Hucklesby v. Hook*, 82 L. T. 117; *Gibbs v. Northern Const. Co.*, 43 Dorn. L. R. 276.

⁵⁵ In *Boardman v. Spooner*, 13 Allen, 353, 358, the court said: "The stamp-

ing of the purchasers' names and a date on the bill and memorandum of weights at some time while these papers were in their possession, without evidence when or for what purpose this was done, did not show that they had adopted such a stamp as a signature, and affixed it to the instruments with the intent to bind themselves thereby." So in *Kling v. Bordner*, 65 Ohio St. 86, 100, 61 N. E. 148, the court said: "No special formality in the execution of the writing is necessary, provided, as held in *Anderson v. Harold*, 10 Ohio, 399, it is signed for the purpose of giving it authenticity as an agreement." In *Lee v. Vaughan Seed Stove*, 101 Ark. 68, 141 S. W. 496, 37 L. R. A. (N. S.) 352; a printed name at the top of an order was held insufficient, the court saying: "A signature consists both of the act of writing one's name, and of the intention thereby, finally to authenticate the instrument." See also *Sutherland v. Munsey*, 119 Va. 791, 89 S. E. 882.

⁵⁶ *Coon v. Rigden*, 4 Colo. 275; *Davis v. Shields*, 26 Wend. 341; *James v. Patten*, 6 N. Y. 9, 55 Am. Dec. 376; *Doughty v. Manhattan Brass Co.*, 101

authorize an agent to make a memorandum entirely and sign it either with the principal's name or with the agent's, that he may also authorize an agent to make a portion of a memorandum, that is, to fill in blanks. After the agent has thus exercised his authority the memorandum should certainly be as effectual as if he had made it altogether. The principal is not willing to trust him to the extent of the whole memorandum but directs him to make use for the purpose of a specified signature and perhaps other written portions of a memorandum.⁶⁷ Where attempt is made to authorize the other party to the contract to fill in the blanks an insuperable difficulty arises. As will be seen,⁶⁸ one party to a contract cannot make the other his agent to execute a memorandum. An agency to fill in blanks seems in effect the same thing. At the time the signature is made it does not authenticate the memorandum and unless the blanks are filled in by some one, himself capable of signing the document effectually, so that his adoption of the signature already there may be regarded as a signing at that time, there can be no signed memorandum. The question in regard to the correction of a memorandum is similar. Anybody but the other party to the contract may be authorized to correct an existing memorandum, but the other party on principle may not.⁶⁹

grantee. It was held that while this document when delivered by the agent was not a good conveyance, it was a good memorandum of a contract to convey. On the other hand, in *Hodgkins v. Bond*, 1 N. H. 284, 287, it was held that a guarantee written over a blank signature on the back of a promissory note did not make a good memorandum. The same was held in *Jackson v. Titus*, 2 Johns. 430, in regard to an assignment in blank of an interest in land after the blanks had been filled in.

⁶⁷ The case of *Blacknall v. Parish*, 6 Jones Eq. 70, referred to in the preceding note, is satisfactorily explained on this ground. In *Ayres v. Probasco*, 14 Kans. 175, the same result might have been reached in regard to a mort-

gage except that by the law of Kansas the authority of an agent to convey land must be in writing.

⁶⁸ See *infra*, § 587.

⁶⁹ In *Bluck v. Gomperts*, 7 Exch. 862, 869, a memorandum of guarantee of two bills for £200 and £146, respectively, had been signed by the defendant. It was later found that the amount for which the second bill should be drawn was £150, and it was so drawn. The bills were delivered by the guarantor to the creditor (who later became plaintiff in the case), and upon delivering them the guarantor wrote across the face of his guarantee for the plaintiff's signature an acknowledgment of the receipt of "the two drafts (one being for £150 instead of £146, there being an error in the in-

A contrary rule, however, exists in some States in regard to contracts for the sale of land. Either because of special language in the statute, or because of the rather extraordinary view that "party to be charged" necessarily means the vendor,⁷² these courts hold not only that the vendor must sign the

(land); *Hodges v. Kowing*, 58 Conn. 12, 18 Atl. 979, 7 L. R. A. 87 (land); *Matthis v. Weir* (Del. Ch.), 84 Atl. 878; *Perkins v. Hadsell*, 50 Ill. 216 (land); *Ullsperger v. Meyer*, 217 Ill. 262, 75 N. E. 482 (land); *First Presbyt. Church v. Swanson*, 100 Ill. App. 39 (contract not to be performed within a year); *Shirley v. Shirley*, 7 Blackf. (Ind.) 452 (land); *Burke v. Mead*, 159 Ind. 252, 64 N. E. 880 (land); *Knapp v. Beach*, 52 Ind. App. 573, 101 N. E. 37; *Schaefer v. Whitman*, 146 Ia. 64, 67, 124 N. W. 763 (goods); *Wiley v. Hellen*, 83 Kan. 544, 112 Pac. 158 (land); *Smith v. Theobald*, 86 Ky. 141, 5 S. W. 394 (contract not to be performed within a year); *Engler v. Garrett*, 100 Md. 387, 59 Atl. 648 (land); *Williams v. Robinson*, 73 Me. 186, 40 Am. Rep. 352 (goods); *Old Colony R. R. Corp. v. Evans*, 6 Gray, 25, 66 Am. Dec. 394 (land); *Booklovers' Library v. Bogigian*, 193 Mass. 444, 79 N. E. 769 (land); *Nickerson v. Bridges*, 216 Mass. 416, 103 N. E. 939; *Morin v. Marts*, 13 Minn. 191 (goods); *Peevey v. Houghton*, 72 Miss. 918, 17 So. 378, 18 So. 357, 48 Am. St. 592; *Ivory v. Murphy*, 36 Mo. 534 (land); *Cunningham v. Williams*, 43 Mo. App. 629 (goods); *Moore v. Thompson*, 93 Mo. App. 336, 348, 67 S. W. 680 (contract not to be performed within a year); *Tracy v. Berridge*, 180 Mo. App. 220, 167 S. W. 1176 (goods); *Gartrell v. Stafford*, 12 Neb. 545, 11 N. W. 732, 41 Am. Rep. 767 (land); *Sabre v. Smith*, 62 N. H. 663 (goods); *Houghwout v. Boisaubin*, 18 N. J. Eq. 315; *Stengel v. Sergeant*, 74 N. J. Eq. 20, 68 Atl. 1106 (land); *Clason v. Bailey*, 14 Johns. 484 (goods); *McCrea v. Purmort*, 16 Wend. 460, 30 Am. Dec. 103; *Justice v. Lang*, 42

N. Y. 493, 1 Am. Rep. 576 (goods); *Mason v. Decker*, 72 N. Y. 595, 28 Am. Rep. 190 (goods); *Lord v. Cronin*, 154 N. Y. 172, 47 N. E. 1088 (land); *Marks v. Cowdin*, 226 N. Y. 138, 123 N. E. 139 (contract not to be performed within a year); *Brown v. Hobbs*, 154 N. C. 544, 70 S. E. 906; *Case Threshing Machine Co. v. Smith*, 16 Or. 381, 18 Pac. 641 (goods); *Taggart v. Hunter*, 78 Ore. 139, 152 Pac. 871, Ann. Cas. 1918 A 128 (employment of agent to sell realty); *Davis v. Martin*, 146 N. C. 281, 59 S. E. 700 (land); *Himrod Furnace Co. v. Cleveland &c. Co.*, 22 Ohio St. 451 (contract not to be performed within a year); *Flegel v. Dowling*, 54 Ore. 40, 102 Pac. 178, 135 Am. St. Rep. 812 (land); *Douglas v. Spears*, 2 Nott & McC. 207, 10 Am. Dec. 588 (goods); *Peay v. Seigler*, 48 S. C. 496, 26 S. E. 885, 59 Am. St. 731 (land); *Shillinglaw v. Sims*, 86 S. Car. 76, 67 S. E. 906; *McPherson v. Fargo*, 10 S. Dak. 611, 74 N. W. 1057, 66 Am. St. 723 (land); *Dyer v. Winston* (Tex. Civ. App.), 77 S. W. 227 (land); *Black v. Hans* (Tex.), 146 S. W. 309; *Bailey v. Leishman*, 32 Utah, 123, 89 Pac. 78 (goods); *Western Timber Co. v. Kalama River Lumber Co.*, 42 Wash. 620, 85 Pac. 338, 6 L. R. A. (N. S.) 397, 114 Am. St. 137 (land); *Monongah &c. Co. v. Fleming*, 42 W. Va. 538, 26 S. E. 201 (land); *Armstrong v. Maryland Coal Co.*, 67 W. Va. 589, 69 S. E. 195. In Idaho, however, although the statute reads "party charged" it is held that the memorandum must be signed by both parties. *Houser v. Hobart*, 22 Ida. 735, 127 Pac. 997 (goods); *Kerr v. Finch*, 25 Ida. 34, 135 Pac. 1165 (goods).

⁷² This view seems to have originated

contract whoever is defendant in the suit, vendor's signature is sufficient to bind the vendor. This may involve the consequence that the vendor of an oral executory contract against the purchaser has his ability to write a memorandum of the bargain himself is not always made clear; but probably, if not universally, it is necessary that the vendor should have indicated his assent to the writing of the memorandum in it or otherwise. It has been suggested that a memorandum with the signature of the defendant in the contract enforceable at law, specific performance may be given because of lack of mutuality;⁷⁴ but it is well settled that if the memorandum would bind the contract at law, equity will not refuse to enforce the contract because the contract could not have been enforced at law by the plaintiff.⁷⁵ It should be observed that the requirement of the signature of the defendant has nothing to do with the question previously considered,⁷⁶ whether the names of

in some misunderstandings in early New York decisions. See *Roget v. Merritt*, 2 Caines, 120; *Ballard v. Walker*, 3 Johns. Cas. 60; *Gale v. Nixon*, 6 Cow. 445; *Worrall v. Munn*, 5 N. Y. 229, 55 Am. Dec. 330.

⁷⁴ *Scott v. Glenn*, 98 Cal. 168, 32 Pac. 983; *Murray v. Crawford*, 138 Ky. 25, 127 S. W. 494, 28 L. R. A. (N. S.) 680; *Evans v. Stratton*, 142 Ky. 615, 134 S. W. 1154, 34 L. R. A. (N. S.) 393; *Henry v. Reeser*, 153 Ky. 8, 154 S. W. 371; *Kaiser v. Jones*, 157 Ky. 607, 163 S. W. 741; *Mull v. Smith*, 132 Mich. 618, 94 N. W. 183 (statutory); *Smith v. Mathis*, 174 Mich. 262, 140 N. W. 548 (statutory); *Gregory Co. v. Shapiro*, 125 Minn. 81, 145 N. W. 791 (statutory); *Krohn v. Dustin*, (Minn. 1919), 172 N. W. 213 (statutory); *Ide v. Leiser*, 10 Mont. 5, 24 Pac. 695, 24 Am. St. Rep. 17; *Gardels v. Kloke*, 36 Neb. 493, 54 N. W. 834; *Iake v. Iake*, 95 Neb. 603, 146 N. W. 918; *Worrall v. Munn*, 5 N. Y. 229, 55 Am. Dec. 330 (statutory);

Dykens v. Towne, 100 N. Y. 171 (statutory); *De la Barb.* 172 (statutory); *Mansing*, 52 N. Y. S. 171 (statutory); *Bishop*, 56 Pa. 42 (statutory); *Appeal*, 69 Pa. 42 (statutory); *Reinbold*, 200 Pa. 42 (statutory); *Am. St.* 735; *McFarland*, 101 S. Dak. 611, 74 N. W. 171 (statutory); *Cherry*, 85 Tenn. 171 (statutory); *Am. St.* 800; *Lane*, 101 Tenn. 705, 164 S. W. 171 (statutory); *1915 C.* 400; *Dodson*, 1915 C. 400; *Hubbard*, 1915 C. 400; *Wis.* 322, 6 N. W. 171 (statutory).

⁷⁵ *Lawrenson v. Lefroy*, 13, per Lord; see dicta of *Chance v. Bailey*, 14 Johns. C. J., in *Wilson v. Lefroy*, 13, per Lord.

⁷⁶ See *infra*, § 141, of contracts relating to the section, n. 71.

⁷⁷ See *supra*, §§ 561

the bargain must appear or whether the consideration furnished by the plaintiff either by way of counter promise or executed consideration must be stated in the memorandum.⁷⁷

§ 587. Or his agent in that behalf.

The original statute allowed signature by an agent and this has been universally followed in this country. Who may be an agent and how his authority may be shown depend upon the principles of the law of agency, but some special applications of that law may be mentioned here. Conceivably the agent may sign either his principal's name without mentioning his own; he may sign his principal's name stating that the signature of the principal is made by him as agent; he may sign his own name as agent for a specified principal; he may sign his own name as agent, but without mentioning for whom; or, finally, he may sign his own name without mentioning any agency. Though it is more proper generally for an agent to disclose upon the memorandum for whom he is acting, the principal, if in fact he authorized the agent, will be bound by a memorandum signed even in the last form stated.⁷⁸ It must be remembered, however, that the requirement of signature is a different thing from the requirement that the parties to the transaction be named, and though a signature often fulfils the double purpose of naming a party and of authenticating the writing, and though the name of the agent will serve as a substitute for the name of the principal if the writing is in such a form as to amount to a personal promise of the agent, yet if the agent by the writing purports clearly to contract on behalf of another who is not named, the memorandum is insufficient.⁷⁹ One person may act as agent for both parties, so far

⁷⁷ These questions were confused in the case of *Wilkinson v. Heavenrich*, 58 Mich. 574, 26 N. W. 139, 55 Am. Rep. 708, and the court there also raised an additional difficulty in regard to consideration, suggesting that as the contract could not be enforced against the plaintiff, there was no consideration for the defendant's promise. This suggestion is unsound. A

voidable or unenforceable promise is sufficient consideration for a counter-promise, though a void promise is not. See *supra*, § 105. And under the Statute of Frauds there are many decisions involving the same question. See cases in this section, note 71, and *supra*, § 105.

⁷⁸ See *supra*, §§ 285, 295, 577.

⁷⁹ See *supra*, § 577.

as making the memorandum is concerned, t
narily be impossible for the agent to represe
entering into the transaction of which the m
record.⁸⁰ It is, however, well settled that one
action cannot be the agent for the other to
dum.⁸¹ If one person is specifically appointe
randum as agent, the authority cannot be
signature made in the presence and under
ection of the authorized agent might perhaps
on the ground that in such a case the agent w
use of the hand of the subordinate for the pu
out his own authority.⁸²

§ 588. Auction sales.

In part at least, from the necessity of the
from evidence of actual authority, it has from
continuously held that the auctioneer at an a
only the agent of the seller, but is also the ag
for the purpose of making and signing a mem

⁸⁰ The decisions in regard to auc
tioneers and brokers referred to in the
following sections sufficiently indicate
the possibility of one person being
agent for both in making a memoran
dum. As to the limitations of the
power of one person to be agent for
two parties to the same transaction in
general, see Mechem, *Agency* (2d ed.),
§§ 1206, 1590.

⁸¹ *Wright v. Dannah*, 2 Campb. 203;
Farebrother v. Simmons, 5 B. & Ald.
333; *Sharman v. Brandt*, L. R. 6
Q. B. 720; *Hopp Bros. Co. v. Hunter*
Mfg. &c. Co., 145 Ga. 836, 90 S. E. 61;
Bent v. Cobb, 9 Gray, 397, 69 Am. Dec.
295; *Boardman v. Spooner*, 13 Allen,
353, 90 Am. Dec. 196; *Tull v. David*, 45
Mo. 444, 100 Am. Dec. 385; *Dunham*
v. Hartman, 153 Mo. 625, 55 S. W.
233, 77 Am. St. Rep. 741; *Johnson v.*
Buck, 35 N. J. L. 338, 10 Am. Rep. 243;
Wilson v. Lewiston Mill Co., 150 N. Y.
314, 44 N. E. 959, 55 Am. St. Rep.
680; *Adams v. Scales*, 1 Baxt. 337, 25

Am. Rep. 772; 1
Vt. 348. Comp.
4 B. & Ad. 443
L. R. 10 Ex. 126
33 Minn. 175, 22
Rep. 22; *Brent v.*
⁸² *Henderson v.*
J. 387.

⁸³ See *Williams*
220.

⁸⁴ *Simon v. Met*
Emmerson v. He
White v. Proctor,
v. Boulter, 4 B. &
Carr, 1 H. & N. 4
63 L. J. Ch. 535;
Ala. 563, 8 So. 211
1 Cal. 415, 54 Am
v. Green, 82 Ga. 18
v. Wilder, 15 Ill. 40
Jones v. Kokomo
Thomas v. Kerr, 3
Dec. 262; *McBra*
Ky. 479, 18 S. W. 1
120 Ky. 106, 85 S. W.

signature by the auctioneer must, however, be made immediately or it will not be binding, so temporary is his authority,⁸⁵ and between the fall of the hammer and the writing of the memorandum, the bidder has a *locus penitentiae* and may withdraw his bid,⁸⁶ or the owner of the property may revoke the auctioneer's authority.⁸⁷ If the auctioneer is himself interested as a seller, he cannot by his signature bind the buyer,⁸⁸ even though the buyer was aware of the auctioneer's personal interest and expressly assented to his signing the memorandum. The difficulty is insuperable of one party to a transaction signing a memorandum as agent for the other.⁸⁹ The authority of the auctioneer to sign a memorandum extends to his clerk,⁹⁰ and the clerk is not subject to the limitation upon the auctioneer, for if the auctioneer's goods are sold to a third person, the clerk can bind both the auctioneer and the buyer by his signature to the memorandum.⁹¹

§ 589. Brokers' notes.

There have been numerous English decisions in regard to contracts made by brokers upon the question of memoranda under the Statute of Frauds. The English practice is for a

Leeman, 43 Me. 158, 160, 69 Am. Dec. 54; *Ijams v. Hoffman*, 1 Md. 423; *Bent v. Cobb*, 9 Gray, 397, 69 Am. Dec. 295; *Springer v. Kleinsorge*, 83 Mo. 152; *Johnson v. Buck*, 35 N. J. L. 338, 10 Am. Rep. 243; *McComb v. Wright*, 4 Johns. Ch. 359; *Ments v. Newwitter*, 122 N. Y. 491, 494, 25 N. E. 1044, 11 L. R. A. 97, 19 Am. St. Rep. 514; *Pugh v. Chesseldine*, 11 Ohio, 109, 37 Am. Dec. 414; *Meadows v. Meadows*, 3 McCord, 458, 15 Am. Dec. 645; *Wright v. Harrison*, 137 Tenn. 157, 192 S. W. 716; *Harvey v. Stevens*, 43 Vt. 653; *Walker v. Herring*, 21 Gratt. 678, 8 Am. Rep. 616; *Atkinson v. Washington & Jefferson College*, 54 W. Va. 32, 39, and cases cited. But see *Dunham v. Hartman*, 153 Mo. 625, 55 S. W. 233, 77 Am. St. Rep. 741; *Adams v. Scales*, 1 Baxt. 337, 25 Am. Rep. 772.

⁸⁸ *Smith v. Arnold*, 5 Mason, 414, 419; *Craig v. Godfroy*, 1 Cal. 415, 54

Am. Dec. 299; *Horton v. McCarty*, 53 Me. 394, 398; *Gill v. Bicknell*, 2 Cush. 355, 358; *Jelks v. Barrett*, 52 Miss. 315; *Schmidt v. Quinsell*, 55 N. J. Eq. 792; *Hicks v. Whitmore*, 12 Wend. 548; *Wright v. Harrison*, 137 Tenn. 157, 192 S. W. 716.

⁸⁹ *Pike v. Balch*, 38 Me. 302, 311, 61 Am. Dec. 248; *Dunham v. Hartman*, 153 Mo. 625, 55 S. W. 233, 77 Am. St. Rep. 741; *Gwathney v. Casen*, 74 N. C. 5, 21 Am. Rep. 484.

⁹⁰ *Byrne v. Fremont Realty Co.*, 120 N. Y. App. Div. 692, 105 N. Y. S. 838.

⁹¹ *Bent v. Cobb*, 9 Gray, 397, 69 Am. Dec. 295; *Tull v. David*, 45 Mo. 444, 100 Am. Dec. 385; *Johnson v. Buck*, 35 N. J. L. 338, 10 Am. Rep. 243.

⁸⁵ See *supra*, § 587, n. 81.

⁸⁶ See cases cited, *supra*, note.

⁸⁷ *Johnson v. Buck*, 35 N. J. L. 338, 10 Am. Rep. 243.

broker employed to make a purchase or sale gain when made in a private memorandum diately to send to the respective principals a bought note and a sold note. In this cou decisions in regard to the matter and probat mon here than in England for brokers to con Moreover, in bargains made on Exchanges Exchange often require arbitration and forl Statute of Frauds. The various forms in v notes may be made have been thus summari

"The first is where on the face of the note fesses to act for both the parties whose name the note. The sold note then in substance say to C. D.,' and sets out the terms of the bai note begins: 'Bought for C. D. of A. B.' or equ and sets out the same terms as the sold nc signed by the broker."

"The second form is where the broker does a bought note the name of the seller, nor in the name of the buyer, but still shows that he is not principal. The form then is simply: 'Bo and 'Sold for A. B.'

"The third form is where the broker, on the appears to be the principal, though he is really Instead of giving to the buyer a note: 'Bough he gives it in this form: 'Sold to you by me.' assumes the obligation of a principal, and cannot sibility by parol proof, that he was only a for another, although the party to whom he g is at liberty to show that there was an unnamed to make this principal responsible.

"The fourth form is where the broker profess broker, but is really a principal, in which case h not bind the other party, and he cannot sue on The English law formerly required that a brok

^{**} See *Kinney v. Horwits* (Conn.), 105 Atl. 438; *Brooke v. Cunningham*, 19 Ga. App. 21, 90 S. E. 1037. See *Roach v. Lane*, 226 Mass. 598, 116 N. E. 470; *Pope Metals Co.* 394, 135 N. W. 81; ^{**} *Benjamin, Sec.* 285, 286.

London should make an entry in a book kept for the purpose. Largely because of this statutory requirement the entry in the book was regarded as the written contract between the parties,⁹⁴ but since this requirement no longer exists, the question seems to be, Was any writing intended as the definite expression of the bargain between the parties and, if so, what was that writing? If the entry in the broker's book and the two notes are harmonious in their terms and each contains the full terms of the bargain, no difficulty under the Statute of Frauds can arise. Sometimes, however, the notes differ from the entry in the book, and sometimes from each other. It seems probable that if either of the notes or the entry in the books could be shown to represent the actual contract of the parties in all its terms, it would be sufficient.⁹⁵ Where, however, the terms of the contract cannot be made out without resort to more than one writing, and the writings are inconsistent, or if the broker's notes are to be regarded as intended to constitute a written contract, and they are inconsistent, no recovery seems possible unless it be possible to reform the written expression of the bargain.⁹⁶ The bought and sold notes are regarded in the cases as a single document.⁹⁷ If both are signed this doctrine seems sound.⁹⁸ Authority to make a contract is sufficient to indicate that a broker has authority to make and sign a memorandum

⁹⁴ Benjamin, Sale (5th Eng. ed.), 287.

⁹⁵ *Rowe v. Osborne*, 1 Stark, 140; *Moore v. Campbell*, 10 Ex. 323; *Heyworth v. Knight*, 17 C. B. (N. S.) 298. In the case last cited the bought and sold notes varied from each other and the court allowed the contract to be shown by the correspondence between the parties. See also *Parton v. Crofts*, 16 C. B. (N. S.) 11, where the court allowed the contract to be proved by one note, the other not being produced. The court held that the two would be presumed to be alike. See also *Hobart v. Lubarsky*, 215 Mass. 528, 102 N. E. 936, where Loring, J., distinguishes between a memorandum and a written contract, holding that a broker as such has authority to sign

a memorandum of an oral contract agreed to by the principals, but not to enter into a written contract.

⁹⁶ *Grant v. Fletcher*, 5 B. & C. 436; *Gregson v. Ruck*, 4 Q. B. 737. By the majority of the court in *Sievwright Archibald*, 17 Q. B. 103, dissenting, Erle, J.; per Willes, J., in *Caerleon Tin-Plate Co. v. Hughes*, 65 L. T. 118, 119; *Peltier v. Collins*, 3 Wend. 459, 20 Am. Dec. 711; *Suydam v. Clark*, 2 Sandf. 133; *Bacon v. Eccles*, 43 Wis. 227.

⁹⁷ *Grant v. Fletcher*, 5 B. & C. 436; *Goom v. Afalo*, 6 B. & C. 117; *Sievwright v. Archibald*, 17 Q. B. 103; *Bibb v. Allen*, 149 U. S. 481, 495, 13 S. Ct. 950, 37 L. Ed. 819. The principle runs through all the cases.

⁹⁸ See *supra*, § 581.

of the contract,⁴⁰ but a broker whose only bring the parties together has no such impl in case of auctioneers, the authority of the be revoked at any time before the memor made out.²

§ 590. Time of making the memorandum.

It is commonly said that a memorandum any time subsequent to the making of a con the bringing of an action. It may, however, fore the contract is made, as the cases pr the effect that a written offer is sufficient dicate. That the memorandum need not k poraneous with the transaction to which it r many of the cases cited in the previous sec made after breach of the contract,⁵ or after goods to which the memorandum relates.⁶ weight of authority the memorandum cann action brought so as to enable that action The memorandum is often said to relate back the oral contract was made, but it is not nece

⁴⁰ *Kinney v. Horwitz* (Conn.), 105 Atl. 438; *Coddington v. Goddard*, 16 Gray, 436; *Hobart v. Lubarsky*, 215 Mass. 528, 102 N. E. 936; *Roach v. Lane*, 226 Mass. 598, 116 N. E. 470; *Pope Metals Co. v. Sadek*, 149 Wis. 394, 135 N. W. 851.

¹ *Aguirre v. Allen*, 10 Barb. 74.

² *Farmer v. Robinson*, 2 Campb. 339, note; *Warwick v. Slade*, 3 Campb. 127.

³ See *supra*, § 579.

⁴ See also *Carrington v. Smith*, 26 Cal. App. 460, 147 Pac. 225; *Campbell v. Preece*, 133 Ky. 572, 575, 118 S. W. 373; *Gate City Bank v. Elliott*, (Mo. 1919), 181 S. W. 25; *Magee v. Blankenship*, 95 N. C. 563; *Winslow v. White*, 163 N. C. 29, 79 S. E. 258; *Puffer v. Bradley*, (Oreg. 1919), 181 Pac. 1; *Ide v. Stanton*, 15 Vt. 685, 40 Am. Dec. 698; *Muir v. Kane*, 55 Wash.

131, 104 Pac. 15 519, 19 Ann. Cas.

⁵ *Bird v. Muir* Am. Rep. 571 *Blankenship*, 95 l also *Spiegel v. Bl* App. 443, 147 N.

⁶ *Phillips v. Oc* 633. See also d acceptance and s of the goods, aft the remainder, is statute, *supra*, § 5

⁷ *Bill v. Bamer* *Lucas v. Dixon*, *Gaines v. McCAda* *Bird v. Munroe*, Am. Rep. 571. under the section lating to land is l cum, 14 Pet. 84, also *Cash v. Clarl* See also *supra*, § 52

the fiction of a relation to explain the situation. It is the oral contract which is enforced, but it can be enforced only when the statute has been satisfied. The statute does not require the satisfaction to be simultaneous with the bargain, and it is unnecessary to make the fictitious assumption that it is in fact simultaneous in a case where it is not. Satisfaction of the statute does, however, result in an oral bargain theretofore unenforceable becoming binding as of the date of oral contract, and there seems to be no limit, except that imposed by the Statute of Limitations, upon the power of a party to an oral contract at any time to make a memorandum binding upon himself.⁸ Justice forbids, however, that after third parties have acquired property in good faith on the assumption that a certain person is the owner, that this person should thereafter invalidate their title by making a memorandum which for the first time makes effective a prior oral transfer. Doubtless the memorandum will bind the maker of it, but it will not affect the title of a third person to the property. This principle is generally expressed by saying, in analogy with the law of ratification of an unauthorized agency, that the memorandum has no retroactive effect as to third persons. However the principle be expressed, its effect is evident.⁹

§ 591. Written contracts may be varied by subsequent oral agreement.

“By the general rules of the common law, if there be a contract [not within the Statute of Frauds] which has been reduced

⁸ See *Emery v. Boston Terminal Co.*, 178 Mass. 172, 59 N. E. 763, 86 Am. St. Rep. 473.

⁹ The leading case is *Felthouse v. Bindley*, 11 C. B. (N. S.) 869. In that case the seller of a horse by an oral sale put up property, including horse in question, at auction, and the horse, together with the other property, was sold by the auctioneer. Subsequently the seller wrote a letter to the first buyer which was assumed by the court to be a sufficient memorandum of the oral bargain. The buyer, under

the oral bargain, sued the auctioneer for conversion, and it was held that he could not recover. See to the same effect *Bird v. Munroe*, 66 Me. 337, 22 Am. Rep. 571; *Emery v. Boston Terminal Co.*, 178 Mass. 172, 59 N. E. 763, 86 Am. St. Rep. 473. It would seem in *Felthouse v. Bindley*, the plaintiff might have successfully maintained action against the seller, though he could not sue the auctioneer; nor, the buyer at the auction sale. *Shelton v. Thompson*, 96 Mo. App. 327, 70 S. W. 256. See further, *supra*, § 529.

into writing, it is competent to the parties, at a breach of it, by a new contract not in writing, or to waive, dissolve, or annul the former agreement in any manner to add to, or subtract from, or vary, the terms of it, and thus to make a new contract, proved, partly by the written agreement, and partly by subsequent verbal terms engrafted upon what is left of the written agreement."¹⁰ It is also true that an agreement to discharge or vary a contract in case of breach, it is equally immaterial whether the contract was or was not in writing. The latter agreement, if the parties so intend will operate at once in performance to discharge the liability for breach of contract.¹¹

§ 592. Rescission of contracts within the Statute

If an executory contract is within the Statute and is in writing or a proper written memorandum has at the time been made, a subsequent oral agreement to rescind the contract is effectual if the oral agreement fulfills the requirements of a contract at common law. The Statute does not mention contracts of rescission or discharge and contracts are, therefore, not affected by its terms.¹² It is noticed, however, that if a contract has been perfected by the transfer of either real or personal property, a contract of rescission which contemplates not simply a discharge of executed obligations but a retransfer of the property, certainly be within the section of the statute relating to land or that relating to sales of goods.¹³ Where an executory written contract to buy and sell real property, such an interest in the property on the part of the transferee, a rescission of the contract such a retransfer as

¹⁰ *Goss v. Lord Nugent*, 5 B. & Ad. 58, 64. See further, *infra*, § 1828.

¹¹ See *infra*, § 1846.

¹² *Goss v. Lord Nugent*, 5 B. & Ad. 58, 66; *Morris v. Baron*, [1918] A. C. 1; *Wulschner v. Ward*, 115 Ind. 219, 17 N. E. 273. It is, however, broadly stated in *Gerard-Fillio Co. v. McNair*,

68 Wash. 321, 123 P. 2d 101, contracts required to be in writing. In fact the section related to land contracts.

¹³ *Wulschner v. Ward*, 17 N. E. 273.

writing has been previously considered.¹⁴ Even though personal property has been transferred to the buyer, yet if the agreement to rescind was paid for with anything other than an executory promise, or if anything was done in accordance with the agreement which could operate as an accord and satisfaction, the original agreement doubtless would be effectually discharged.¹⁵ But if an interest in real property is transferred to the buyer, as the section of the statute relating to such property provides for no other way of making the agreement enforceable except by a writing, the contract of rescission would seem unenforceable unless in writing or unless there was such part performance, under the equitable doctrine which goes by that name, as to validate an oral agreement.¹⁶

**§ 593. Variation of contract within the Statute of Frauds—
General doctrine.**

More difficult questions are presented when the subsequent oral agreement does not purport totally to rescind but only to vary some of the terms of an original bargain, which was within the Statute of Frauds and of which a memorandum had been made. It seems clear on principle that no right of action can lie for breach of the second agreement unless the second agreement is a complete contract itself and not within the statute.¹⁷ For instance, the original contract may have been not performable within a year, but the subsequent oral agreement may relate to a matter which can be performed within a year.¹⁸

An action on the first and second agreements combined is

¹⁴ *Supra*, § 491, *ad fin.*

¹⁵ *Burns v. Fidelity Real Estate Co.*, 52 Minn. 31, 36, 53 N. W. 1017; *Warren v. Mayer Mfg. Co.*, 161 Mo. 112, 122, 61 S. W. 644; *Long v. Hartwell*, 34 N. J. L. 116; *Miller v. Pierce*, 104 N. C. 389, 10 S. E. 554; *Jones v. Booth*, 38 Ohio St. 405; *Phelps v. Seely*, 22 Gratt. 573; *Jordan v. Kats*, 89 Va. 628, 630, 16 S. E. 866.

¹⁶ See *supra*, § 494.

¹⁷ *Odell v. Barton*, 249 Fed. 604, 161 C. C. A. 530; *Rosenfeld v. Standard*

Bottling & Extracts Co., (Mass. 1919), 122 N. E. 299, and see cases cited *infra*, n. 19.

¹⁸ *Williams v. Moss' Empires, Ltd.*, [1915] 3 K. B. 242; *Blake v. J. Neils Lumber Co.*, 111 Minn. 513, 127 N. W. 450. See also *Blumenthal v. Bloomingdale*, 100 N. Y. 558, 3 N. E. 292. The criticism in *Morris v. Baron*, [1918] A. C. 1, 25, 26, of the decision of this point in *Williams v. Moss' Empires, Ltd.*, seems ill founded.

open to the same objection as an action on the instrument alone. To allow a right of action in equity to enforce a contract within the statute was at least of the contract were oral.¹⁹ On the other hand, an agreement as orally modified has been performance operates (subject to the requirement of satisfaction, applicable to all agreements of accord and satisfaction, a satisfaction of the liability on the original contract. Statute of Frauds does not apply to fully execute so that when the oral agreement has been performance has the effect which the parties agree to have.²⁰ If the varied agreement has been performance the question must be asked whether the remainder is within the statute and if so whether the performance which has taken place will satisfy the statute. If the conditions can be answered in the affirmative there is

¹⁹ *Stead v. Dawber*, 10 A. & E. 57 (overruling *Cuff v. Penn*, 1 M. & S. 21); *Marshall v. Lynn*, 6 M. & W. 109; *Noble v. Ward*, L. R. 1 Ex. 117; *Morris v. Baron*, [1918] A. C. 1; *Emerson v. Slater*, 22 How. 28, 42, 16 L. Ed. 380; *Swain v. Seamens*, 9 Wall. 254, 272, 19 L. Ed. 554; *Pearsall v. Henry*, 153 Cal. 314, 95 Pac. 154; *Jarman v. Westbrook*, 134 Ga. 19, 67 S. E. 403; *Carpenter v. Galloway*, 73 Ind. 418; *Bradley v. Harter*, 156 Ind. 499, 60 N. E. 139; *Williams v. Robinson*, 73 Me. 186, 40 Am. Rep. 352; *Walter v. Victor G. Bloede Co.*, 94 Md. 80, 50 Atl. 433; *Cummings v. Arnold*, 3 Metc. 486, 491, 37 Am. Dec. 155; *King v. Faist*, 161 Mass. 449, 456, 37 N. E. 456; *Abel v. Munson*, 18 Mich. 306, 100 Am. Dec. 165; *Brown v. Sanborn*, 21 Minn. 402; *Heisley v. Swanstrom*, 40 Minn. 196, 41 N. W. 1029; *Burns v. Fidelity Real Estate Co.*, 52 Minn. 31, 53 N. W. 1017; *Thompson v. Thompson*, 78 Minn. 379, 81 N. W. 204, 543; *Grand Forks Lumber Co. v. McClure Loggins Co.*, 103 Minn. 471, 115 N. W. 406; *Blake v. J. Neils Lumber Co.*, 111 Minn. 513, 127 N. W. 450; [*cf. McDonald v. Union*

Hay Co. (Minn), *Rucker v. Harrington*, 481; *Warren v. M. Mo.* 112, 61 S. W. 1; *rich*, 9 Wend. 68; *Ladd v. King*, 1 R. 624; *Dana v. Har* *Thompson v. Robin* 64 S. E. 718; *Hans* *Wis.* 613, 70 N. W. *tracts not to be* *year*, see *supra*, § 50

²⁰ *Moore v. Cam* *Leather Cloth Co. v* 10 Q. B. 140; *Sw* *Wall.* 254, 19 L. E. *Neils Lumber Co.*, *N. W.* 450; *Long v.* *L.* 116, 127; *Jacks* *St.* 451; *Ladd v. Ki* 51 Am. Dec. 624. *cock*, 30 Vt. 616.

²¹ Thus in a contract for the sale of goods if there has been acceptance and act of the goods after a written agreement, the contract is in its varied form. *Kribs v. Jones*, 4

If the terms of the oral agreement have not been performed, the original contract generally at least must be held to remain in force. Though an oral agreement to rescind without more would be effectual (unless the original contract created an interest in land) ²² where the rescission is to be effected only as part of an entire agreement to substitute a new contract differing in some of its terms from the old one, there can be no rescission if the agreement as a whole is invalid. ²³ It is true that the House of Lords on elaborate consideration has reached a different conclusion ²⁴ qualifying what had been generally regarded as the effect of a previous decision. ²⁵ A written agreement signed by one party only was agreed upon, as the court found, as full satisfaction of claims under a previous written contract for the sale of goods, signed by both parties. The new agreement, though unenforceable by the party who had signed it was held to bar any claims by him on the original contract. In the opinions of the several Lords the idea seems predominant that the second agreement was a valid contract though unenforceable by action and therefore had the intended effect of rescinding the original contract. It may be admitted that the second agreement was merely unenforceable, but the parties can hardly be supposed to have intended to surrender their original rights except on the assumption that the new agreement was enforceable. It may be said that this was merely a mistake of law and should be disregarded; but the law should not allow advantage to be taken of such a mistake to enforce in effect (though not by action) merely a part of an entire contract. If the original contract was to guarantee a certain debt, and the subsequent oral variation was to guarantee another debt instead of that to which the written memorandum related, can it be admitted that thereby the promisee is deprived of any guarantee?

Veneer Co. v. Kwapil, 62 Wash. 385, 113 Pac. 1100. So if there has been part payment. *Packer v. Steward*, 34 Vt. 127. In *Dawson v. Yates*, 1 Beav. 361, payment for an extension of time orally agreed upon as a variation of written contract for the sale of land was held to preclude forfeiture according to the terms of the writing.

See also *Olley v. Fisher*, 34 Ch. D. 367.

²² See *supra*, §§ 491, 592.

²³ *Noble v. Ward*, L. R. 2 Ex. 135; *Hasbrouck v. Tappen*, 15 Johns. 200; *Barton v. Gray*, 57 Mich. 622, 632, 24 N. W. 638.

²⁴ *Morris v. Baron*, [1918] A. C. 1.

²⁵ *Noble v. Ward*, L. R. 2 Ex. 135.

§ 594. Amount of variation.

No distinction is taken in the cases between the original agreement and slight extension for a brief period of the time for performance. No distinction has been expressed. "Every part of the contract in regard to which stipulating must be taken to be material."²⁷

§ 595. Non-performance of provisions of a memorandum caused by a party is excuse

Though no other contract can be enforced except as represented by the written memorandum, an agreement varying the terms of the contract may have no effect. Admitting, as a court must admit, that this is the only contract which can be enforced, any doubt as to that contract can be shown which is not based on the non-performance of a parol agreement as such. It would not be an action by A against B for breach of a contract by a memorandum that A refused to accept performance of a cross suit by B against A, even though by the memorandum, A's obligation to perform on his part was expressly conditional on the receipt by him of performance from B. If he had refused, A would not be allowed to plead his failure to perform the condition. If instead of receiving performance, A had requested B to delay performance, and B had simply said he did not care for it at once, and A had caused B to fail to perform a condition, A, for that, as before, would not be permitted to insist on B's performance of the condition. One who has caused a condition to fail cannot rely upon it as an excuse for his failure to perform his own obligations.^{27a} It seems immaterial whether the condition was formed by a positive oral agreement that the condition should be performed as the written memorandum specified, or whether the condition was requested or even permitted the changed performance of the condition. If an oral agreement

²⁷ *Goss v. Lord Nugent*, 5 B. & Ad. 67; *Harvey v. Graham*, 5 A. & E. 74; *Marshall v. Lynn*, 6 M. & W. 116. But see *Morris v. Baron*, [1918] A. C. 1, 25.

²⁷ Per Parke, B., 6 M. & W. 116, 117.

^{27a} See *infra*, §§ 6

²⁸ The English de

would not be enforceable as a contract, but might nevertheless operate as a continuing cause for non-performance of the written agreement. It seems essential, however, that B could, and presumably would have performed the condition or obligation on his part, had it not been for A's action. Otherwise A has not caused B's failure to perform. Whether it be supposed

(1) That the plaintiff is seeking to enforce the contract and the defendant sets up as a defence that the plaintiff has not performed according to the terms of the original written memorandum; or, as less commonly happens,

(2) That the plaintiff is seeking to enforce the contract and the defendant to excuse himself from liability sets up an oral agreement or statement by which the performance for which the plaintiff sues was prevented, the principle is the same:—

To the extent that a failure to perform has been caused by either party he cannot take advantage of the non-performance. He may have caused merely temporary failure to perform, or he may have caused a permanent failure. Generally it will be only a temporary delay in performance which will be caused. One who requested or prevented performance when due may withdraw his request or cease his prevention, and on so doing, or in a reasonable time thereafter, the other party must give the performance promised by him unless the delay has operated to make performance impossible, or materially more burdensome.²⁹

cases relied on a supposed distinction. In *Ogle v. Vane*, L. R. 2 Q. B. 275, L. R. 3 Q. B. 272, Blackburn, J., said: "The difference is between writing and binding one's self to wait." See also the following note.

²⁹ In *Hickman v. Haynes*, L. R. 10 C. P. 598, the plaintiff had agreed to sell and the defendant to buy iron in the future. The defendant had requested, before the time for performance, an enlargement of the time for taking delivery. This was granted, but the defendant ultimately refused altogether to take the iron. In an action on the contract the defendant set up that the plaintiff was not himself

ready and willing to perform the contract at the time when performance was due according to the written memorandum. Reliance was placed to some extent on the fact that there was no agreement to forbear, but merely a voluntary forbearance, but it is hard to see that a mutual agreement, which was unenforceable, would have altered the decision. The court held that having induced the plaintiff to withhold delivery when it was due, the defendant could not insist afterwards that prompt delivery was a condition precedent, though before that time either party could have changed his mind and required the other to per-

§ 596. Damages.

The question may be important not only with respect to the right of recovery but with reference to the an

form the contract according to its original terms. Perhaps this should be qualified if the change of mind was so near the time for performance as to make performance extremely difficult for the other party. See *Tyers v. Rosedale Co.*, L. R. 8 Ex. 305, L. R. 10 Ex. 195. So in *Scheerschmidt v. Smith*, 74 Minn. 224, 228, 77 N. W. 34, the court said: "This oral extension of the time of payment became no part of the contract so as to bind the parties. Because it was not in writing, as well as because there was no consideration for it, defendant might have repudiated it and demanded payment at any time. But in such case he could not declare the contract forfeited for nonpayment until the plaintiff had a reasonable time thereafter in which to make payment, because the failure to pay on due day was caused by the defendant's own conduct." See also *White Oak Fuel Co. v. Carter*, 257 Fed.; 54 *Hirsch Rolling Mill Co. v. Milwaukee &c. R. Co.*, 165 Wis. 220, 161 N. W. 741. In *Thomson v. Poor*, 147 N. Y. 402, 42 N. E. 13, the court said: "We know of no principle of law which will permit a party to a contract, who is entitled to demand the performance by the other party of some act within a specified time, and who has consented to the postponement of the performance to a time subsequent to that fixed by the contract, and where the other party has acted upon such consent, and in reliance thereon has permitted the contract time to pass without performance, to subsequently recall such consent and treat the non-performance within the original time as a breach of the contract." In *Marsh v. Bellew*, 45 Wis. 36, 52; it is there said: "We are of the opinion that the waiver of payment at the time fixed

in a contract for or the extension payment, is not terms of the w exclude it from evidence in a co in all cases when sion of time has parol or otherwi has acted upon t sion or waiver, the vendor bou In *Neppach v. Or* 46 Or. 374, 395, t said: "Conceding tended for by th the oral extensio tract was inval contract, and did the terms of the it was, neverthele plaintiff and Hir ant cannot now to their injury," (46 Oreg. 374, 395 tract for the sale o consents or agree of the performanc time specified of so benefit, cannot, acted upon such c of the default, and forfeited, although the stipulation at may have been m the contract," citi 83 Fed. 684, 28 C. v. Moore, 102 Ill. T. R. Co. v. Prat Pac. 464; *Stearns v. Scheerschmidt v. S* 77 N. W. 34; *Sher Mo.* 27, 59 S. W. well, 34 N. J. L. 1 man, 1 Abb. Des Gilbert, 3 Johns. 5:

In *Ogle v. Vane*³⁰ it was held that the plaintiff who had contracted to buy iron from the defendant in July, and who, after waiting at the defendant's request till the following February, then bought in the market, could charge the defendant for damages based on the price in February, though the price was higher then than in July. The court relied to some extent on the fact that though there was forbearance at the defendant's request there was no agreement to forbear, but it seems an agreement would have made no difference, for the agreement would neither have rescinded the original contract nor have had any effect itself except in so far as it caused the plaintiff to delay tendering performance.

§ 597. Pleading.

The difficulty in dealing with the situation seems generally to have arisen from the pleading. If the plaintiff sues on the oral contract or on the written and oral contracts combined, he cannot prove the case upon which he has declared. He must therefore declare on the written contract. It follows that the defendant can never be held liable for failing to do anything except what he undertook by promises stated in the written memorandum, though performance of what either of the parties so promised may be excused by matter *in pais*. The time of performance, however, is not regarded as a part of the description of the thing promised, even though time is material. An excuse for performing on time does not excuse altogether.³¹ Therefore, a defendant who promised in writing to convey Blackacre on April 1st and who from one cause or another is excused from performing during that month may be held liable on his promise if he fails to convey on May 1st. Accordingly, if when sued on the promise as written, the defendant pleads the plaintiff's failure to pay or tender on April 1st, the plaintiff may reply that he would have made such payment or tender had not the defendant caused him to delay in so doing until May 1, on which day he made tender.

1 Ohio, 251. See also *Kissack v. Bourke*, 224 Ill. 352, 79 N. E. 619; *Scott v. Hubbard*, 87 Or. 498, 136 Pac. 653; *Whiting v. Doughton*, 31 Wash. 327, 71 Pac. 1026. But see *Jarman v.*

Westbrook, 134 Ga. 19, 67 S. E. 403.

³⁰ L. R. 2 Q. B. 275, L. R. 3 Q. B. 272.

³¹ See *infra*, § 845.

lish decision³⁴ which was soon thereafter repudiated in England,³⁵ between the contract and its performance. "The statute," Wilde, J., said, "requires a memorandum of the bargain to be in writing, that it may be made certain; but it does not undertake to regulate its performance." The court then proceeded to argue that as a substituted performance would operate as a satisfaction of the original contract, and that as tender is equivalent to performance, the plaintiff could sue on the original contract and prove in support of it an offer to perform with the alterations later agreed upon. But the sounder view even in the case of a binding contract of accord, is that tender is not equivalent to performance, and there is no satisfaction even if the tender is wrongfully refused.³⁶ However this may be, a tender where there is no obligation to accept it cannot possibly have the effect of performance. The learned author of the leading text-book on the subject³⁷ gives his approval to the decision, but the current of authority seems strongly against it.

§ 600. Conflict of laws.

As most provisions of the Statutes of Frauds prevailing in different States of the Union are identical in the several jurisdictions, questions of the conflict of laws arise less frequently on most clauses of the statute than otherwise might be the case; but the fact that a large number of States have no provision corresponding to the seventeenth section of the English Statute of Frauds makes it peculiarly easy for questions to arise in the sale of goods involving the conflict of laws. It was decided in England in the often-cited case of *Leroux v. Brown*³⁸

³⁴ *Cuff v. Penn*, 1 M. & S. 21.

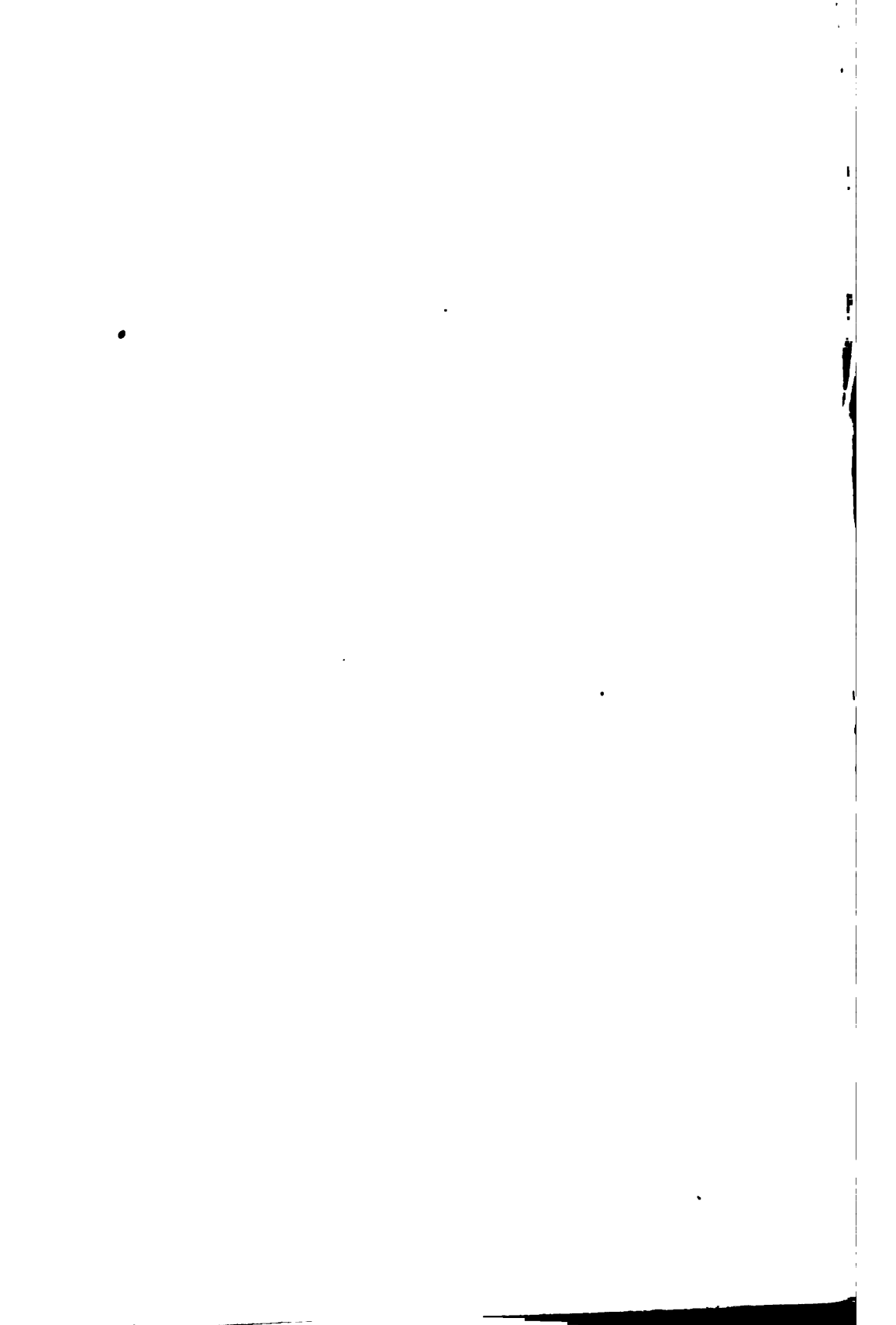
³⁵ *Stead v. Dawber*, 10 A. & E. 57, and *Marshall v. Lynn*, 6 M. & W. 109.

³⁶ See *infra*, § 1843.

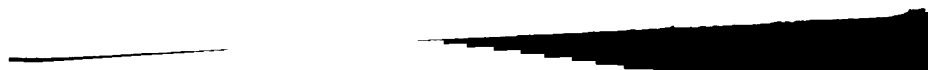
³⁷ *Browne*, Statute of Frauds, § 424. See also *Smith v. Loomis*, 74 Me. 503; *McDonald v. Union Hay Co.* (Minn.), 172 N. W. 891; *Lee v. Hawks*, 68 Miss. 669, 9 So. 828. Compare *Wiessner v. Ayer*, 176 Mass. 425, 57 N. E. 672; *Rosenfeld v. Standard Bott-*

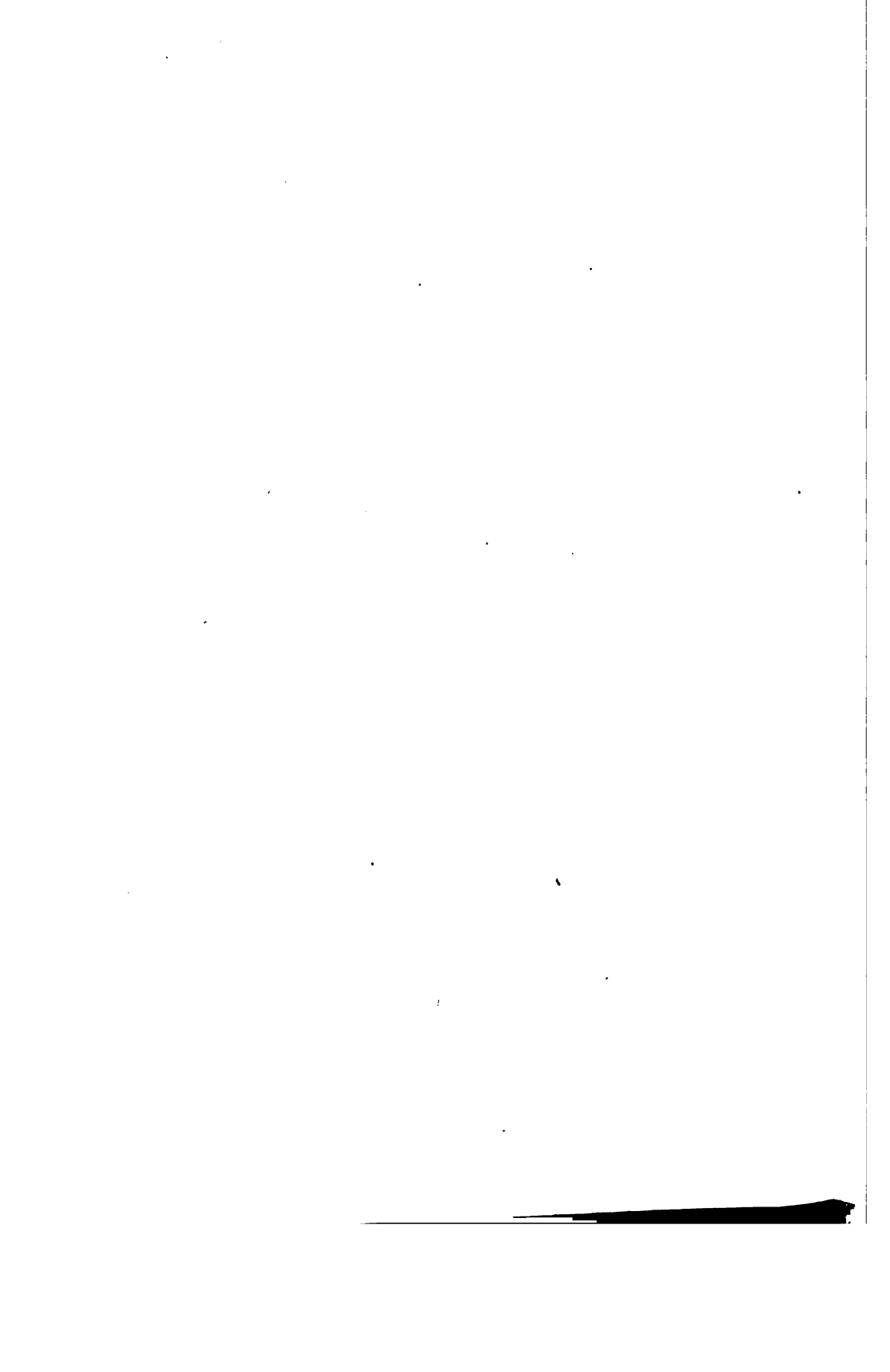
ling & Extracts Co. (Mass.), 122 N. E. 299. In Nebraska it seems to be held that the agreement as orally varied is valid if there is consideration for the variation. *Bowman v. Wright*, 65 Neb. 661, 91 N. W. 580; *Lincoln Realty Co. v. Garden City Land Co.*, 94 Neb. 346, 143 N. W. 230; but the requirement of a writing is independent of and additional to the requirement of consideration.

³⁸ 12 B. 801.



changes have not generally been regarded as requiring a construction different from that of the English prototype, the distinction is not only oversubtle but is unimportant. It must be admitted, however, that though decisions applying the *lex loci contractus* may be difficult to justify in theory, they produce a satisfactory result. Parties to a contract or sale naturally observe the formalities requisite to make it enforceable in the place where they are contracting. They may fairly be held to that standard of care; and on the other hand it is undeniably a practical injustice to deprive the plaintiff of a remedy if the defendant moves from a State where the bargain was made and where no Statute of Frauds was in force, to a State where a Statute of Frauds is in force





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